Case No. 19-15222

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GABBI LEMOS

Plaintiff - Appellant,

vs.

COUNTY OF SONOMA, STEVE FREITAS, and MARCUS HOLTON,

Defendants - Appellees.

PLAINTIFF-APPELLANT'S PETITION FOR HEARING OR REHEARING *EN BANC*

On Appeal from the Decision of the United States District Court
for the Northern District of California, Case No. 4:15-cv-05188-YGR
The Honorable Yvonne Gonzalez Rogers

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I. INTRODUCTION

Under FRAP 35 (a) a rehearing en banc is appropriate if it (1) is necessary to secure or maintain uniformity of the court's decision or (2) involves a question of exceptional importance. FRAP 35(b) states that a Petition for a Rehearing En Banc must begin with a statement that either:

> (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
>
> (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

Both of these circumstances appear in the instant case. The gravamen of the case rests on the question of the proper interpretation and application of *Heck v. Humphrey*, 512 U.S. 477 (1994). The panel majority ruled that under *Heck*, the conviction of Gabrielle (Gabbi) Lemos under California Penal Code § 148(a)(1), precluded her from filing a civil action for excessive force pursuant to 42 U.S.C. § 1983.

The panel's decision contradicts the purpose of *Heck by* ruling that if a criminal conviction is valid, all of the police behavior throughout the entire

encounter must necessarily be considered lawful and reasonable. In doing so, the panel decision essentially states that there can be no unlawful police activity if it involves a valid arrest.

The significance of this panel's ruling, if affirmed, would be to deprive individuals convicted at trial of violating Cal. Pen. Code Sec. 148(a)(1) of their right to sue for excessive force used by police that was collateral to and distinct from the act or acts that resulted in their criminal conviction. If nothing else, this provides a free pass to police to violate constitutional rights of individuals as long as those individuals were involved in an act in violation of section 148(a)(1). It prohibits any redress of grievances against officers for constitutional violations which occurred during a police encounter by deeming all such police activity as lawful simply by virtue of the underlying conviction at trial. The panel decision runs contrary to the language and intent of *Heck,* and creates a dangerous precedent that significantly serves to deprive people of their civil rights, and therefore should be reversed.

II. FACTS

On Saturday, June 6, 2015, Gabrielle (Gabbi) Lemos graduated from Petaluma High School. One week later on June 13, her mother and sisters threw a graduation party for her at their home in Petaluma that was attended by close friends and family. The party ended at about 8:00 p.m., and the guests began to

leave. Gabrielle stayed awake for another hour opening presents, then went to bed. At about 11:00 p.m., Gabrielle awoke to flashing police lights outside of her bedroom window. She walked outside barefoot in her pajama where she was joined by her mother Michelle and her sister Chantee. (ER 344)

At approximately the same time on June 13, 2015, Deputy Holton was on patrol driving in a rural part of Petaluma. As he approached the Lemos home he saw a pickup truck with a large trailer attached carrying a race car. The truck was stopped with its headlights on. It was blocking one lane of traffic. He stopped and rolled down his window. He heard some people yelling. He exited his vehicle to investigate. (ER 18)

Deputy Holton first approached the driver of the truck, Darien Balestrini, who exited the vehicle and cooperated. He explained that his girlfriend was drunk, had misplaced her cell phone, and was crying. Holton then walked around to the passenger side of the truck to speak to the female subject, (Lemos' sister Karli Labruzzi), who was seated in the front seat. Deputy Holton encountered three females standing outside of the vehicle in the vicinity of Karli; 1) plaintiff Gabrielle Lemos, 2) Gabrielle's mother Michelle Lemos and, 3) Gabrielle's other sister Chantee Labruzzi. Karli Labruzzi leaned out of the window and stated she had lost her cell phone. (ER 18)

Holton then opened the truck door to speak to Karli and determine whether

she had any weapons or visible injuries to her person. Karli stated that she had lost her cell phone, and that there was no fight. (ER 19). Gabrielle Lemos inserted herself between Holton and Karli and verbally protested to Holton, believing his conduct was not warranted. Holton responded by pushing Gabrielle Lemos away from him with his right hand. Lemos' mother moved Lemos away and Holton closed the truck door. (ER 19, 54)

The three women moved away from the truck and continued to verbally protest Holton's actions. Holton called for backup to assist him. Holton was unable to calm the situation as the women continued to move about the front yard. During this time Holton did not announce he intended to arrest anyone. The women continued to verbally protest. (ER 49-50) Once backup, Deputy Dillon, arrived at the scene the situation began to deescalate. (ER 20)

As the situation calmed, Lemos' mother told her to go into the house. Again, it should be noted that up to that point, neither Deputy Holton nor Deputy Dillon gave any indication of an intent to arrest anyone. In response to her mother, Gabrielle Lemos, who was no longer near the truck, turned and walked towards the house. This was now over seven minutes after the initial contact with Holton at the truck door.

As Gabrielle Lemos was walking to the house, Holton grabbed her, stating, "Hey, Come here." He then took her face first to the ground. (ER 20) Prior to

that point, Holton did not express any intention to arrest Gabbi, or anyone else. (ER 20) In fact, Deputy Holton testified that the reason he grabbed Gabbi was to prevent her from entering the house because he had not "cleared" it yet. (ER 20)

> Defendants contend that Holton feared that if Lemos returned to the house she could arm herself, flee, barricade herself inside, or a myriad of other possibilities. (*Id*. No. 34.) Plaintiff disputes that Holton had a genuine, reasonable fear that Lemos would so act. (*Id.*)

(ER 20, n. 7)

Only after she was taken to the ground was Gabrielle Lemos arrested and taken into custody. She was transported to a local hospital for treatment for head and facial injuries. Ms. Lemos suffered thousands of dollars in medical expenses. (ER 345)

The District Attorney initially declined to prosecute the case. (ER 345) Immediately after this lawsuit was filed on November 12, 2015, the District Attorney changed course and prosecuted both Gabrielle Lemos and her mother Michelle, who was not arrested, for violations of Penal Code section 148.

The jury in the criminal proceeding was instructed that they could find Gabrielle Lemos guilty of violating § 148(a)(1) based on four distinct and alternative theories of liability. The criminal jury was instructed that Ms. Lemos could be deemed guilty if the jury found each of the following elements beyond a reasonable doubt.

1. Deputy Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer.

2. Gabrielle Lemos willfully resisted, obstructed or delayed Deputy Marcus Holt when on in the performance or attempted performance of those duties. and,

3. When Gabrielle Lemos acted, she knew, or reasonably should have known, that Deputy Marcus Holton was a peace officer performing or attempting to perform his duties. (Panel at 5-6)

The jury was instructed that Lemos could be found guilty based on four theories of liability: Lemos (1) made physical contact with Holton as he was trying to open the truck door; (2) placed herself between Holton and Ms. Labruzzi; (3) blocked Holton from opening the truck door and seeing or speaking to Ms. Labruzzi; ***or*** (4) pulled away from Holton when Holton attempted to grab her. (Opinion at 6, emphasis added).

The jury ultimately convicted Plaintiff of violating section 148(a)(1), but because the jury was only provided with a general verdict form, drafted by the prosecutor, it is impossible to determine which theory of liability the verdict relates to; whether it was one or any combination of alternatives 1-3, which did not relate to Ms. Lemos' allegations of excessive force, ***or*** whether it was alternative 4, the one discrete event that is directly related to the use of force, and

this lawsuit.

When viewed together the jury instructions appear vague and even contradictory. The so-called "four theories" of the criminal case are not actually theories at all, but discrete events. The first three involve Ms. Lemos attempting to prevent Deputy Holton from opening the passenger side of the truck and engaging with Ms. Labruzzi. Although they were separate acts they occurred in rapid succession as to be almost simultaneous. In contrast, the fourth "theory" of criminal liability occurred over seven minutes later, and after Ms. Lemos had disengaged from talking to Deputy Holton.

III. ARGUMENT

As noted above, the jury was instructed that it was not required to find that Ms. Lemos engaged in all of the four acts she was accused of committing. Instead, the jury only had to unanimously find that she had committed at least one of them. The jurors did not have the opportunity to specify, nor did the general verdict form that they were provided allow for any specificity regarding which one or more acts by Ms. Lemos constituted the basis for the finding of her guilt.

A. The jury instructions were unclear and illogical.

The problem occurs when the "four acts" instruction is contrasted with the instruction that the jury needed to find that Deputy Holton was lawfully performing his duties. That instruction provides no timeframe. It allows for the

distinct possibility that the jurors might have felt that Deputy Holton was lawfully performing his duties at some point or points during the entire encounter, and not at other points. If the jury unanimously decided that Holton was lawfully performing his duties at the time of one or all of the first three acts that still leaves open the strong possibility that his behavior was unreasonable and excessive at the time he used force to prevent Ms. Lemos from returning into her house. In short, the finding that Ms. Lemos committed at least one unlawful act does not and *cannot* necessarily be taken to mean that the jurors felt that Deputy Holton acted lawfully throughout the entire encounter.

B. In a multi-act event, the Court must ascertain which parties committed which acts, and when. There is no bright line rule.

The Panel majority ruled that under *Heck* and its progeny the general jury verdict of guilty was necessarily sufficient to show reasonable and lawful behavior by Deputy Holton throughout the entire encounter. Such a conclusion is incongruous to the facts of this case, and given the jury instructions discussed above, it is also contrary to common sense.

When someone who has been convicted of a crime under state law seeks damages in a § 1983 suit, "the district court must consider whether a judgment in favor of the plaintiff would imply the invalidity of his conviction or sentence." *Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1130 (9th Cir. 2011) (quoting

Heck, 512 U.S. at 487). If the section 1983 action would indeed imply the invalidity of the criminal conviction, the civil action is barred. *Id.*

Citing *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996), the Panel majority notes (Panel Majority, at 9), that under *Heck* "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed," but that a plaintiff's allegation of excessive force by a police officer is not barred by *Heck* if the officer's conduct is "distinct temporally or spatially from the factual basis for the [plaintiff's] conviction." *Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 1042 (9th Cir. 2012) (citing *Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir. 2005) (en banc)).

In her dissent Judge Berzon notes that:

> The majority today holds, in effect, that once a person resists law enforcement, she has invited the police to inflict any reaction or retribution they choose, as long as the prosecutor could get the plaintiff convicted by a jury—and not as the result of a plea—on a charge of resisting, delaying, or obstructing a police officer. In so holding, the majority confidently asserts that a jury's conviction of a defendant under California Penal Code section 148(a)(1)—unlike conviction under the same section by plea agreement—*necessarily* requires a determination that the officers involved were acting lawfully at all times during the course of the interaction with the

> defendant, and so, under *Heck v. Humphrey*, 512 U.S. 477 (1994), precludes an excessive force claim for damages under 42 U.S.C. § 1983.

(Berzon dissent at 18)

Heck held that a plaintiff may not use a civil suit under section 1983 to attack collaterally the validity of a criminal conviction that arises from the same underlying facts. If success on the section 1983 claim "would necessarily imply the invalidity" of the conviction, the claim is barred under *Heck.* 512 U.S. at 486–87. However, an exception to the general *Heck* bar exists if "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id*. at 486–87. None of these conditions exist here.

Under section 148(a)(1), in order for an arrest to be valid at the time the person subjected to the arrest resists, obstructs, or delays "the officer [must] be *lawfully* engaged in the performance of his or her duties". *Yount v. City of Sacramento*, 43 Cal. 4th 885, 894 (2008). The use of excessive force in an investigatory stop or during an arrest violates the Fourth Amendment's protection against unreasonable seizures of the person." *Graham v. Connor*, 490 U.S. 386, 394 (1989), *see also*, *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (en banc) In California the lawfulness of the officer's conduct is an essential

element of the offense of resisting, delaying, or obstructing a peace officer.

However, a section 148(a)(1) conviction does not necessarily establish that force used by an officer prior to or after a section 148(a)(1) arrest was reasonable and therefor lawful.

The California Supreme Court in *Yount v. City of Sacramento*, 43 Cal. 4th 885, 76 Cal. Rptr. 3d 787, 183 P.3d 471 (2008) adopted a three-part test to determine whether a section 1983 action should be dismissed pursuant to the *Heck* bar.

> To determine "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction" (*Heck*, *supra*, 512 U.S. at p. 487), the Court of Appeal proposed a three-part analysis: "First, the court must determine, using the substantial evidence test, what acts or omissions may have formed the factual basis for the plaintiff's obstruction conviction. Second, the court must ascertain what alleged misconduct by the officer forms the factual basis for the civil rights claim (e.g., excessive force). The final step is to consider the relationship between the plaintiff's acts of obstruction and the officer's alleged misconduct." We find this framework useful (see *VanGilder v. Baker* (7th Cir. 2006) 435 F.3d 689, 691).

43 Cal. 4th at 894, 76 Cal. Rptr. 3d at 795, 183 P.3d at 478-79 (2008)

In the instant case, the first prong is not ascertainable from the mere fact of the conviction and the general verdict form utilized. As noted above, any one of four acts, either taken alone or in conjunction with all or some of the other three may have formed the factual basis for the plaintiff's conviction. As for the second prong, the civil claim by Ms. Lemos clearly sets forth her allegations of unlawful

behavior on the part of Deputy Holton as being limited to the deputy's use of force which resulted in her injuries as she was walking back to her house.

The final prong is impossible to evaluate because without knowledge of what act or acts of the plaintiff formed the basis of the jury's verdict. It would be pure conjecture to say what the relationship between those acts and the officer's alleged misconduct was. It is entirely possible, and arguably probable, that the fourth event, Deputy Holton's grabbing Ms. Lemos and pushing her to the ground when she was walking toward her house (approximately seven minutes after the other events which took place at the passenger side of the truck) was not a part of the jury's decision in the criminal case. It certainly was not necessarily and invariably a part of it. Under this analysis Ms. Lemos' civil complaint cannot be said to necessarily implicate the validity of her criminal conviction. As noted in Judge Berzon's dissent:

> Application of *Heck* in this context is complicated when, as here, there were several possible factual bases for the section 148(a)(1) conviction, *i.e.*, more than one alleged act of resistance, delay, or obstruction, but it is not clear from the record which particular act or acts form the basis of the conviction. Because the *Heck* bar applies only when a section 1983 claim "would *necessarily* imply the invalidity" of the conviction and not if it only *might* imply the conviction's invalidity, *id.* (emphasis added), the *Heck* bar does not apply unless the conduct challenged in the excessive force suit is necessarily the same conduct found lawful in the section 148(a)(1) conviction. *See Smith*, 394 F.3d at 699; *Hooper*, 629 F.3d at 1134.

(Berzon dissent at 26)

In her dissent, Judge Berzon cites to three Ninth Circuit decisions to illustrate the operative analysis. In *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005):

> the plaintiff refused police orders to take his hands out of his pockets, put them on his head, and turn around. 394 F.3d at 693–94. Smith subsequently physically resisted arrest, and police used physical force to subdue him: the officers ordered a police dog to bite Smith three times and pepper-sprayed him four times. *Id*. at 694. Smith pleaded guilty to the section 148(a)(1) violation, but "there [was] no information as to which of his actions constituted the basis for his plea." *Id*. at 698. Addressing this information vacuum, *Smith* concluded that "[b]ecause on the record before us we cannot determine that the actions that underlay Smith's conviction upon his plea of guilty occurred at the time of or during the course of his unlawful arrest, Smith's success in the present action would not necessarily impugn his conviction." *Id.* at 699.

(Berzon dissent at 26-27)

Hooper v. Cty. of San Diego, 629 F.3d 1127 (9th Cir. 2011) was another case where the *Heck* bar was deemed not to apply. It too involved an attack by a police dog during an arrest. There, Hooper suffered police-directed dog bites to her head. She did not contest her conviction for resisting a police officer, but sued under section 1983 claiming excessive force was used after she was already subdued. The Court analyzed the case under *Heck. Id.* at 1128. The Court found that Hooper's section 1983 claim was not barred by the *Heck* doctrine because it did not imply or connote the invalidity of her criminal conviction.

> In sum, we conclude that a conviction under California Penal Code § 148(a)(1) does not bar a § 1983 claim for excessive force under *Heck* when the conviction and the § 1983 claim are based on different actions during "one continuous transaction." In the case now before us, we hold that Hooper's § 1983 excessive force claim is not *Heck-barred* based on her conviction under § 148(a)(1).

629 F.3d at 1134.

In contrast, *Beets v. County of Los Angeles*, 669 F.3d 1038 (9th Cir. 2012), presents a different scenario with different results.

> Finally, in *Beets*, the plaintiffs alleged excessive force by a police officer who shot their son, Glenn Rose. 669 F.3d at 1040. Rose drove a truck "rapidly in the direction of" the officer, who, "fearing for his life, fired at [Rose] and killed him." *Id*. Rose's companion, a passenger in the truck, was convicted of assaulting the officer with a deadly weapon, on the theory that she had aided and abetted Rose. *Id*. The criminal jury was instructed that the lawfulness of the officer's actions was an element of the crime, so it could not convict unless it found that the officer was not using excessive force at the time of the assault with a deadly weapon (the truck). *Id*. at 1041. Holding the conviction barred the excessive force claim under *Heck*, *Beets* determined that on the facts before the court in that case, "there are not multiple factual bases for [the] conviction," so the jury's verdict necessarily established that the only use of force at issue (*i.e*., the officer's shooting Rose) was not excessive. 669 F.3d at 1045.

(Berzon dissent at 27-28)

The instant case is unequivocally more akin to *Smith* and *Hooper* where there were multiple actions by both the arrestee and the police, and unlike *Beets* there was but a single possible basis for the conviction. Here, there is no way to ascertain the jury's view of what specific actions by the arrestee were the grounds

of the guilty verdict, and also no way to determine what actions of the police were and were not lawful. The Panel majority posited a bright line rule that in all cases and all circumstances a guilty verdict under section 148(a)(1) necessarily bars any and all opportunity for a party who feels aggrieved by excessive police action to redress injury via a section 1983 civil action. This is contrary to California and United States precedent, and to good public policy.

CONCLUSION

For all these reasons, the decision by the panel majority should be reversed.

Dated: July 30, 2021

Respectfully submitted,

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Exhibit A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABBI LEMOS, *Plaintiff-Appellant*, v. COUNTY OF SONOMA, STEVE FREITAS, and MARCUS HOLTON, *Defendants-Appellees.*	No. 19-15222 D.C. No. 4:15-cv- 05188-YGR OPINION

Appeal from the United States District Court
For Northern California, Oakland
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted May 22, 2020
San Francisco, California

Filed July 16, 2021

Before: Marsha S. Berzon and Sandra S. Ikuta, Circuit Judges, and Ivan L.R. Lemelle,[*] District Judge.

Opinion by Judge Lemelle;
Dissent by Judge Berzon

[*] The Honorable Ivan L.R. Lemelle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

SUMMARY**

42 U.S.C. § 1983 / *Heck v. Humphrey*

The panel affirmed the district court's order on summary judgment holding that appellant's 42 U.S.C. § 1983 claim for excessive force was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

Appellant argued that her conviction after jury trial for violations of California Penal Code § 148(a)(1) (resisting, obstructing, or delaying a peace officer), and her § 1983 claim were not necessarily based on the same transaction, and therefore not barred by *Heck*.

The panel held that the relevant inquiry in applying *Heck* is whether the record contained factual circumstances that supported the underlying conviction under § 148(a)(1), and not whether the conviction was obtained by a jury verdict or a guilty plea. The panel held further that, based on the jury instructions and evidence of record before it, the jury verdict established that appellant resisted and the deputy's conduct was lawful throughout the encounter. Furthermore, in California, the lawfulness of an officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer. The panel held that the record compelled a finding the jury determined that the arresting deputy acted within the scope of his duties without the use of excessive force, and that appellant sought to show that the same conduct constituted excessive force. The district court

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

appropriately considered summary disposition of remaining legal issues under *Heck* and its progeny. In reliance, the panel found that *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005 (en banc), and *Beets v. City of Los Angeles*, 669 F. 3d 1038 (9th Cir. 2012), controlled application of the *Heck* bar as found by the district court.

Judge Berzon dissented. She wrote that the jury was instructed that there were four possible factual bases on which it could convict appellant, and three of the factual bases pertained to acts not an issue in appellant's section 1983 claim. Success on appellant's section 1983 claim therefore did not necessarily imply that her conviction was invalid. In concluding that *Heck* barred appellant's excessive force claim, the majority fundamentally erred.

COUNSEL

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OPINION

LEMELLE, District Judge:

Appellant Gabbi Lemos appeals the district court's order granting appellee County of Sonoma, Sheriff Steve Freitas, and Deputy Marcus Holton's motion for summary judgment. Appellant argues that her conviction after jury trial for violations of California Penal Code § 148(a)(1) and her 42 U.S.C. § 1983 claim are not necessarily based on the same transaction, and as a result the district court erred in ruling that the § 1983 claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 13, 2015, Deputy Holton, after seeing a pickup truck blocking a lane of traffic and hearing screaming, stopped at the home of Gabbi Lemos to investigate what he believed was a domestic dispute involving Karli Labruzzi and Darien Balestrini. After speaking with Balestrini, outside of the vehicle, Holton walked around to the passenger side where he encountered Labruzzi, Gabbi Lemos, Lemos's mother, and Lemos's sister. Holton asked Lemos, her mother, and sister to step away from the vehicle so that Holton could speak with Labruzzi.

While speaking with Labruzzi, Holton attempted to open the truck door. Lemos then inserted herself between Holton and the open truck door while pointing her finger at Holton and yelling that Holton was not allowed to go in the truck. Holton then pushed Lemos away from him with his right hand. After closing the truck door and repeatedly ordering Lemos, Lemos's mother and Lemos's sister to calm down to which the parties did not comply, Holton requested backup.

Following backup's arrival, Lemos and others continued to be uncooperative. Holton then separated Lemos's mother from the group to explain the investigation, but Lemos's mother returned to the group and continued to be uncooperative. Subsequently, Lemos's mother told Lemos to go into the house at which point Lemos turned to walk toward the house. As Lemos walked past Holton, Holton told her, "Hey, come here. Hey." Lemos did not respond and continued to walk away. Holton then ran up behind Lemos, grabbed her, and brought her to the ground.

On November 12, 2015, Lemos filed a complaint in the district court asserting an excessive force claim under 42 U.S.C. § 1983 arising out of the June 13, 2015 incident. Lemos claimed Holton used excessive force in stopping her from fleeing as he attempted to arrest her. On April 18, 2016, the district court stayed the federal action during pendency of state criminal proceedings against Lemos, in which Lemos had been charged with resisting, obstructing, or delaying a peace officer in violation of California Penal Code § 148(a)(1).[1]

On August 31, 2016, a jury was instructed Lemos could be found guilty of violating California Penal Code § 148(a)(1). The jury was instructed to find each of the following elements beyond a reasonable doubt: (1) "Deputy

[1] California Penal Code § 148(a)(1) provides, "Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer," (2) "[Lemos] willfully resisted, obstructed or delayed Deputy Marcus Holton in the performance or attempted performance of those duties," and (3) "[w]hen [Lemos] acted, she knew, or reasonably should have known, that Deputy Marcus Holton was a peace officer performing or attempting to perform his duties." As to the first element, the jury was instructed that "[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." With respect to the second element, the jury was instructed that Lemos could be found guilty based on four theories of liability: Lemos (1) made physical contact with Holton as he was trying to open the truck door; (2) placed herself between Holton and Ms. Labruzzi; (3) blocked Holton from opening the truck door and seeing or speaking to Ms. Labruzzi; or (4) pulled away from Holton when Holton attempted to grab her. Lemos was convicted by a jury for violating California Penal Code Section 148(a)(1) when Lemos resisted, delayed, or obstructed Deputy Holden while he was conducting his duties as an officer on June 13, 2015.

On May 24, 2018, the district court lifted the stay. On November 8, 2018, all defendants filed a motion for summary judgment. The district court issued its order granting defendant's motion for summary judgment on January 29, 2019. Lemos timely filed a notice of appeal.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

We review *de novo* the district court's grant of summary judgment. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996). We must determine, "viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist." *Id.* We will affirm only if no "reasonable jury viewing the summary judgment record could find by a preponderance of the evidence that the plaintiff is entitled to a favorable verdict." *Narayan v. EGL, Inc.*, 616 F.3d 895, 899 (9th Cir.2010). "If a rational trier of fact could resolve a genuine issue of material fact in the nonmoving party's favor," summary judgment is inappropriate. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir.2011). "[C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge." *Id.* (quoting *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir.2009)).

Lemos contends that jurors in the criminal trial were instructed she could be found guilty of violating § 148(a)(1) based on four theories of liability, and the jury was given a general verdict form. The verdict form did not indicate whether the jury found Lemos guilty of one or all of the instances given in the jury instructions. Lemos contends that if the jury did not find her guilty of pulling away from Holton when he attempted to restrain her (the fourth theory of liability), then her § 1983 claim is not barred by *Heck*.

Excessive force claims are analyzed under the objective reasonableness standard of the Fourth Amendment as enunciated in *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985). *See Blanford v. Sacramento Cnty.*, 406 F.3d 1110, 1115 (9th Cir. 2005). For assigned reasons below, we discern no material factual disputes from this record. The sole issue remaining on

appeal is a basic *Heck* question—whether success on Lemos's § 1983 excessive force claim "would 'necessarily imply' or 'demonstrate' the invalidity" of Lemos's state court conviction under California Penal Code § 148(a)(1).

THE HECK PRECLUSION DOCTRINE

In *Heck v. Humphrey*, the United States Supreme Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . . A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is *not* cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed . . . .

512 U.S. 477, 486 (1994). Under *Heck*, "[w]hen a plaintiff who has been convicted of a crime under state law seeks damages in a § 1983 suit, 'the district court must consider whether a judgment in favor of the plaintiff would

necessarily imply the invalidity of his conviction or sentence.'" *Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1130 (9th Cir. 2011) (quoting *Heck*, 512 U.S. at 487). If it would, the civil action is barred. *Id.*; *cf. Yount v. City of Sacramento*, 43 Cal. 4th 885, 902 (2008) (extending *Heck* to California state law claim for battery). *Heck* instructs that "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed." *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir.1996) (per curiam). However, a plaintiff's allegation of excessive force by a police officer is not barred by *Heck* if the officer's conduct is "distinct temporally or spatially from the factual basis for the [plaintiff's] conviction." *Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 1042 (9th Cir. 2012) (citing *Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir.2005) (en banc)).

In *Beets*, we rejected an attempt to separate a deputy's action from the criminal activity underlying the § 1983 plaintiffs' excessive-force claim. The § 1983 plaintiffs in *Beets*, like Lemos here, argued that there were several possible factual bases for the relevant criminal conviction. *Id.* at 1045. Therefore, they argued, the conviction was not necessarily based on the same factual basis as the alleged civil rights violations. *Id.* In *Beets*, as here, the jury instructions in the criminal case required that to convict the defendant, the jury had to find she acted willfully against a police officer who was "lawfully performing his duties as a peace officer," and that the officer was not "using unreasonable or excessive force in his or her duties." *Id.*

Beets reaffirmed and relied on *Smith* to conclude that the jury necessarily determined that during the entire course of the deputy's conduct, he "acted within the scope of his duties

and did not use excessive force." *Beets*, 669 F.3d at 1045.[2] In *Smith*, we distinguished such a jury verdict from a guilty plea: "[W]here a § 1983 plaintiff has pled guilty or entered a plea of nolo contendere . . . it is *not* necessarily the case that the factual basis for his conviction included the whole course of his conduct." 394 F.3d at 699 n.5. *Beets* reaffirmed this distinction. 669 F.3d at 1045. Because the jury's verdict in the criminal case necessarily found that the deputy did not use excessive force at any time during the "course of the defendant's conduct," *id.* (quoting *Smith*, 394 F.3d at 699 n.5), a verdict in the plaintiffs' favor on their § 1983 excessive-force claim would have necessarily implied that the underlying criminal conviction was invalid. Therefore, the claim was barred by *Heck*. *Id.*

Although *Beets* relied on *Smith* in determining the officer acted within the scope of his duties during the entire course of conduct, it was one of two independent grounds on which *Beets* rejected the plaintiffs' argument that the relevant conviction was not barred by *Heck*; indeed, *Beets* made clear that the argument failed "on two counts." *Id.* Nevertheless, "[i]t is well-established that 'where a decision rests on two or more grounds [as in *Beets*], none can be relegated to the

[2] Reliance on *Beets* and *Smith* is criticized in a well-reasoned dissent to an unpublished disposition in *Wilson v. City of Long Beach*, 567 F. App'x 485 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1154 (2015). While positing certain record deficiencies in the factual and legal outcomes, the dissent also emphasized that the ruling in *Beets*, and footnote 5 in *Smith*, on which *Beets* relies, are non-binding dicta. We note however when the circuit was sitting en banc, as in *Smith*, even dicta is binding on subsequent panels. An en banc panel announces "binding legal principle[s] for three-judge panels and district courts to follow even though the principle[s] [may be] technically unnecessary to the . . . disposition of the case." *Barapind v. Enomoto*, 400 F.3d 744, 751 n.8 (9th Cir. 2005) (en banc) (per curiam).

category of obiter dictum.'" *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1016 n.5 (9th Cir. 2013) (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949)).

This comparative analysis of jury verdicts and guilty pleas does not support the proposition, as grossly mischaracterized by the dissent, that this opinion serves as an open invitation for police overreaction, provided that the prosecutor secures a guilty jury verdict as opposed to a guilty plea. Whether the accused wishes to proceed to trial or enter a guilty plea is not the defining factor of *Heck*'s application. Instead, the relevant inquiry is whether the record contains factual circumstances that support the underlying conviction under § 148(a)(1), *not* whether the conviction was obtained by a jury verdict or a guilty plea. *Beets*, 669 F.3d at 1045; *Yount*, 43 Cal. 4th at 891.

Yount involved an incident wherein the plaintiff consistently resisted the officers' attempts to place him in the patrol car until one officer mistakenly fired his pistol, instead of his taser, to subdue the plaintiff. *Yount*, 43 Cal. 4th at 888. In pleading no contest to a violation of § 148(a)(1) for his conduct leading up to the gunshot, Yount stipulated to a factual basis "without any explicit recitation of what those facts were." *Id.* at 895. Upon review of Yount's conviction, his subsequent admission to its underlying facts, and eyewitness testimony at the *Heck* hearing, the Supreme Court of California found that *Heck* barred his § 1983 claims pertaining to the force used by the officers in response to Yount's violent resistance. *Id.* at 898. However, the court found that *Heck* did not bar Yount's claims regarding the use of deadly force thereafter because there was nothing within the criminal record that provided a justification for such force. *Id.*

To the extent that the dissent mischaracterizes our opinion to imply that a guilty plea to § 148(a)(1) will lack factual support to bar a § 1983 claim under *Heck*, *Yount* demonstrates that such is untrue. Rather, as established in *Yount*, so long as evidentiary support for the § 148(a)(1) conviction exists in the record, plea agreements, just like guilty jury verdicts, may establish the criminal defendant's resistance toward the officers and the officer's lawful conduct in response.

We further acknowledge that *Heck* would not necessarily bar a § 1983 claim for excessive force when the defendant enters into a plea agreement and the conviction and the § 1983 claim are based on different actions taken during one continuous transaction. *See Hooper v. City of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011) (excessive force used after an arrest is made does not destroy the lawfulness of the arrest). In *Hooper*, the complainant struggled briefly with the arresting officer after they were on the ground by "jerking side to side." The officer restrained Hooper's hands behind her back, and she allegedly stopped resisting when instructed to do so by the officer. Thereafter, and in response to a gathering of spectators, the officer allegedly screamed "Get away from my car. Get away from my car. Come here, Kojo." The officer's German Shepherd ran up to and bit Hooper's head and held her head until backup arrived. The dog's bites caused significant injuries to Hooper. She pled guilty to resisting a peace officer under California Penal Code § 148(a)(1). Hooper neither disputed the lawfulness of the arrest nor her resistance. *Id.* at 1129. However, she contends that the officer used excessive force after her resistance ended. The material facts in *Hooper* are distinguishable from the material facts in *Lemos*. Significantly, Hooper entered into a plea agreement—as opposed to being convicted by a jury—so it was not

necessarily determined that the officer acted lawfully "throughout the whole course of [Hooper's] conduct," *Smith*, 394 F.3d at 699 n.5, and she reportedly stopped resisting before the alleged use of excessive force by the canine, while Lemos' resistance was clearly viewed by her trial jury as continuous throughout the entire transaction of events leading up to and including all subsequent physical contacts with the arresting deputy. The jury instructions required that the jury find that Deputy Holton was "lawfully performing or attempting to perform his duties as a peace officer," and the instructions explained that an officer "is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." Therefore, based on the jury instructions and evidence of record before it, the jury verdict established Lemos resisted and the deputy's conduct was lawful throughout the encounter. *See Beets*, 669 F.3d at 1045; *cf. Yount*, 43 Cal. 4th at 896–97 (holding that plaintiff's unlimited no contest plea established his culpability for resisting an officer during the entire incident).

Furthermore, in California, the lawfulness of an officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer. *In re Muhammed C.*, 95 Cal. App. 4th 1325, 1329 (2002). For the §148(a)(1) conviction to be valid, a criminal defendant must have "resist[ed], delay[ed], or obstruct[ed]" a police officer in the *lawful* exercise of his duties. *Id.* This circuit further explained in *Smith*:

> Excessive force used by a police officer at *the time of the arrest* is not within the performance of the officer's duty. *Id.; People v. Olguin,* 119 Cal.App.3d 39, 45–46,

173 Cal.Rptr. 663 (Cal.Ct.App.1981) ("*[A]n arrest made with excessive force* is equally unlawful. '[It] is a public offense for a peace officer to use unreasonable and excessive force *in effecting an arrest.*' ") (citation omitted) (emphasis added); *People v. White,* 101 Cal.App.3d 161, 167, 161 Cal.Rptr. 541 (Cal.Ct.App.1980) ("Thus, in the present case it becomes essential for the jury to be told that if they found the *arrest was made with excessive force,* the arrest was unlawful and they should find the defendant not guilty of those charges which required the officer to be lawfully engaged in the performance of his duties ([Cal.Penal Code] §§ 245, subd. (b), 243 and 148).") (emphasis added).

Under the definitions set forth in the California cases listed above, "the time of the arrest" does not include previous stages of law enforcement activities that might or might not lead to an arrest, such as conducting an investigation; it includes only the time during which the arrest is being *effected.* A conviction for resisting arrest under § 148(a)(1) may be lawfully obtained only if the officers do not use excessive force *in the course* of making that arrest. A conviction based on conduct that occurred *before* the officers commence the process of arresting the defendant is not "necessarily" rendered invalid by the officers' subsequent use of excessive force in making the arrest. For example, the officers do not act unlawfully when they perform investigative

> duties a defendant seeks to obstruct, but only afterwards when they employ excessive force in making the arrest. Similarly, excessive force used *after* a defendant has been arrested may properly be the subject of a § 1983 action notwithstanding the defendant's conviction on a charge of resisting an arrest that was itself lawfully conducted. *See, e.g., Sanford v. Motts,* 258 F.3d 1117, 1119–20 (9th Cir.2001) (explaining that a successful § 1983 suit based on excessive force would not necessarily imply the invalidity of Sanford's conviction under § 148(a)(1) because the officer's use of excessive force occurred subsequent to the conduct for which Sanford was convicted under § 148(a)(1)).

Smith, 394 F.3d at 695–696.

Thus, the dissent is correct in stating that a valid §148(a)(1) conviction does not necessarily implicate the lawfulness of the officer's conduct throughout the entirety of his encounter with the arrestee. Dis. Op. at 26. Simply put, a conviction under §148(a)(1) is valid only when "the officer was acting lawfully *at the time the offense against the officer was committed*." *People v. Williams*, 26 Cal. App. 5th 71, 82 (2018) (emphasis added); *Smith*, 394 F.3d at 699. While we do not dispute the dissent's position as a general statement of law, it does not change the fact that the jury unanimously found that Holton acted lawfully throughout the continuous chain of events on June 13, 2015, even when he placed Lemos under arrest.

In cases like *Lemos* involving several potential grounds for a § 148(a)(1) violation within a continuous chain of

events, courts often take into account certain temporal considerations regarding the individual's resistance and the officer's use of force. *Williams*, 26 Cal. App. 5th at 86; *see Yount*, 43 Cal. 4th at 899 ("Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer." (citation omitted)); *see also Hooper*, 629 F.3d at 1131 ("[A] conviction under § 148(a)(1) can be valid, even if, during a single continuous chain of events, some of the officer's conduct was unlawful."). However, contrary to the dissent's interpretation, the statute does not require jurors to isolate each potential basis for a § 148(a)(1) violation and make piecemeal determinations of the officer's lawful conduct at each event, as previously acknowledged by this Court. *See Hooper*, 629 F.3d at 1132 ("Section 148(a)(1) does not require that an officer's lawful and unlawful behavior be divisible into two discrete 'phases,' or time periods, as we believed when we decided *Smith*."). Accordingly, California jurisprudence advises against so-called "temporal hair-splitting" in search of a distinct break between the criminal act and the use of force where none meaningfully exists. *Fetters v. County of Los Angeles*, 243 Cal. App. 4th 825, 841 (2016); *Truong v. Orange County Sheriff's Dept.*, 129 Cal. App. 4th 1423, 1429 (2005).

The dissent nevertheless claims that the jury instructions here specifically directed the jurors to "distinguish among [each factual basis], unanimously." Dis. Op. at 31. In *Smith*, the court stated:

> Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the

> basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction . . . . Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would *necessarily* imply the invalidity of his conviction.

394 F.3d at 699 n.5 (citation omitted); *accord Beets*, 669 F.3d at 1045.[3] While it is correct that the jury had to agree unanimously that Lemos committed at least one of the four violations, it was not required of the jury to expressly identify which of those bases gave rise to the § 148(a)(1) conviction, just as in *Smith*.

Viewed in light of binding circuit precedent, the record compels finding the jury determined that the arresting deputy acted within the scope of his duties without the use of excessive force, and that Lemos seeks to show that the same conduct constituted excessive force. Here, as in *Beets*, 669 F.3d at 1045, the jury was instructed that "[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." And,

[3] The dissent claims that this language in *Smith* may no longer be a correct statement of law in California in light of our *Hooper* decision. Dis. Op. at 34–35. However, *Hooper*'s reassessment of how § 148(a)(1) should be interpreted has no bearing on the jury's ultimate determination of the defendant's guilt and the officer's lawful actions during the incident here. We remain bound by *Beets* to read the jury instructions here as compelling the determination that Holton was not using unreasonable or excessive force throughout the entire course of Lemos's conduct. *See Beets*, 669 F.3d at 1045.

the jury was told that it could convict Lemos only if "Deputy Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer." Lemos's jury considered all parties' evidence of relevant conduct, including the officers' body camera footage that's part of this record. Material factual disputes have been resolved by Lemos's jury. Therefore, the district court appropriately considered summary disposition of remaining legal issues under *Heck* and its progeny. In reliance, we find that *Smith* and *Beets* control application of the *Heck* bar as found by the district court.

AFFIRMED.

BERZON, Circuit Judge, dissenting:

The majority today holds, in effect, that once a person resists law enforcement, she has invited the police to inflict any reaction or retribution they choose, as long as the prosecutor could get the plaintiff convicted by a jury—and not as the result of a plea—on a charge of resisting, delaying, or obstructing a police officer. In so holding, the majority confidently asserts that a jury's conviction of a defendant under California Penal Code section 148(a)(1)—unlike conviction under the same section by plea agreement—*necessarily* requires a determination that the officers involved were acting lawfully at all times during the course of the interaction with the defendant, and so, under *Heck v. Humphrey*, 512 U.S. 477 (1994), precludes an excessive force claim for damages under 42 U.S.C. § 1983.

But the jury instructions in this case were flatly inconsistent with that version of what a section 148(a)(1) conviction connotes. Lemos's jury was instructed that there

were four possible factual bases on which it could convict Lemos, and that it could "not find the defendant guilty unless you all agree that the People have proved that the defendant committed *at least one* of the alleged acts of resisting, obstructing, or delaying a peace officer who was lawfully performing his or her duties, *and you all agree on which act the defendant committed*." (emphasis added). Three of the factual bases pertained to acts not at issue in Lemos's section 1983 claim. Success on her section 1983 claim therefore does not necessarily imply that her conviction is invalid.

In concluding nonetheless that *Heck* bars Lemos's excessive force claim, the majority fundamentally errs. Neither California law nor Ninth Circuit precedent supports or requires this result. And it is likely to encourage the very sort of police overreaction to minor criminal behavior that has led to public outcry and calls for reform in recent years. I emphatically dissent.

I.

Here are the relevant facts, viewed, as we must view them on review of a summary judgment order, in the light most favorable to Gabrielle Lemos, the non-moving party, *see Tuuamalemalo v. Greene*, 946 F.3d 471, 476 (9th Cir. 2019):

On June 13, 2015, Gabrielle Lemos's family had thrown a party at their home celebrating her graduation from high school. Around 11:00 p.m. that same day, Lemos's sister, Karli Labruzzi, returned to the family home with her boyfriend, Darien Balestrini, to retrieve her cell phone. Balestrini's truck was parked on the two-lane road in front of the house, blocking one lane of traffic, when Sheriff's Deputy Holton drove by on patrol. Holton testified that he

heard yelling, including a woman's voice "saying they're fighting or there's some type of fight." He decided to investigate, activating his body camera.

Holton first spoke with the driver, Balestrini. Balestrini explained calmly that his girlfriend, Labruzzi, was drunk, had misplaced her cell phone, and was crying; he denied that anyone had been fighting. Holton next walked toward the passenger side of the truck where Labruzzi was seated, to investigate whether there had been any domestic violence or a "domestic related incident." According to Holton, a "domestic related incident is just an argument between people who have an established relationship, say a boyfriend/girlfriend, husband and wife, established relationship, they have argument, but there's no crime committed." Lemos, her mother Michelle, and her sister were standing near the passenger door when Holton approached. Holton asked the three women to step away from the vehicle so that he could speak with Labruzzi.

At that point, Labruzzi leaned out of the passenger window with her cell phone and stated that she had lost her phone and that there was no fight. Holton then opened the passenger door to see whether Labruzzi had any weapons or visible injuries on her body. Lemos loudly said, "Officer, what are you doing? You're not allowed to do that," and stepped between Holton and her sister. With his right hand Holton pushed Lemos away from him.

As Lemos and her mother continued to protest that Holton was not allowed to go into the car without a warrant, Holton closed the passenger door. He later testified that by this time he had decided to arrest Lemos, but he did not announce that intention. Instead, he attempted to grab Lemos, but her mother and sister shielded her, repeatedly shouting, "What are you doing?" and "Leave her alone!"

Holton drew his Taser and pointed it at the women, yelling that they should calm down because he was "investigating something." But the mother and daughters continued to protest, so Holton called for backup. Deputy Dillion arrived a short time later, and several other officers arrived after that.

Around when Dillion arrived, Holton asked Lemos's mother to speak with him away from the group. She followed him but continued to object, telling Holton, "You're not touching my kid again." When Holton repeated that he was investigating something, Lemos's mother reiterated that there was no "domestic" for him to investigate and complained that he had grabbed her daughter. She then returned to the group.

Dillion began talking to Lemos and her sister while Holton and Lemos's mother spoke separately. Lemos was cooperative and calm as she and her sister spoke to Dillion. She told her mother to calm down so that they could listen to Dillion. Lemos explained to Dillion that her family was upset because they believed Holton had assaulted her when he pushed her away from the car door, and she listened to Dillion's response.

As Dillion continued speaking to Lemos's sister, their mother told Lemos to go into the house. Following her mother's advice, Lemos walked toward the house. Still not announcing an intention to arrest Lemos, Holton ran after Lemos, saying, "Hey, come here. Hey," and grabbed her left wrist. At the time, Lemos was eighteen years old, five feet tall, and weighed 105 pounds; Holton weighed approximately 250 pounds. When she twisted away from him, Lemos asserts, Holton "grabbed [her] by the back of the neck, picked her up off the ground, threw her into the ground face-first, and rubbed her face into the gravel." As Lemos and her family screamed, Holton pinned Lemos facedown

on the ground and handcuffed her hands behind her back. Lemos's mother tried to pull Holton off Lemos but Dillion moved her mother away.

Holton then—finally—announced that Lemos was "under arrest for interfering," and took her to a patrol car. Her face was bloodied, and she was later taken to the hospital in an ambulance. Lemos incurred "thousands of dollars in medical expenses and was unable to leave her house for over a month following these events."

The District Attorney initially declined to prosecute Lemos. After this excessive force suit was filed, however, Lemos was charged with a violation of California Penal Code section 148(a)(1). The criminal case was tried to a jury.

The jury was instructed that Lemos was alleged to have committed four acts of resistance, delay, or obstruction, so there were four possible factual bases for concluding that Lemos had violated section 148(a)(1). Those four alternatives, the jury was told, were that Lemos:

> 1. made physical contact with the Deputy as he was trying to open the truck door;
>
> 2. placed herself between the Deputy and Ms. Labruzzi;
>
> 3. blocked [the] deputy from opening the truck door and seeing or speaking with Ms. Labruzzi;
>
> 4. pulled away when [the Deputy] attempted to grab her.

The jury was further instructed:

> You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the alleged acts of resisting, obstructing, or delaying a peace officer who was lawfully performing his or her duties, *and you all agree on which act the defendant committed*.

(Emphasis added.) The jury returned a verdict of guilty on a general verdict form; it did not indicate which act or acts formed the basis for the conviction.

The district court granted summary judgment to the officers on Lemos's excessive force claim, concluding that, as a result of her criminal conviction, her section 1983 claim was barred under *Heck v. Humphrey*, 512 U.S. 477 (1994).

II.

A. *Heck* Framework

Heck held that a plaintiff may not use a civil suit under section 1983 to attack collaterally the validity of a criminal conviction that arises out of the same underlying facts. 512 U.S. at 486–87. If success on the section 1983 claim "would *necessarily* imply the invalidity" of the conviction, the claim is barred under *Heck*. *Id*. at 487 (emphasis added).[1]

[1] This bar does not apply if "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id*. at 486–87. Lemos does not contend that her conviction has been

Lemos was convicted of violating California Penal Code section 148(a)(1), a misdemeanor. A section 148(a)(1) violation is often referred to as "resisting arrest," but—importantly for this case—it encompasses more than that shorthand suggests. A person violates section 148(a)(1) if she "willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office." Cal. Penal Code § 148(a)(1). Under the statute, then, resistance is not required for a conviction, nor need the offense occur in the course of an arrest.

As a matter of California law, a conviction on a section 148(a)(1) charge establishes that there was a valid basis for the arrest, *i.e.*, the arrest was lawful. A conviction under section 148(a)(1) "requires that the officer be *lawfully* engaged in the performance of his or her duties" at the time the arrestee resists, obstructs, or delays the officer. *Yount v. City of Sacramento*, 43 Cal. 4th 885, 894 (2008). So, as we have recognized, "[i]n California, the lawfulness of the officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer." *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (en banc). The use of excessive force in an investigatory stop or during an arrest violates the Fourth Amendment's protection "'against unreasonable . . . seizures' of the person." *Graham v. Connor*, 490 U.S. 386, 394 (1989) (alteration in original) (quoting U.S. Const. amend IV).

Critically, and, contrary to the majority's assertion, Maj. Op. at 13, whether it follows the defendant's plea or a jury's verdict, a single section 148(a)(1) conviction cannot establish that *all* of an officer's conduct throughout an

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invalidated, reversed, expunged, or impugned by the grant of a writ of habeas corpus.

extended interaction with the arrestee was lawful. More specifically, a section 148(a)(1) conviction does not necessarily establish that force used by an officer prior to or after a section 148(a)(1) arrest was reasonable and so not excessive. The California Supreme Court in *Yount*, 43 Cal. 4th 885, interpreting California law, has so held, explaining that if a defendant "resist[s] a lawful arrest" and the officers "respond with excessive force to subdue him," then

> [t]he subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, [with only] the first giving rise to criminal liability on the part of the criminal defendant . . . .

Id. at 899 (quoting *Jones v. Marcum*, 197 F. Supp. 2d 991, 1005 n.9 (S.D. Ohio 2002)). In other words, "a conviction under § 148(a)(1) can be valid even if, during a single continuous chain of events, some of the officer's conduct was unlawful." *Hooper v. County of San Diego*, 629 F.3d 1127, 1131 (9th Cir. 2011) (citing *Yount*, 43 Cal. 4th 885). In reaching this conclusion, *Yount* rejected *Susag v. City of Lake Forest*, 94 Cal. App. 4th 1401 (Cal. Ct. App. 2002), "which had . . . viewed the plaintiff's criminal conviction as encompassing all of the acts of resistance supported by the evidence." *Yount*, 43 Cal. 4th at 888–89. Under *Yount*, then, if an officer engages in lawful conduct supporting a section 148(a)(1) conviction and, separately, applies excessive force, the conviction remains valid. *See id.* at 899. Where that is the case, a finding of excessive force in a civil § 1983 action would only "necessarily imply the invalidity of the

convictions," *Heck*, 512 U.S. at 487, and so, under *Heck*, preclude § 1983 liability if the excessive force claim pertained to the part of the interaction between the criminal defendant/civil suit plaintiff and the officer being sued for damages that involved lawful police conduct.

Application of *Heck* in this context is complicated when, as here, there were several possible factual bases for the section 148(a)(1) conviction, *i.e.*, more than one alleged act of resistance, delay, or obstruction, but it is not clear from the record which particular act or acts form the basis of the conviction. Because the *Heck* bar applies only when a section 1983 claim "would *necessarily* imply the invalidity" of the conviction and not if it only *might* imply the conviction's invalidity, *id.* (emphasis added), the *Heck* bar does not apply unless the conduct challenged in the excessive force suit is necessarily the same conduct found lawful in the section 148(a)(1) conviction. *See Smith*, 394 F.3d at 699; *Hooper*, 629 F.3d at 1134.

Thus, to determine whether a plaintiff's conviction for resisting arrest bars her excessive force claim under *Heck*, our case law instructs that we must examine the record regarding the factual basis for the conviction. *See, e.g.*, *Smith*, 394 F.3d at 699; *Hooper*, 629 F.3d at 1134. Three key Ninth Circuit decisions—*Smith* and *Hooper*, which held that there was no *Heck* bar, and *Beets v. County of Los Angeles*, 669 F.3d 1038 (9th Cir. 2012), which held that there was—illustrate how this precept works in practice.

In *Smith*, the plaintiff refused police orders to take his hands out of his pockets, put them on his head, and turn around. 394 F.3d at 693–94. Smith subsequently physically resisted arrest, and police used physical force to subdue him: the officers ordered a police dog to bite Smith three times and pepper-sprayed him four times. *Id.* at 694. Smith pleaded

guilty to the section 148(a)(1) violation, but "there [was] no information as to which of his actions constituted the basis for his plea." *Id.* at 698. Addressing this information vacuum, *Smith* concluded that "[b]ecause on the record before us we cannot determine that the actions that underlay Smith's conviction upon his plea of guilty occurred at the time of or during the course of his unlawful arrest, Smith's success in the present action would not necessarily impugn his conviction." *Id.* at 699.

Turning to *Hooper*: In that case, the plaintiff "jerked her hand away" from an officer as he attempted to handcuff her. 629 F.3d at 1129. She then physically resisted until both she and the officer were on the ground and the officer had secured her hands behind her back. *See id.* After she had stopped physically resisting, a police dog, on the officer's command, bit Hooper's head, causing significant damage to her scalp. *Id.* Hooper pleaded guilty to a violation of section 148(a)(1). *Id.*

Hooper held the *Heck* bar inapplicable, because "holding in Hooper's § 1983 case that the use of the dog was excessive force would not 'negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of [Hooper's] attempt to resist it [when she jerked her hand away from Deputy Terrell].'" *Id.* at 1133 (alterations in original) (quoting *Yount*, 43 Cal. 4th at 899). *Hooper* reached this result although the entire incident "took place . . . in a span of 45 seconds." *Id.* at 1129.

Finally, in *Beets*, the plaintiffs alleged excessive force by a police officer who shot their son, Glenn Rose. 669 F.3d at 1040. Rose drove a truck "rapidly in the direction of" the officer, who, "fearing for his life, fired at [Rose] and killed him." *Id.* Rose's companion, a passenger in the truck, was convicted of assaulting the officer with a deadly weapon, on

the theory that she had aided and abetted Rose. *Id*. The criminal jury was instructed that the lawfulness of the officer's actions was an element of the crime, so it could not convict unless it found that the officer was not using excessive force at the time of the assault with a deadly weapon (the truck). *Id*. at 1041. Holding the conviction barred the excessive force claim under *Heck*, *Beets* determined that on the facts before the court in that case, "there are not multiple factual bases for [the] conviction," so the jury's verdict necessarily established that the only use of force at issue (*i.e*., the officer's shooting Rose) was not excessive. 669 F.3d at 1045.

Beets also briefly asserted, quoting *Smith*, that, as a matter of California law, a jury verdict necessarily determines that *all* of the officer's conduct must have been lawful. 669 F.3d at 1045 (citing *Smith*, 394 F.3d at 699 n.5).[2] But *Beets* is clear that "there [were] not multiple factual bases for [the] conviction," so the jury considered the lawfulness of only one action by the officer in reaching its verdict on the charge of assault on an officer with a deadly weapon. *See* 669 F.3d at 1045. In that circumstance, the jury *did* necessarily find lawful all of the officer's conduct that it considered, and *Beets*'s recitation of *Smith*'s summary of California law was essentially an aside. And that recitation is in any event not relevant here, where the criminal jury was instructed precisely contrary to *Smith*'s and *Beets*'s descriptions of the scope of a section 148(a)(1) jury conviction.

[2] At the time of the *Beets* decision, the Ninth Circuit had already recognized that this was an inaccurate description of current, post-*Smith* California law. *See Hooper*, 629 F.3d at 1131–32. See pp. 33–36, *infra*, discussing this aspect of *Beets*.

In sum, the *Heck* bar does not apply if the record leaves open the possibility that the officer's lawful conduct supporting the section 148(a)(1) conviction is different from the officer's alleged unlawful application of excessive force, *see Smith*, 394 F.3d at 699; or that the officer used some force that was reasonable and some force that was excessive, *see Hooper*, 629 F.3d at 1134. The excessive force claim *is* barred if the record conclusively establishes that the conviction and the section 1983 claim are based on the same actions by the officer, as in *Beets*. *See* 669 F.3d at 1045.

B. Application of *Heck* in this case

Under this framework, *Heck* does not bar Lemos's claim that Holton used excessive force when he threw her to the ground and rubbed her face into the gravel. As instructed, the jury's verdict could well have been based on Lemos's obstruction (and Holton's corresponding lawful actions) six minutes earlier, when Lemos inserted herself between Holton and the passenger door.

Again, the jury here was specifically instructed as to four possible acts of resistance, delay, or obstruction by Lemos that could support a section 148(a)(1) conviction. The first three potential bases for the conviction were that Lemos "1. made physical contact with the Deputy as he was trying to open the truck door; 2. placed herself between the Deputy and Ms. Labruzzi; 3. blocked [the] deputy from opening the truck door and seeing or speaking with Ms. Labruzzi." Holton is not alleged in this case to have used excessive force at any of those times. And although none of those incidents involved an arrest, section 148(a)(1), I repeat, covers obstructing or delaying a lawful investigation, which is what was alleged with regard to the first three incidents the jury was asked to consider. Only the fourth potential basis for the conviction involved the same incident as Lemos's section

1983 excessive force claim: "4. [Lemos] pulled away when [the Deputy] attempted to grab her," before she was taken to the ground, handcuffed, and, finally, arrested. The jury was further instructed that it could not render a verdict of guilty unless it unanimously agreed that Lemos had "committed at least one of the alleged acts," and it also "all . . . agree[d] on which act the defendant committed."

Thus, it is simply not true that the criminal jury *in this case* necessarily concluded that all of the officer's conduct, including the force used when she was grabbed on the way to her house, taken to the ground, and injured, was lawful—that is, not excessive. The jury, based on the instructions given, could have unanimously decided to convict because of Lemos's actions while she was at the car attempting to prevent Holton from interacting with Ms. Labruzzi.

Whether the instructions given should have been otherwise, as the outdated discussion in *Smith*, repeated in *Beets*, would indicate, simply does not matter. The analysis appropriate under *Heck* depends on what the jury verdict necessarily *actually* determined. Here, the criminal jury was instructed to look at the twelve-minute set of events discretely, not as a whole. And the jury was specifically allowed to convict Lemos under § 148(a)(1) even if it thought Holton's actions at the time he tackled her to the ground as she was walking to the house were unlawful because the force used was excessive.

It is worth noting—although not directly relevant to the *Heck* analysis—that, if anything, a conviction on one or all of the first three incidents sent to the jury is more likely than on the fourth. The first three incidents involved little force by Holton but did, on the officers' version, present evidence of actual interference with Holton's investigation. The incident on which this case centers, in which Lemos was, on

the mother's advice, trying to leave a contentious situation, did not stop as soon as told to do so, and was physically wrestled to the ground and injured by a police officer, is a poor candidate for a unanimous jury conclusion that she was resisting lawful police activity.

So, on the facts and very specific instructions given the jury here regarding discrete bases for conviction, the *Heck* bar does not apply. As in *Hooper*, a "holding in [Lemos's] § 1983 case that the [takedown] was excessive force would not 'negate the lawfulness of the initial [investigation at the car door], or negate the unlawfulness of [Lemos's] attempt to [obstruct that investigation].'" 629 F.3d at 1133 (quoting *Yount*, 43 Cal. 4th at 899). And, just as in *Smith*, the record does not establish that Lemos's conviction was based on any particular one or combination of the four alleged acts. *See* 394 F.3d at 698. Thus, "[b]ecause we are unable to determine 'the factual basis for [Lemos's conviction],' [her] lawsuit does *not* necessarily imply the invalidity of [her] conviction and is therefore not barred by *Heck*." *Smith*, 394 F.3d at 698 (quoting *Heck*, 512 U.S. at 487).

C. Majority's Error

The majority's fundamental error in reaching the opposite conclusion is that it ignores the critical distinction between the criminal case underlying *Beets* and the conviction here. That distinction, of course, is that here, there was an instruction to the jury that it should *not* regard every interaction between Holton and Lemos that fateful night in June as a single incident, but instead should distinguish among them, unanimously. In *Beets*, in contrast, there was one interaction only in dispute, and no indication the criminal jury was asked to distinguish that incident from any other.

The majority substitutes for this determinative circumstance the assertion that because the criminal case underlying the *Heck* bar argument was decided by a jury and not by a guilty plea, the conviction necessarily establishes, as a matter of California law, that *all* of Deputy Holton's conduct throughout his twelve-minute interaction with Lemos and her family was deemed lawful. Maj. Op. at 10, 12–13. The distinction between a section 148(a)(1) conviction based on a jury's verdict—apparently *any* jury verdict, including one in which the jury was specifically told to distinguish between four interactions and decide which involved obstruction of lawful police action—and one based on a plea cannot possibly bear the weight assigned to it by the majority.

The majority concludes, for example, that "Lemos' resistance was clearly viewed by her trial jury as continuous throughout the entire transaction of events leading up to and including all subsequent physical contacts with the arresting deputy." Maj. Op. at 12–13. How could we possibly know that, when the jury was instructed that it should not take that approach? We have no evidence of how the jury evaluated each of the four bases for conviction it was told independently to consider. All we know is that it unanimously concluded that Lemos had committed *at least one of the four alleged acts* of resistance, delay, or obstruction, and so entered a verdict of guilty on a general verdict form. In fact, the best evidence of what actually occurred—the officers' body-worn camera footage—reveals that for several minutes between the incident at the car door and Lemos's eventual arrest, Lemos was cooperative and calm as she spoke to Deputy Dillion. This evidence is plainly inconsistent with the majority's unfounded conclusion that the jury must have found that Lemos resisted continuously "throughout the encounter." Maj. Op. at 13.

Nor did *Beets* and *Smith* announce the rule the majority posits—that *whatever* a jury is instructed to decide, the legal effect of a section 148(a)(1) conviction is always that the jury found *all* of the officer's conduct to be lawful. The key language that appears in *Smith* and *Beets* assumes instructions according with an outdated statement of California law, as *Hooper* explained. *See Hooper*, 629 F.3d at 1132. But even if that statement of law were accurate, the language contained in a footnote in *Smith* and repeated in *Beets* (in both instances, as explained earlier, in discussions unconnected to the facts of the case) is inapplicable to the facts of this case by its own terms.

The language in *Beets* on which the majority relies is a direct quote from a footnote in the Ninth Circuit's 2005 en banc decision in *Smith*:

> Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction. *See People v. McIntyre,* 115 Cal. App. 3d 899, 910–11 (Cal. Ct. App. 1981) ("It is only incumbent that [the jury] agree [a culpable act] occurred on that date, the exact time or sequence in relation to the[offense] is not material.") (citation omitted). Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would "*necessarily* imply the invalidity of his

> conviction." *Susag*, 94 Cal. App. 4th at 1410 (emphasis added).

Smith, 394 F.3d at 699 n.5 (alterations in the original); *see also Beets*, 669 F.3d at 1045 (quoting *Smith*, 394 F.3d at 699 n.5).

But the application of the *Heck* bar to this case does not depend on the abstract contours of California law. What matters instead is the specific instructions provided to Lemos's jury. Once more, those instructions told the jury to determine, unanimously, that at least one of four specific, disparate acts served as the basis for conviction. *Smith*'s assertion that under then-California law the jury did not make such a determination simply does not apply to a situation in which the jury was explicitly *told to do so*.

Although my analysis could stop there, I note that *Yount* and *Hooper*, both decided after *Smith*, explain *why* Lemos's jury may have been instructed in such a manner and also suggest that *Smith* and *Beets* do not correctly state current California law. *Yount* distinguished *Susag*, on which *Smith* relied, "which had . . . viewed the plaintiff's criminal conviction as encompassing all of the acts of resistance supported by the evidence." 43 Cal. 4th at 888. *Yount* concluded instead that a conviction for resisting arrest did not establish that *all* of the officer's actions were necessarily lawful. *See id.* at 889. As noted previously, the court clarified that "[t]hough occurring in one continuous chain of events, two isolated factual contexts [c]ould exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer." *Id.* at 899 (quoting *Jones*, 197 F. Supp. 2d at 178).

We evaluated *Yount*'s effect on *Smith* in *Hooper*, in 2011, in which we explained that "*Yount* does not mean that our holding in *Smith* was wrong. But it does mean that our understanding of § 148(a)(1) was wrong." 629 F.3d at 1132. Under *Yount*'s reading of the statute, "[i]t is sufficient for a valid conviction under § 148(a)(1) that at some time during a 'continuous transaction' an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully. It does not matter that the officer might also, at some other time during that same 'continuous transaction,' have acted unlawfully." *Id.*

Beets's subsequent reliance on the *Smith* footnote is in tension with *Hooper* and *Yount* and is almost surely no longer a correct statement of California law. But, crucially, the jury instructions in this case distinguish it from *Beets* and *Smith regardless of the legally correct interpretation of California law as applied to section 148(a)(1)*. What matters here is that the instructions actually given to the jury in Lemos's criminal case directed the jury to convict if it unanimously concluded that during *one*—not all—of the four specified incidents Lemos resisted, delayed, or obstructed a lawful action by Holton.[3] Whether those

[3] For its interpretation of California law, *Smith* relied on the statement that, under applicable law, "[i]t is only incumbent that the jury agree a culpable act occurred on that date[;] the exact time or sequence in relation to the offense is not material." *Smith*, 394 F.3d at 699 n.5 (quoting *McIntyre*, 115 Cal. App. 3d at 910–11 (alterations adopted)). But *McIntyre* stands for a narrower rule than the language quoted in *Smith* might suggest.

McIntyre affirmed that the standard California jury instruction on jury unanimity, which requires that "in order to find the defendant guilty, *all the jurors must agree that he committed the same act or acts*," is correct. 115 Cal. App. 3d at 908 (quoting Cal. Jury Instr. No. 17.01).

instructions properly reflected California law (they did, as explained) is of no moment in our determination of what the criminal jury *necessarily* decided, which is the core of the *Heck* inquiry.

Additionally, California law does not assign any significance to whether a conviction is based on a plea or a jury verdict. Echoing Judge Watford's analysis in a similar case, "I can't think of any reason why the analysis under *Heck* should proceed differently for convictions resulting from a jury verdict as opposed to a guilty plea, and neither *Smith* nor *Beets* offered any justification for that distinction." *Wilson v. City of Long Beach*, 567 F. App'x 485, 487 (9th Cir. 2014) (mem.) (Watford, J., dissenting).

In short, under the *specific* jury instructions here, as under the plea agreement discussed in *Smith*, "it is *not* necessarily the case that the factual basis for [Lemos's] conviction included the whole course of [her] conduct." 394 F.3d at 699 n.5. The *Heck* bar therefore does not apply.

III.

The practical result of the majority's holding is that people who are subjected to excessive force by officials in California, who want to hold those officers to account, and who are charged with misdemeanor resisting arrest under

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McIntyre held only that it was not error to omit the instruction in a case in which the acts constituting the charged crime were part of a continuous course of conduct. *See id*. at 910; *see also People v. Muniz*, 213 Cal. App. 3d 1508, 1518–19 (Cal. Ct. App. 1989) (citing *McIntyre*, 115 Cal. App. 3d at 910). The instruction in Lemos's case is substantively the same one that the California court in *McIntyre* quoted with approval for cases that do *not* involve only one continuous course of conduct. *See* 115 Cal. App. 3d at 908.

section 148(a)(1) must choose between holding the state to its burden on the criminal charge in a criminal trial and the opportunity to vindicate their rights by bringing an excessive force case. Under the majority's opinion, the only way to guarantee that an excessive force claim is not forfeited by a jury's verdict is to plead guilty on the criminal charge. The Constitution forbids police from using excessive force, and section 1983 provides an avenue to vindicate that right. The majority's opinion undercuts these protections. Because it is unjust and contrary to our case law, I dissent.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

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Exhibit B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GABBI LEMOS,

Plaintiff,

vs.

COUNTY OF SONOMA, ET AL.,

Defendants.

CASE NO. 15-cv-05188-YGR

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 60

Plaintiff Gabrielle Lemos ("Lemos") brings this action against defendants the County of Sonoma ("County"), Sheriff Steve Freitas, and Deputy Marcus Holton alleging claims for violation of her civil rights under 42 U.S.C. Section 1983 based on an incident on June 13, 2015 in which she claims Deputy Holton used excessive force as he attempted to arrest her for resisting, obstructing, or delaying a peace officer in the performance or attempted performance of his duties in violation of California Penal Code Section 148(a). Defendants now move for summary judgment on the grounds that plaintiff's claims are barred by the *Heck* doctrine, as set forth in *Heck v. Humphry*, because they necessarily implicate the invalidity of her underlying criminal conviction for violation of Section 148(a). (Dkt. No. 60 ("MSJ") at 1 (citing 512 U.S. 477 (1994)).)

Having carefully reviewed the pleadings, the papers and evidence submitted, as well as oral argument from counsel on January 8, 2019, and for the reasons set forth more fully below, the Court **GRANTS** defendants' motion for summary judgment.[1]

[1] Accordingly, the Court **DENIES AS MOOT** parties' stipulation to continue fact and expert discovery deadlines, deadline to complete early neutral evaluation, and deadline to file dispositive motions. (Dkt. No. 73.)

I. BACKGROUND

On June 13, 2015, Deputy Holton was on patrol, dressed in his full Sheriff's uniform. (Dkt. No. 71-2 ("Def. Reply Statement") No. 1.) He wore a body camera fixed to the center of his chest. (*Id.*) At approximately 11:00 p.m. on June 13, 2015, Holton was driving on Liberty Road, which was a dark, rural, country road with one lane in each direction. (*Id.* No. 2.) The area was very dark with no streetlights. (*Id.* No. 3.) When Holton arrived at 684 Liberty Road, he saw a pickup truck with a large trailer attached carrying a race car. (*Id.* No. 4.) The truck had its headlines on, and it was stopped, blocking the southbound lane of traffic in violation of the vehicle code. (*Id.*)

Holton shined his vehicle spotlight on the truck and saw it was unoccupied. (*Id.* No. 5.) He then saw a male and another person walking towards the truck. (*Id.*) Holton rolled down his window and heard people screaming and yelling, including screaming about some type of fight. (*Id.* No. 6.) During Lemos's trial, Holton testified that because he had heard people yelling, he was obligated to investigate to determine whether a crime was in progress and if anyone needed assistance. (*Id.* No. 7.) Holton exited his vehicle to investigate a possible violation of law and activated his worn body camera. (*Id.* No. 8.) Once Holton encountered the parties, he wanted to separate them to speak with them individually and determine what was happening. (*Id.* No. 9.) A male later identified as Darien Balestrini sat in the driver's seat of the truck, and Holton asked him to exit the truck. (*Id.* No. 10.) Balestrini cooperated, exited the truck, provided his identification, and explained that his girlfriend was drunk, had misplaced her cell phone, and was crying. (*Id.* No. 11.) Balestrini denied that he and his girlfriend were fighting. (*Id.* No. 12.)

Police practice in such situations is to separate the parties and speak to them individually to encourage parties to speak freely without the influence of another person. (*Id.*) After speaking with Balestrini, Holton walked around to the passenger side of the vehicle and encountered three females standing outside the vehicle, later identified as plaintiff Gabrielle Lemos, her mother Michelle ("mother"), and her sister Chantal ("sister").[2] (*Id.* No. 13.) Holton asked Lemos, her

[2] Defendants aver that all three women started screaming at Holton. (*Id.* No. 13.) Plaintiff

mother, and her sister to step away from the vehicle so that he could speak to the female subject, later identified as Karli Labruzzi, who sat in the front seat of the truck. (*Id.* No. 15.) The door of the truck was closed, and the female subject leaned out of the window with her cell phone and stated that she had lost her cell phone and that there was no fight. (*Id.*) Holton could not yet determine whether a domestic related incident had occurred or who might be a suspect or a victim. (*Id.* No. 16.) Holton tried to speak with the female subject, but Lemos, her mother, and her sister continued to be very disruptive. (*Id.*)

Holton opened the truck door to speak to the female subject and to observe whether she had any weapons or visible injuries to her person. (*Id.* No. 17.) Lemos then inserted herself between Holton and the open vehicle door.[3] (*Id.* No. 18.) As Lemos inserted herself, she yelled at and pointed her finger at Holton, claiming that he could not do what he was doing. (*Id.* No. 19.) Holton responded by pushing Lemos away from him with his right hand. (*Id.* No. 20.) Lemos's mother moved Lemos away, and Holton closed the truck door. (*Id.* No. 21.) Lemos's mother and sister then shielded Lemos from Holton and refused to allow Holton to speak with her.[4] (*Id.* No. 23.) Holton could not determine what the three women were saying. (*Id.* No. 24.) They refused to calm down, and Holton was unable to explain the situation to them. (*Id.*) Because of their continued uncooperative behavior, Holton requested expedited backup to assist him in controlling the situation. (*Id.* No. 25.) Loud aggravated screaming could be heard in the background of Holton's transmission requesting expedited backup. (*Id.* No. 26.) During trial,

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contends that Holton was the one yelling. (*Id.*)

[3] Defendants aver that Lemos "suddenly forced herself between Holton and the truck passenger door, smashing into Holton on the gun side of his body and stood pressed against Holton's body." (*Id.* No. 18.) They further contend that Lemos's actions were threatening to Holton because officers are trained to prevent people from being on their gun side to avoid exposing their weapon to them or allowing them an opportunity to grab their gun, and it caused Holton to believe that Lemos was going to be assaultive. (*Id.*) Plaintiff points to the difference in size and attire between Lemos and Holton to suggest that plaintiff's actions could not have threatened Holton. (*Id.*)

[4] Plaintiff asserts that her family so shielded her "after [Holton] pushed her by her neck, attempted to grab her, and drew his Taser." (*Id.* No. 23.)

Holton testified to his belief that the situation was dangerous because he was alone and outnumbered, Lemos and her family were uncooperative, the situation was volatile and still progressing, and he still did not know what was going on or whether a domestic incident had occurred.[5] (*Id.* No. 27.)

Holton repeatedly told the women to please calm down, he tried to separate the group and explain to them that he was investigating a possible domestic-related incident. (*Id.* No. 28.) Deputy Dillion arrived on the scene to assist Holton. (*Id.* No. 29.) Lemos, her mother, and her sister continued to scream and yell at Dillion. (*Id.*) Holton tried to calm the group and tried to separate the mother from the group to explain the investigation, but she kept returning to the group and yelling. (*Id.* No. 30.) Holton and Dillion could not control the group.[6] (*Id.* No. 31.) One could hear additional police sirens approaching, and it was apparent that additional officers would soon arrive on the scene. (*Id.* No. 32.)

Lemos's mother told her to go into the house at which point Lemos turned to walk away towards the house. (*Id.* No. 33.) Holton had not cleared the house.[7] (*Id.* No. 34.) As Lemos walked past Holton, he told her "Hey, come here. Hey." (*Id.* No. 35.) Lemos did not respond and continued to walk away. (*Id.*) Holton then ran up behind Lemos, grabbed her, and brought her to the ground.[8] (*Id.* No. 36.) Once Lemos was on the ground, she continued to scream and resist.

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[5] Plaintiff asserts that Holton did not possess such a belief. (*Id.* No. 27.)

[6] Defendants contend that the situation was therefore volatile and dangerous for the officers. (*Id.* No. 31.) Plaintiff disputes that characterization. (*Id.*)

[7] Defendants contend that Holton feared that if Lemos returned to the house she could arm herself, flee, barricade herself inside, or a myriad of other possibilities. (*Id.* No. 34.) Plaintiff disputes that Holton had a genuine, reasonable fear that Lemos would so act. (*Id.*)

[8] Plaintiffs contend that Holton grabbed Lemos by the back of the neck, picked her up off the ground, threw her into the ground face-first, and rubbed her face into the gravel. (*Id.* No. 36.) Defendants aver that Holton ran up behind Lemos and grabbed her left wrist with both of his hands, Lemos pulled her left arm to the right and twisted to get away from Holton and prevent him from handcuffing her. (*Id.* No. 36.) Defendants also aver that Lemos was taken to the ground to decrease the chance of injury to her, the offices, and others. (*Id.* No. 37.) Plaintiff argues that Holton took Lemos to the ground to hurt her. (*Id.*)

(*Id.* No. 38.) She had her hands underneath her body and refused to put her hands behind her back.[9] (*Id.*) Holton managed to get on top of Lemos, straddling her with one knee on each side of her body, and finally managed to handcuff her. (*Id.* No. 39.) Lemos's mother ran up to Holton and kicked him and grabbed the back of his collar.[10] (*Id.* No. 40.) Holton yelled "Get off me. Get back!" and pushed up to try to get her off of him. (*Id.* No. 41.) Deputy Dillion took control of plaintiff's mother and pulled her off. (*Id.*) Approximately ten minutes elapsed from the time Deputy Holton arrived and first contacted Lemos to the time Holton finally gained control of Lemos. (*Id.* No. 42.) Holton asked Lemos if she was injured and she responded with an expletive and laughed. (*Id.* No. 43.) Lemos was transported to the hospital for medical clearance, where she told Holton that she had drank three Jack Daniels and colas that night.[11] (*Id.* No. 44.) During the physical confrontation with Lemos, Holton's hat fell off and his body worn camera detached from his shirt. (*Id.* No. 45.) Because of the incident, Holton sustained injuries to his left knee and the right side of his neck. (*Id.*)

On August 31, 2016, Lemos was convicted by a jury for violating California Penal Code Section 148(a)(1). (*Id.* No. 48.) The instructions provided that the jury find each of the following elements beyond a reasonable doubt:

1. Deputy Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer;
2. The defendant willfully resisted, obstructed, or delayed Deputy Marcus Holton in the performance or attempted performance of

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[9] Defendants aver that Holton did not know whether plaintiff had a weapon in her waistband. (*Id.* No. 38.) Plaintiff characterizes this belief as unreasonable given Lemos's attire of yoga pants. (*Id.*)

[10] Defendants say Lemos's mother kicked Holton in the face and shoulder area and grabbed his collar to try to prevent Lemos's arrest. (*Id.* No. 40.) Plaintiff contends that her mother kicked Holton in his backside with a sandaled foot and grabbed his collar in order to pull him off of Lemos. (*Id.*)

[11] Defendants contend that Lemos also told Holton that her sister Karli, the female subject, and Balestrini were involved in a domestic-related incident, although no physical altercation appeared to have occurred. (*Id.* No. 44.) Plaintiff disputes this characterization and says that she told Holton that the couple had been "bickering" and that there had been nothing physical between them. (*Id.*)

those duties; AND

3. When the defendant acted, she knew, or reasonably should have known, that Deputy Marcus Holton was a peace officer performing or attempting to perform his duties.

(Dkt. No. 70-1, Exhibit A at 9-10.) With respect to the first element, the judge further instructed that "[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." (*Id.* at 10.) With respect to the second element, the court provided four alternative theories by which the jury could find Lemos guilty, namely that she: (1) made physical contact with the deputy as he was trying to open the truck door; (2) placed herself between the deputy and the female subject; (3) blocked the deputy from opening the truck door and seeing or speaking with the female subject; and (4) pulled away from the deputy Holton when he attempted to grab her. (*Id.*) The court further instructed the jury that they could not find Lemos guilty unless they all agreed that Lemos committed at least one of these alleged acts. (*Id.* No. 49.)

The jury unanimously found Lemos guilty and used a general verdict forms, which did not require the jury to specify which theory or theories they agreed-upon with respect to the second element. (*Id.* No. 50.)

II. LEGAL STANDARD

Summary judgment is proper where the pleadings, discovery, and affidavits demonstrate that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine if it could reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material where it could affect the outcome of the case. *Id.*

The party moving for summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact as to an essential element of the nonmoving party's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Once the movant has made this showing, the burden shifts to the nonmoving party to identify specific evidence showing there is a genuine issue of material fact for trial. *Id.* If the nonmoving party cannot do so, the movant "is entitled to . . . judgment as a matter of law because the nonmoving party has failed to make a

sufficient showing on an essential element of her case." *Id*. (internal quotations omitted).

On summary judgment, the court draws all reasonable factual inferences in favor of the nonmoving party. *Anderson*, 477 U.S. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id*. However, conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp*., 594 F.2d 730, 738–39 (9th Cir. 1979).

III. ANALYSIS

Defendants aver that Lemos's excessive force claims under Section 1983 necessarily implicate the validity of her criminal conviction for violation of California Penal Code Section 148 for resisting, obstructing, or delaying Holton in the performance or attempted performance of his duties, and therefore, her claims are barred by the *Heck* doctrine. (MSJ at 8.) When a plaintiff "seeks damages in a [Section] 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.[12] *Heck*, 512 U.S. at 486-87. Therefore, "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which [S]ection 1983 damages are sought, the 1983 action must be dismissed." *Cunningham v. Gates*, 312 F.3d 1148, 1153 (9th Cir. 2002) (internal citation omitted).

[12] Notably, the Supreme Court in *Heck* cited to the following as an example of "a [Section] 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful" and as a result "the [Section] 1983 action will not lie":

> An example . . . would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest . . . . He then brings a § 1983 action against the arresting officer seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted.

Heck, 512 U.S. at 503 n. 6 (emphasis in original).

Under Section 148(a)(1), "[t]he legal elements of a violation . . . are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." *In re Muhammed C.*, 95 Cal.App.4th 1325, 1329, 116 Cal.Rptr.2d 21 (2002) (citations omitted). A conviction under Section 148(a)(1) can be valid even if, during a single continuous chain of events, some of the officer's conduct was unlawful. *Yount v. City of Sacramento*, 43 Cal.4th 885, 76 Cal.Rptr.3d 787, 183 P.3d 471 (2008). "It is sufficient for a valid conviction under [Section] 148(a)(1) that at some time during a 'continuous transaction' an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully. It does not matter that the officer might also, at some other time during that same 'continuous transaction,' have acted unlawfully." *Hooper v. County of San Diego*, 629 F.3d 1127, 1132 (9th Cir. 2011).

The Ninth Circuit has "recognized that an allegation of excessive force by a police officer would not be barred by *Heck* if it were distinct temporally or spatially from the factual basis for the person's conviction." *Beets v. County of Los Angeles*, 669 F.3d 1038 (9th Cir. 2012) (citing *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005)). Stated differently, a *Heck* bar does not lie when the conviction and the Section 1983 claim are based on different actions that occurred during "one continuous transaction." *See Hooper*, 629 F.3d at 1133. Thus, in *Beets*, the Ninth Circuit found that one could not separate the criminal actions that formed the basis of the underlying conviction and the alleged use of excessive force because it was the officers' use of force "that brought an end" to the criminal activity. *Beets*, 669 F.3d at 1044-45. By contrast, in *Hooper*, the defendant officer's alleged use of excessive force occurred *after* he had already gained control over the plaintiff and had "gotten both of Hooper's hands behind her back." *Hooper*, 629 F.3d at 1129. Only after Hooper had "stopped resisting when [the officer] instructed her to do so[,]" did the officer instruct his department issue canine to "[c]ome here[,]" after which the dog bit and held Hooper's head, resulting in loss of large portions of Hooper's scalp. *Id.* Based on this distinction, the Ninth Circuit in *Hooper* determined that the criminal conduct of the underlying conviction and the alleged use of excessive force were "different actions during one

continuous transaction." *Id.* at 1134 (internal quotations omitted). Moreover, the court emphasized that a jury verdict, unlike a plea, "necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct," so that a subsequent Section 1983 excessive force action brought by the defendant "would necessarily imply the invalidity of his conviction." *Id.* at 1045 (internal quotation marks omitted).[13]

Here, it is undisputed that the jury found that Holton did not use "excessive force" when he engaged in his duties, i.e. the first element of Lemos's Section 148(a) conviction. As in *Beets*, the jury that convicted Lemos was required to find "that: 1. Deputy Marcus Holton was peace officer lawfully performing or attempting to perform his duties as a peace office . . . ." (*See* Dkt. No. 70-1, Exhibit A at 9.) The jury could not so find in circumstances where Holton was "unlawfully arresting or detaining someone or using unreasonable or excessive force in his . . . duties." *See id.* at 10.[14]

Thus, a *Heck* bar would not lie if the basis for the Section 1983 claim "were distinct temporally or spatially from the factual basis for the person's conviction" or Section 1983 claim and the conviction were based on different actions that occurred during the one continuous transaction. The Court finds that the undisputed facts of this case do not support either approach.

The Court finds that plaintiff's conduct of resisting, obstructing, or delaying Holton in his performance of his duties continued for the 10-minute period, that is, it began when Lemos first

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[13] Since *Beets*, courts in this district have held that a Section 148(a)(1) conviction obtained by jury verdict barred a subsequent Section 1983 action for excessive force. *See Lozano v. City of San Pablo*, No. 14–cv–00898–KAW, 2014 WL 4386151, at *6 (N.D. Cal. Sept. 4, 2014) ("The jury verdict in the state court proceedings brings this case squarely in line with *Beets*."); *Tarantino v. City of Concord*, No. 12–cv–00579–JCS, 2013 WL 3722476, at *3 (N.D. Cal. July 12, 2013) (holding that plaintiff's convictions at trial for assault on a peace officer and violation of section 148(a)(1) barred plaintiff's excessive force claims where the jury made special findings that plaintiff "initiated a physical altercation" with the officers and "did not act in self-defense"); *Box v. Miovas*, No. 12-cv-04347-VC (PR), 2015 WL 192273317, at *6 (N.D. Cal. April 28, 2015) ("The facts in this case are like those in *Beets*. Box was found guilty of violating § 148(a)(1) by a jury. . . . Therefore, pursuant to *Beets*, Box's claim for excessive force is barred by *Heck*.") In *Kyles v. Baker*, Judge Orrick adopted this reasoning to hold that because a plaintiff was convicted by a plea of no contest, not by a jury trial, his conviction did not necessarily determine the lawfulness of the officers' actions throughout the whole course of plaintiff's conduct. 72 F.Supp.3d 1021, 1037 (2014).

[14] *See also Beets*, 669 F.3d at 1045; *Lozano*, 2014 WL 4386151, at *6; *Tarantino*, 2013 WL 3722476, at *5; *Box*, 2015 WL 192273317, at *6.

inserted herself between the officer and the open vehicle door and did not cease until Holton gained control of Lemos after taking her to the ground and placing her in handcuffs. (*See* Def. Reply Statement Nos. 18-42.) Throughout the interaction Lemos continued to scream at Holton and failed repeatedly to comply with his instructions. (*See e.g., id.* Nos. 24, 28, 29, 31.) The situation was exacerbated by her mother's conduct and interference. Given plaintiff's and her cohorts' continuous screaming and provoking, with respect to Holton's actions, the Court finds no temporal or spatial distinction or other separation between the conduct for which Lemos was convicted, by a jury, and the conduct which forms the basis of her Section 1983 claim. Holton did not bring the situation under control until he brought Lemos to the ground and secured her hands. (*See id.* Nos. 39, 42.) Lemos has not and cannot allege that Holton used excessive force thereafter. Accordingly, for *Heck* purposes, the Court finds Holton's actions to form one uninterrupted interaction and the jury's finding that he did not use excessive force would be inconsistent with a Section 1983 claim based on an event from that same encounter. Accordingly, the Court finds that Lemos's claims are barred by the *Heck* doctrine.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** defendants' motion for summary judgment.

This Order terminates Docket Numbers 60 and 73.

IT IS SO ORDERED.

Dated: January 29, 2019

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

CERTIFICATE OF COMPLIANCE

I am one of the attorneys honored to represent the Plaintiff-Appellant. This brief contains 3,746 words, less than 4,200 words allowed, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) as it is 14-point and double-spaced. See attached Form 8 as required.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Court of Appeals Docket No. 19-15222

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABBI LEMOS,

Plaintiffs/Appellants,

v.

COUNTY OF SONOMA, et al.,

Defendants/Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 4:15-cv-05188-SBA
Hon. Yvonne Gonzales Rogers

DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFF-APPELLANT'S PETITION FOR REHEARING OR REHEARING *EN BANC*

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I. INTRODUCTION

Consistent with binding Ninth Circuit and Supreme Court authority, the Appellate Panel in this case correctly concluded that Appellant Gabrielle Lemos' ("Lemos") claims under 42 U.S.C. §1983 are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) and properly affirmed summary judgment in favor of Appellees Deputy Marcus Holton ("Holton"), the County of Sonoma ("County") and Sheriff Steve Freitas ("Freitas") (collectively "Appellees"). Lemos was convicted by a jury on August 31, 2016 for violating Penal Code §148(a) for resisting, obstructing or delaying Holton in the performance of his duties during a June 13, 2015 incident. Lemos' §1983 claims that Holton used excessive force in stopping her from fleeing as he attempted to arrest her necessarily implicated the validity of her conviction for violating §148. The Panel, therefore, correctly concluded that Lemos' §1983 claims are *Heck* barred.

The Panel's decision does not create any "bright line rule," "deem[] all … police activity as lawful simply by virtue of the underlying conviction at trial," or "prohibit any redress of grievances against officers for constitutional violations which occurred during a police encounter" (see petition) as "grossly mischaracterized" by Appellant. Rather, the Panel's decision was carefully tailored to the specific undisputed facts of Lemos' particular case. The pivotal issue was not the broad fact that Lemos was convicted by a jury, but rather, the particular

record established by Lemos' jury trial clearly showed that her conviction "necessarily determined the lawfulness of [Deputy Holton's] actions throughout the whole course of [his] conduct." *Beets v. Cnty. of Los Angeles,* 669 F.3d 1038 (9th Cir. 2012).) Lemos identified no valid basis in the district court, on appeal or in the instant petition, to disregard the law and the audio and video recordings of her continuous unlawful conduct resisting and obstructing Holton's law enforcement efforts. The evidence shows no temporal break throughout, and Holton's use of force cannot be separated from Lemos' unlawful conduct for which she was criminally convicted. Lemos' §1983 claims thus are barred by *Heck* and summary judgment properly was granted by the district court and correctly affirmed by the Panel.

Lemos' petition asserts the same arguments considered and rejected by the Panel, as carefully explained in its decision. The panel's decision that Lemos' §1983 claims are barred by her underlying conviction was correct and consistent with *Heck* and binding circuit precedent, and Appellant's petition for rehearing or rehearing *en banc* should be denied.

II. STATEMENT OF UNDISPUTED FACTS

At approximately 11:00 p.m. on June 13, 2015, Holton was on patrol when he saw a pickup truck with a large trailer stopped with its headlights on and blocking traffic. (ER 239-243.) Holton saw two people walking towards the truck

and he heard screaming and yelling, including Lemos' mother Michelle, screaming that there was a fight going on. (ER 243-244, 294.)

Holton believed a fight or a domestic violence situation might be occurring. He activated his body worn camera and exited his car to investigate to determine whether a crime was occurring and if assistance was needed. (ER 238, 244-245, 247, 295-298.) Balestrini was in the driver's seat and explained that his girlfriend was drunk and misplaced her phone and was crying, and he denied they were fighting. (ER 245-249.)

Holton walked to the passenger side where Michelle, Lemos and her sister Chantal started screaming and yelling at Holton. (ER 250-251, 256.) Holton asked the trio to step away from the vehicle so he could speak to Karli, who was sitting in the passenger seat. (ER 251-252.)

Holton tried to speak with Karli to determine whether a domestic incident occurred, but Lemos, Michelle and Chantal continued obstructing his efforts. (ER 252, 287-288.) Holton opened the door to speak with Karli and Lemos forced herself between Holton and the door and stood pressed against him, causing Holton to believe Lemos was going to be assaultive. (ER 252-254, 256-257, 278-279, 293, 299, 325.) Lemos continued yelling at Holton and she poked him in his shoulder. Holton pushed Lemos away with his hand in response. (ER 255, 257.)

Holton instructed Lemos to turn around and he attempted to grab her to

arrest her, but Lemos refused and pulled away. (ER 255, 258, 262, 279-280.) Michelle and Chantal shielded Lemos and continued yelling at Holton, and they refused to calm down or allow Holton to speak with Lemos. (ER 256, 258, 280-282.)

Holton requested expedited backup to assist and when Deputy Dillion arrived, Lemos, Michelle and Chantal continued to scream and yell at both officers and refused to separate or cooperate. (ER 259-265, 307-311.) The officers were unable to control the group, additional police sirens could be heard approaching and it was apparent that additional officers would soon arrive on scene. (ER 265, 312-314.) Michelle told Lemos to go into the house, and Lemos turned to walk away towards the house. (ER 265.)

Holton feared that if Lemos returned to the house she could arm herself, flee or barricade inside. (ER 265-266.) As Lemos passed Holton he told her, "Hey, come here. Hey." Lemos did not respond and continued walking away. (ER 266, 305.) Holton ran up behind Lemos and grabbed her wrist and brought her to the ground when she pulled and twisted to get away. (ER 266-268.)

Lemos' obstreperous behavior throughout was captured on the deputies' body worn cameras. (ER 276, 318-321, 329-340.) On August 31, 2016, Lemos was convicted by a jury for violating Penal Code §148(a). (ER 326-327.) The jury was given CALCRIM Instruction 2670 and instructed that Lemos could not be found

guilty if the People failed to establish that Holton was lawfully performing his duties as a peace officer. The jury expressly was instructed that a peace officer is not lawfully performing his duties if he is "using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention." (ER 107-111, Instructions 2656 and 2670.) Instruction "2670 Lawful Performance: Peace Officer," set forth the objective reasonableness test for evaluating the lawful use of police force expounded in *Graham v. Connor*, 490 U.S. 386 (1989), and specifically instructed that Lemos was entitled to resist if the jury found Holton's conduct was unreasonable. (ER 109-111.) Lemos' conviction for violating §148 thus necessarily meant the jury determined that Holton did not use unreasonable force and Lemos was not entitled to resist.

The district court found Lemos' §1983 claims that Holton used excessive force were barred by her criminal conviction under *Heck*, and summary judgment was entered in favor of Appellees. The Appellate Panel correctly affirmed the judgment on July 16, 2021. (*Lemos v. County of Sonoma*, 5 F.4th 979 (9th Cir. 2021), see Exh. A to Lemos' Petition ("Panel Opinion").)

III. ARGUMENT

A. Rehearing Or Rehearing En Banc Is Unwarranted

The Panel correctly concluded that Lemos' §1983 claims are barred by *Heck* because the lawfulness of Holton's conduct throughout the incident was

determined by a jury when it convicted Lemos of violating §148, and her §1983 claims necessarily implicate the validity of her criminal conviction. Lemos' attempt to parse out her unlawful conduct to avoid *Heck* is unsupported in the evidence or law. Lemos ignores that, notwithstanding that the DA may have noted four identifiable acts of resistance during the course of the incident, Lemos' resistance and the incident itself was a continuous unbroken event with no temporally distinct or separable incidents. Lemos also ignores that she could not have been convicted on the basis of *any one* of the designated acts if Holton used excessive force at any time, regardless of whether the jury believed Lemos resisted or obstructed Holton at any one or all of the four noted points during the incident. Given the particular facts of this case, Lemos' underlying conviction necessarily included the determination that Holton's use of force was lawful. Lemos' §1983 claims are barred by *Heck* because of the specific facts of this case, not merely because she was convicted by a jury as her petition erroneously asserts. The Panel's decision was correct and rehearing is unwarranted.

Further, en banc review "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." (Federal Rules of Appellate Procedure, Rule 35(a); *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990); *Hart v. Massanari*, 266 F.3d 1155, 1172 , fn.29

(9th Cir. 2001).)

En banc rehearing to maintain uniformity of decisions is only proper to resolve an *irreconcilable conflict* between Ninth Circuit precedents and is unwarranted if prior decisions are distinguishable. (FRAP 35(a)(1); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *United States v. Zolin*, 842 F.2d 1135, 1136 (9th Cir. 1988) (rehearing en banc vacated as "improvidently granted" where court could distinguish prior opinions).) The Panel's decision in this case is in accordance with this Court's decisions in *Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 1046 (9th Cir. 2012), *Hooper v. Cnty, of San Diego*, 629 F.3d 1127 (2011) and *Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir. 2005) (en banc) and no irreconcilable conflict exists.

Lemos's petition also presents no question of "exceptional importance.". There is no inconsistency or conflict within this Circuit regarding application of *Heck*, and no inter-circuit split exists warranting en banc review. (FRAP Rule 35). The Panel's decision is clearly based on the particular facts and circumstances of Lemos' specific incident and is not susceptible to Lemos' hyperbolic mischaracterization of the Panel's decision that it renders all police activity lawful simply by virtue of an underlying conviction at trial. The Panel's decision, in fact, expressly reiterated that:

> Whether the accused wishes to proceed to trial or enter a guilty plea is not the defining factor of *Heck*'s application. **Instead,**

> **the relevant inquiry is whether the record contains factual circumstances that support the underlying conviction under §148(a)(1), *not* whether the conviction was obtained by a jury verdict or a guilty plea**. *Beets*, 669 F.3d at 1045; *Yount* [*v. City of Sacramento*, 43 Cal.4th 885, 891 (2008)].

(Panel Opinion, p. 20, original italics, other emphasis added.) The Panel's opinion thus forecloses Lemos' argument that "grossly mischaracterize[s]" the breadth of its decision. The Panel's opinion is consistent with Ninth Circuit precedent and Supreme Court authority regarding application of the *Heck* doctrine, regardless of whether the conviction is obtained by jury verdict or plea agreement. The Panel's opinion was correct and creates no broader application of the *Heck* doctrine than prior circuit precedent and is not of exceptional importance to justify en banc review.

B. The Panel Correctly Concluded That Lemos' Claims Are Barred By *Heck*

As the video recordings established, Lemos' unlawful conduct continued for the duration of the encounter and Holton's use of force to arrest her was not distinct temporally or spatially and cannot be separated from Lemos' unlawful conduct for which she was criminally convicted. Lemos' excessive force claims are fundamentally inconsistent with her criminal conviction for violation of §148(a) and necessarily imply the invalidity of her underlying conviction, thus the *Heck* doctrine applies. (*Heck*, 512 U.S. at 486-487; *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2002).)

Lemos' action is akin to *Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 1046 (9th Cir. 2012) in which *Heck* was applied in similar circumstances. In *Beets*, decedent GPR and his companion Morales fled from police after committing multiple crimes, stopping only when GPR was shot and killed by police. Morales was convicted by a jury for resisting arrest and assault with a deadly weapon on a peace officer based on an aiding and abetting theory. This Court found the conviction necessarily rested on the jury's findings that the officer was in the lawful performance of his duties and did not use excessive force. (*Id.* at 1041.) *Heck* thus applied. The alleged excessive force by police was not distinct temporally or spatially from the factual basis for Morales's conviction because the officer's actions could not be separated from GPR and Morales' criminal activity. (*Id.* at 1042, *citing*, *Smith*, 394 F.3d at 699.) GPR and Morales engaged in a series of unlawful actions and it was the shooting that brought an end to their criminal activity. The attempt to separate the officer's actions from the criminal activity thus was unsupportable. (*Beets*, 669 F.3d at 1043.)

This Court further noted that in *Cunningham, supra*, it previously rejected attempts to separate the officers' responses from the criminal defendants' activities. "[T]here was no break between Cunningham's provocative act of firing on the police and the police response that he claim[ed] was excessive. Indeed, in convicting Cunningham of felony murder, the jury concluded that the police

response was a natural consequence of Cunningham's provocative act. Because the two are so closely interrelated, Cunningham's conviction forecloses his excessive force claim …" (*Beets,* 669 F.3d at 1044, *citing Cunningham,* 312 F.3d at 1155.) Similarly, in *Beets* "[t]here was no break between GPR's assault with the pickup truck and the police response. [The officer] acted during the course of GPR's and Morales' crime and [were] part of a single act for which the jury found [Morales] bears responsibility.…There was no separation between GPR's criminal actions and the alleged use of excessive force such as existed in *Smithart* (alleged assault occurred after Smithart got out of the truck) or *[Smith v.] City of Hemet* (alleged assault occurred after Smith was detained)." (*Beets,* 669 F.3d at 1044-1045.)

As the Panel explained in its opinion in this case:

> The §1983 plaintiffs in *Beets*, like Lemos here, argued that there were several possible factual bases for the relevant criminal conviction. *Id.* at 1045. Therefore, they argued, the conviction was not necessarily based on the same factual basis as the alleged civil rights violations. *Id.* In *Beets*, as here, the jury instructions in the criminal case required that to convict the defendant, the jury had to find she acted willfully against a police officer who was "lawfully performing his duties as a peace officer, and that the officer was not "using unreasonable or excessive force in his or her duties." *Id.*
>
> *Beets* reaffirmed and relied on *Smith* to conclude that the jury necessarily determined that during the entire course of the deputy's conduct, he "acted within the scope of his duties and did not use excessive force." (Panel Opinion p. 9-10.)

The fundamental flaw in Lemos' argument is that she ignores that her unlawful actions were part of an unbreakable chain of events, with no temporal or

spatial break between Lemos' provocative acts and Holton's use of force, and the incident did not involve distinct separable acts forming the basis for her conviction. (*Beets*, 669 F.3d at 1045; *Susag*, 94 Cal.App.4th at 1410.) Accordingly, Lemos could not have been criminally convicted of violating §148 under any theory if any part of Holton's use of force during the incident was excessive. In California, "the lawfulness of the officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a police officer. … Disputed facts relating to the question whether the officer was acting lawfully are for the jury to determine when such an offense is charged." (*Baranchik v. Fizulich*, 10 Cal.App.5th 1210, 1221 (2017); *Susag v. City of Lake Forest*, 94 Cal.App.4th 1401, 1409 (2002); *People v. Jenkins*, 22 Cal.4th 900, 1020 (2000).) Where the events that led to a plaintiff's claimed injuries are part of an unbreakable chain of events, and the plaintiff was convicted in a jury trial for resisting, delaying or obstructing an officer in violation of Penal Code §148, that conviction "inherently includes a finding that [the officer's] actions were lawful." (*Baranchik v. Fizulich*, 10 Cal.App.5th 1210, 1224 (2017).) "Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction..... Thus, **a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct,**

and any action alleging the use of excessive force would 'necessarily imply the invalidity of his conviction.' *Susag*, 94 Cal.App.4th at 1410…" (*Beets*, 669 F.3d at 1045, emphasis in original; *citing Smith*, 394 F.3d at 699 n.5.)

As the Panel noted, whether a conviction was by jury trial or guilty plea "is not the defining factor of *Heck*'s application." (Panel Opinion p.11.) A jury trial might provide a more precise record of the facts and evidence on which the conviction is based, but contrary to Lemos' assertion, the panel's decision does not find a jury verdict in itself necessarily establishes *Heck*'s applicability in every case. (*See, Id.* at 11-12.) *Heck*'s application is still determined by the specific facts of each case regardless of the mechanism of conviction.

Lemos' unlawful actions were part of an unbreakable chain of events that cannot be separated from Holton's use of force to stop her criminal conduct. Video recordings established that there was no break or distinct point in the incident in which Holton had the incident under control. (See ER 332-333.) No meaningful temporal break existed between Lemos' provocative acts and Holton's use of force, and her conviction is based on the entire incident as a whole. (*Beets*, 669 F.3d at 1045; *Susag*, 94 Cal.App.4th at 1410.) Lemos' excessive force claims, therefore, necessarily implicate the validity of her criminal conviction, and her claims are barred by *Heck*.

Importantly, a jury fully evaluated the evidence surrounding the incident,

including the lawfulness of Holton's use of force, and convicted Lemos of violating §148. As in *Baranchik,* Lemos' jury specifically was given CALCRIM Instruction 2670 and instructed that Lemos could not be found guilty if the People failed to establish that Holton was lawfully performing his duties. (ER 107-110.) The jury also was specifically instructed that Lemos was entitled to resist if it found Holton's conduct was unreasonable. (ER 109-110.) The jury verdict against Lemos, therefore, necessarily included a determination that Holton's use of force was lawful and not excessive. The instructions were not unclear or illogical as Lemos incorrectly argues.

Contrary to Lemos' argument, the prosecution's designation of four identifiable acts of resistance does not alter the facts or create any meaningful temporal break between her provocative acts and Holton's use of force to stop her unlawful acts. Regardless of which one or more of Lemos' unlawful acts formed the basis for her conviction, under the law and the jury instructions given, Lemos could not have been found guilty of any one of those acts if Holton had used unreasonable force at all during the course of the incident.

Lemos' reliance on *Hooper* and *Smith* is unavailing, as the cases are factually dissimilar. In *Hooper,* Hooper was on the ground under control with her hands restrained behind her back, and after she stopped resisting, the deputy called his canine from the car and the dog bit Hooper's head and held on until backup

arrived. (*Hooper*, 629 F. 3d at 1129.) Hooper pled guilty to resisting in violation of 148(a)(1). Hooper did not dispute the lawfulness of her arrest nor her resistance. (*Id.*) However, she claimed the officer used excessive force after her resistance ended. As the Panel's decision explained, the facts in *Hooper* showed two distinct actions and Hooper's guilty plea did not necessarily determine that the officer acted lawfully throughout the whole course of Hooper's conduct, thus *Heck* did not apply under the facts of that case. (Panel Opinion p. 13.)

Lemos' reliance on *Smith* likewise is misplaced. In *Smith,* Smith refused to comply with orders, was pepper sprayed and attempted to reenter his residence. Officers grabbed him, slammed him against the door and threw him down on the porch. A police dog was ordered to bite Smith. Smith agreed to comply. As officers secured Smith's arms, the dog was instructed to bite a second time. Officers dragged Smith off the porch, face down. The dog was ordered to bite Smith again. Smith was pepper-sprayed at least four times, twice after the dog bit him, and at least once after officers pinned him on the ground. (*Smith,* 394 F.3d at 694.) Smith pled guilty to violating §148; no jury trial or evaluation of the evidence formed the basis of his conviction. (*Id.*) The facts in *Smith* showed distinct events that could have formed the basis for his guilty plea, and his plea did not require a determination of the reasonableness of the officers' conduct. *Heck* thus did not apply under those circumstances.

Lemos' reliance on *Yount v. City of Sacramento*, 43 Cal.4th 885, 895 (2008) also is meritless. As the California Supreme Court explained, even a guilty plea based only on a general stipulation that "a factual basis existed" that was "silent as to which act or acts formed the factual basis for Yount's admission" could suffice for *Heck* to apply, "[o]therwise, a section 1983 plaintiff could routinely circumvent the *Heck* bar through artful pleading." (*Id.* at 896-98.) It also "would have the perverse effect of rewarding those (like [Plaintiff]) who engage in multiple acts of resistance." (*Id.* at 897.) "Yount obtained substantial benefit from his general plea," and it "would be anomalous to construe Yount's criminal conviction broadly for criminal law purposes so as to shield him from a new prosecution arising from these events but then, once he had obtained the benefits of his no contest plea, to turn around and construe the criminal conviction narrowly so as to permit him to prosecute a section 1983 claim arising out of the same transaction." (*Id*.) Moreover, to the extent Yount's excessive force claim for the shooting that occurred *after* he was secured in handcuffs and leg restrains was not *Heck* barred, *Yount* is still unavailing. The facts showed distinct, separate events because Yount already was secured in custody, under control and restrained when he was *accidentally* shot by an officer. His plea to violating §148 would not have included determination that the accidental shooting was reasonable because it was a separate, distinct event after he was restrained and in custody, and he could not

have been convicted of violating §148 for the second event, as deadly force could not have been reasonable when he was in hand and leg restraints. (*Id.* at 898-99.) *Yount* fails to salvage Lemos' claims.

The indisputable video recordings of the incident show that Lemos' unlawful conduct continued unbroken throughout the incident, and that she was not under control until she was physically restrained. No break or separation existed between Lemos' continuing unlawful conduct and Holton's use of force. *Hooper, Smith* and *Yount* thus are easily distinguished on their facts and inapplicable.

Lemos' excessive force claim is not "distinct temporally or spatially from the factual basis" for her conviction and would necessarily implicate the jury's conclusion that Holton's conduct was lawful and reasonable throughout the whole course of the incident and the jury's criminal judgment against her. (*Beets*, 669 F.3d at 1045.) The Panel thus correctly concluded that Lemos' excessive force claims are barred by *Heck* based on the specific facts of Lemos' case. The Panel's decision does not create any "bright line rule" that an officer's use of force is deemed reasonable throughout anytime a plaintiff is convicted by a jury for violating §148 as Lemos baselessly asserts.

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IV. CONCLUSION

For the foregoing reasons, Appellees respectfully submit that Lemos' petition for rehearing or rehearing en banc should be denied.

Dated: August 23, 2021

BERTRAND, FOX & ELLIOT, OSMAN & WENZEL

By: *__/s/ Richard Osman__*

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COUNTY OF SONOMA, STEVE FREITAS, and MARCUS HOLTON

CERTIFICATE OF COMPLIANCE TO
FED. R. APP. P. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 19-15222

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 3,904 words as counted by Microsoft Word for Microsoft 365 MSO Version 2002 word processing program used to generate the brief.

Dated: August 23, 2021

/s/ Richard W. Osman
Richard W. Osman

STATEMENT OF NO RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees COUNTY OF SONOMA, STEVE FREITAS and MARCUS HOLTON state that they are not aware of any related cases pending in this Court.

Dated: August 23, 2021

/s/ Richard W. Osman
Richard W. Osman