FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KYLE JOHNSON, *Plaintiff - Appellee*, v. JAMES ADGAR, San Jose Police Department Officer, Badge No. 4552, *Defendant - Appellant*, CITY OF SAN JOSE, TIMOTHY HARPER, *Defendants*.	No. 25-1392 D.C. No. 5:21-cv-01849-BLF OPINION

KYLE JOHNSON, *Plaintiff - Appellee*, v. San Jose Police Department Officer JAMES ADGAR, Badge No. 4552, *Defendant - Appellant*,	No. 25-5468 D.C. No. 5:21-cv-01849-BLF

CITY OF SAN JOSE,

Defendant.

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Argued and Submitted July 9, 2026
San Francisco, California

Filed November 2, 2026

Before: Richard A. Paez, Richard C. Tallman, and Mark J. Bennett, Circuit Judges.

Opinion by Judge Tallman;
Partial Dissent by Judge Paez

SUMMARY*

Certification to California Supreme Court / Qualified Immunity

The panel filed (1) an order certifying a question to the California Supreme Court; and (2) an opinion reversing the district court's denial of Officer James Adgar's post-verdict

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

motion for judgment as a matter of law based on qualified immunity as to Kyle Johnson's Fourth Amendment excessive force claim under 42 U.S.C. § 1983, and remanding.

The panel certified to the California Supreme Court the following question:

What is the standard for determining whether a particular constitutional right is "clearly delineated and plainly applicable" under the Tom Bane Civil Rights Act, Cal. Civ. Code § 52.1? What is the difference between this standard and the standard used to determine if the law is "clearly established" for purposes of federal qualified immunity under 42 U.S.C. § 1983, if any?

In a concurrently filed opinion, the panel held that Officer Adgar is entitled to qualified immunity as to the Fourth Amendment excessive force claim under 42 U.S.C. § 1983.

While attending a protest at San Jose City Hall, Johnson was struck behind his knee by a 40mm foam baton round. Officer Adgar fired that round in response to a volley of projectiles thrown at police officers by other protestors in the crowd. Doctors later diagnosed Johnson with a pulmonary embolism, attributed to the leg injury he suffered at the protest. Johnson brought this action alleging, in part, that Officer Adgar's actions violated his Fourth Amendment rights and California's Bane Act.

At trial, Johnson argued that he was shot because Officer Adgar fired indiscriminately into the crowd rather than targeting a specific person. Following a jury verdict in Johnson's favor on all claims against Officer Adgar, Officer Adgar renewed his earlier-filed motion for judgment as a

matter of law on the 42 U.S.C. § 1983 and Bane Act claims. The district court denied the motion as to the claims predicated on a Fourth Amendment violation.

The panel first held that Officer Adgar violated Johnson's Fourth Amendment right to be free from excessive force. The panel concluded that substantial evidence supported the jury's finding that Officer Adgar seized Johnson when he indiscriminately shot into the crowd (of which Johnson was a member) and that Officer Adgar's use of force was unreasonable. Given the disproportionate number of peaceful protestors in the part of the crowd at which he fired, there was a significant risk that he would hit someone not engaged in wrongdoing with a weapon that could cause serious injury or death.

Although the panel concluded that Officer Adgar violated Johnson's Fourth Amendment right to be free from excessive force, the panel held that he is entitled to qualified immunity as to the Fourth Amendment claim. The panel concluded that Officer Adgar did not violate clearly established law because *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), the relevant precedent, is materially distinguishable from the situation he confronted.

Accordingly, the panel reversed the district court's denial of Officer Adgar's post-verdict motion for judgment as a matter of law on the Fourth Amendment claim and remanded for a recalculation of attorneys' fees, pending the panel's decision as to the state law claim. The panel did not address the Bane Act claim in its opinion.

Dissenting in part, Judge Paez agreed with the majority that Officer Adgar violated Johnson's Fourth Amendment right to be free from excessive force. However, he disagreed with the majority's conclusion that Officer Adgar is

nonetheless entitled to qualified immunity. Judge Paez wrote that *Nelson* clearly established the unlawfulness of shooting a projectile weapon capable of causing serious and permanent injury indiscriminately into a group of protestors who did not pose an imminent risk to public safety. This ruling offered sufficient notice to Officer Adgar that he used excessive force against Johnson, precluding qualified immunity on Johnson's excessive force claim. Judge Paez wrote that in concluding otherwise, the majority overlooked the panel's obligation to analyze the motion based on the facts established at trial, viewing the evidence in the light most favorable to Johnson, and drawing all reasonable inferences in favor of him.

COUNSEL

Abimael Bastida (argued), Matthew Schechter, and James McManis, McManis Faulkner, San Jose, California, for Plaintiff-Appellee.

Brian P. Eggleston (argued), Nicholas Sympson, Thomas J. Gray, and Malgorzata Laskowska, Senior Deputy City Attorneys; Ardell Johnson, Assistant City Attorney; James Huang, Deputy City Attorney; Nora Frimann and Susana A. Wood, City Attorneys; San Jose Office of the City Attorney, San Jose, California; for Defendants-Appellants.

OPINION

TALLMAN, Circuit Judge:

While attending a protest at San Jose City Hall, Kyle Johnson was struck behind his knee by a 40mm foam baton round. Officer James Adgar fired that round in response to a volley of projectiles thrown at police officers by other protestors in the crowd. Johnson sued Officer Adgar and the City of San Jose, alleging that Officer Adgar's actions violated several federal and state laws. A jury returned a verdict for Johnson against Officer Adgar, but not against the City.

This appeal presents two issues: (1) whether Officer Adgar is entitled to qualified immunity for Johnson's Fourth Amendment excessive force claim under 42 U.S.C. § 1983, and (2) whether, as a matter of law, Officer Adgar violated a "clearly delineated and plainly applicable" right under California's Tom Bane Civil Rights Act, Cal. Civ. Code § 52.1. *Cornell v. City & Cnty. of San Francisco*, 225 Cal. Rptr. 3d 356, 386 (Cal. Ct. App. 2017). In this opinion, we address only the first issue and hold that Officer Adgar is entitled to qualified immunity.

Accordingly, we reverse the district court's denial of Officer Adgar's post-verdict motion for judgment as a matter of law on this claim and remand for a recalculation of attorneys' fees, pending our decision as to the state law claim. In a concurrently filed order, we certify a question to the California Supreme Court concerning the Bane Act. Because the recalculation of attorney's fees depends on this Panel's evaluation of the state law claim, we instruct the district court not to recalculate attorney's fees until this Panel issues a decision on the Bane Act claim. We also

instruct the clerk of court to hold the mandate in this case and begin the time for parties to file a Petition for Rehearing and Petition for Rehearing En Banc after this Panel decides the Bane Act claim.

I

We recount the facts, as we must, in the light most favorable to Johnson. *See Bell v. Williams*, 108 F.4th 809, 818 (9th Cir. 2024) (standard for reviewing a post-verdict motion for judgment as a matter of law).

In response to George Floyd's death during an arrest in Minneapolis, anti-police protests began nationwide. Protests in San Jose started on May 29, 2020. The May 29 protests were, in one officer's description, the most "violent and destructive" he had experienced in fifteen years.

This case arose from a protest outside San Jose City Hall on May 30, the evening after the chaotic events of May 29. A crowd assembled at the City Hall plaza during daylight hours. The crowd was generally benign, facing a police skirmish line and protesting, chanting, and singing. Some officers testified that, as night fell, the crowd began to take on a different character, edging toward the level of agitation police experienced the day before.

Johnson arrived at the City Hall plaza at 21:53.[1] He was there to show solidarity with the other protestors and intended to do nothing but peacefully protest. He had no sign, no weapon, and nothing to throw. Unlike some other protestors, he did not engage with the police in any way.

Officer Adgar arrived at the City Hall plaza at 22:13. He was armed with a 40mm projectile impact weapon (PIW),

[1] All times are expressed in 24-hour format.

which fires a foam baton round that can cause serious injury or death. He was assigned to a post behind the skirmish line and ordered to shoot with his PIW anyone he saw throwing bottles. At 22:24, about ten minutes after Officer Adgar arrived on scene, some protestors began throwing bottles and perhaps other objects at the officers; some of the projectiles were made of glass. Officers, including Officer Adgar, responded by firing PIWs. Protestors, including Johnson, retreated from the plaza.

The crowd, including Johnson, quickly returned to the plaza. At 22:33, some protestors threw another volley of objects at the police. Officers, including Officer Adgar, again responded by firing PIWs. Johnson, who had not thrown anything, was hit in the back of his left leg. Doctors later diagnosed him with a pulmonary embolism, attributed to the leg injury he suffered at the protest.

Johnson sued the City of San Jose and Officer Adgar, bringing claims under § 1983 for violations of his First and Fourth Amendment rights. He also brought claims under California's Bane Act for interference with those same constitutional rights, and under common law for battery and negligence. At trial, Johnson argued that he was shot because Officer Adgar fired indiscriminately into the crowd rather than targeting a specific person.

The jury returned a verdict in Johnson's favor on all claims against Officer Adgar, but on no claims against the City, and awarded Johnson $1,353,313 in undifferentiated damages.[2] As part of its verdict, the jury specifically found that Officer Adgar had fired indiscriminately into the crowd.

[2] The damages award was a lump sum, rather than being divided among the various causes of action.

After the verdict, Officer Adgar renewed his earlier-filed motion for judgment as a matter of law on the § 1983 and Bane Act claims under Federal Rule of Civil Procedure 50(b).[3] The district court granted the motion as to the claims predicated on a First Amendment violation but denied it as to the claims predicated on a Fourth Amendment violation. This timely appeal followed.

II

We review de novo the denial of Officer Adgar's renewed motion for judgment as a matter of law under Rule 50(b). *Bell*, 108 F.4th at 818. "We do not reweigh the evidence or substitute our preferred result." *Id.* Rather, "we 'must view all evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in the favor of the non-mover, and disregard all evidence favorable to the moving party that the jury is not required to believe.'" *Id.* (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008)). The jury's verdict must be upheld "if it is 'supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion.'" *Id.* (quoting *Harper*, 533 F.3d at 1021). "Grant of a renewed motion for judgment as a matter of law is proper only if the evidence permits just one reasonable conclusion that is contrary to the jury's verdict." *Id.* at 818–19.

Officers are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *Puente v. City of Phoenix*, 123 F.4th

[3] Officer Adgar did not challenge the jury's verdict regarding the battery and negligence claims.

1035, 1057 (9th Cir. 2024) (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018)). Whether the law was "clearly established" for qualified immunity purposes is reviewed de novo, as is the "application of law to the facts to determine whether on those facts, qualified immunity is established." *Thompson v. Mahre*, 110 F.3d 716, 721 (9th Cir. 1997). After a jury verdict, "the party that prevailed at trial is entitled to have the evidence construed in a light most favorable to it." *Id.* In other words, "post-verdict, a court must apply the qualified immunity framework to the facts that the jury found." *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 459 (9th Cir. 2013).

III

Officer Adgar seeks qualified immunity for the § 1983 claim that he violated Johnson's Fourth Amendment right to be free from excessive force. As noted, he is entitled to qualified immunity unless he violated Johnson's constitutional rights and the unlawfulness of his conduct was clearly established at the time.[4] *Puente*, 123 F.4th at 1057.

[4] While in some cases, it makes sense to assume a constitutional violation occurred and address only the "clearly established law" prong, this is not such a case. "The elements of a Bane Act claim are essentially identical to the elements of a § 1983 claim, with the added requirement that the government official had a specific intent to violate a constitutional right." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 907 (9th Cir. 2024) (quoting *Hughes v. Rodriguez*, 31 F.4th 1211, 1224 (9th Cir. 2022)). This means that, for both claims, we must determine if Officer Adgar committed a constitutional violation. The analysis diverges from there: we address the "clearly established law" prong for qualified immunity and, separately, the specific intent requirement for the Bane Act. *See Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1036–45 (9th Cir. 2018) (engaging in this diverging analysis). Accordingly, we begin with the common element of whether a constitutional violation occurred.

A

First, we consider if Officer Adgar violated Johnson's right to be free from excessive force. A Fourth Amendment excessive force claim has two elements: (1) the plaintiff was seized, and (2) the officer used excessive force. *Cuevas v. City of Tulare*, 107 F.4th 894, 898 (9th Cir. 2024). We address each element in turn.

1

The first issue is whether Officer Adgar seized Johnson. Officer Adgar contends the evidence is insufficient to support the jury's finding that he did. Given the highly deferential standard we apply when reviewing the jury's verdict for evidentiary sufficiency, we disagree.

A seizure occurs when an officer applies "physical force to the body of a person with intent to restrain." *Puente*, 123 F.4th at 1051 (quoting *Torres v. Madrid*, 592 U.S. 306, 325 (2021)). Use of "physical force in any way that restricts or otherwise limits the ability of an individual to move about freely" qualifies as a seizure. *Sanderlin v. Dwyer*, 116 F.4th 905, 912 (9th Cir. 2024). This is true "even if the restriction is limited in nature or time, and even where the force is not applied for the purpose of effectuating an arrest," provided the force is "intentionally applied." *Id.* at 911–12 (emphasis omitted) (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989)). When analyzing the intent element, we examine "whether the challenged conduct *objectively* manifests an intent to restrain" rather than considering the officer's subjective motivations. *Puente*, 123 F.4th at 1051 (quoting *Torres*, 592 U.S. at 317).

Officer Adgar's conduct—shooting Johnson with a 40mm foam baton round—limited Johnson's freedom of

movement. Video footage admitted at trial shows Johnson running toward the City Hall building after the 22:33 volley. Suddenly, his gait changes and he begins running with a noticeable limp until he can take cover behind a low wall. Johnson testified that this footage showed the moment he was hit, after which he ran with a noticeable limp and was forced to stop due to the pain. Officer Adgar also admitted that he intentionally fired his 40mm PIW. Because this intentional application of force meaningfully interfered with Johnson's freedom of movement, even if briefly, Johnson was seized for Fourth Amendment purposes. *See Sanderlin*, 116 F.4th at 912 (finding that a person seized when he was "unable to stand or walk properly" after being shot with a foam baton round).

Officer Adgar argues, however, that he did not seize Johnson because he did not intentionally target Johnson.[5] He contends that he targeted a specific protestor who threw a bottle, missed his target, and accidentally hit Johnson. Relying on dicta from *United States v. Lockett*, Officer Adgar argues that an innocent bystander who is inadvertently shot is not "seized" for Fourth Amendment purposes. *See* 919 F.2d 585, 590 n.4 (9th Cir. 1990) (While "an unarmed suspect shot by a police officer might have a fourth amendment claim against the officer . . . , an innocent bystander struck by a stray bullet from the officer's weapon would not have such a claim."); *Villanueva v. California*, 986 F.3d 1158, 1166 n.6 (9th Cir. 2021) (noting that *Lockett*'s footnote is dicta).

Officer Adgar's "innocent bystander" theory might succeed if we accept his view of the facts. But his view of

[5] The parties agree that Officer Adgar did not intentionally target Johnson.

the facts does not control; the jury's does, provided substantial evidence supports it. *See Bell*, 108 F.4th at 818 (standard of review).

The jury found that Officer Adgar indiscriminately fired his weapon—that is, fired at the crowd generally rather than at a specific target within the crowd.[6] In *Nelson v. City of Davis*, we held that a person was seized when officers "intentionally fired [projectiles] in the direction of a group of which [he] was a member" and he was "rendered immobile" after being hit in the eye, even though the officers indiscriminately fired at the group rather than targeting him specifically. 685 F.3d 867, 875–76 (9th Cir. 2012). We reached this conclusion because Nelson was "an object of intentional governmental force"—the shooting at the group—"and his freedom of movement was limited as a result." *Id.* at 876. Thus, if substantial evidence supports the jury's finding that Officer Adgar indiscriminately shot into the crowd (of which Johnson was a member) at 22:33, then Johnson was seized.

Substantial evidence supports this finding. Officer Adgar's body camera footage shows a person near the base of a curved wall apparently throwing a bottle at 22:33:14. That person begins to walk away (to the left, from Officer Adgar's perspective) after making his throw, while another person standing next to him appears to throw another object. The footage shows Officer Adgar bring his PIW into a firing

[6] While the district court ultimately granted Officer Adgar judgment as a matter of law on the First Amendment claims, it did so because the evidence was not sufficient to show that Officer Adgar acted from retaliatory animus. The district court did not disturb the jury's finding that Officer Adgar fired indiscriminately; indeed, it relied on the "indiscriminate shooting" theory to conclude that Officer Adgar seized Johnson.

position, track briefly to the left, and then lower his weapon to reload. In that brief period, the footage shows that his weapon was pointed into an area with a fleeing crowd.

Officer Adgar testified that he "saw someone throw something or in the process of throwing it, which caused me to focus on that individual, try to aim at that individual, and track him through the crowd, and at that point once I believed that I had that person identified, I pulled the trigger." He acknowledged that he could not see if he hit his target.

Officer Adgar contends that his testimony and the footage show that he had identified and aimed at a specific target rather than firing indiscriminately into the crowd.[7] That is one plausible interpretation of the evidence, but it is not the only plausible interpretation. The jury could also find that Officer Adgar, who *tried* to aim at a particular suspect and only *believed* that he identified the right person before firing, could not successfully identify a clear target in the crowd and simply shot in the general direction of someone he saw throwing a bottle. In that case, Johnson was one of "the undifferentiated objects of shots intentionally fired by [Officer Adgar] in the direction of" the crowd. *Nelson*, 685 F.3d at 877. Officer Adgar's use of his weapon "was intentional, it was aimed towards [Johnson] and [the crowd], and it resulted in the application of physical force to [Johnson's] person as well as the termination of his movement. [Johnson] was therefore intentionally seized

[7] Officer Adgar also makes much of the fact that he was ordered to target only individuals who were throwing objects at police officers. But it does not matter what orders he received if the jury's plausible interpretation of the evidence was that he did not follow those orders.

under the Fourth Amendment," even though Officer Adgar did not target him specifically. *Id.*

In sum, the evidence does not point to "just one reasonable conclusion that is contrary to the jury's verdict" that Johnson was seized. *Bell*, 108 F.4th at 818–19. Accordingly, we affirm the jury's verdict on this point.

2

The second issue is whether Officer Adgar used excessive force to effect the seizure[8] because "[a] seizure results in a constitutional violation only if it is unreasonable." *Nelson*, 685 F.3d at 878 (citing *Graham v. Connor*, 490 U.S. 386 (1989)). To determine if a seizure was unreasonable, "we balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'" *Sanderlin*, 116 F.4th at 913 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

When considering Johnson's interests, "'the type and amount of force inflicted' against him" is paramount. *Id.* at 914 (quoting *Young v. Cnty. of Los Angeles*, 655 F.3d 1156,

[8] The parties dispute whether we must reach this issue, as the jury found that Officer Adgar did use excessive force. There is some tension in our precedents, with cases supporting both sides of this issue. *See Est. of Aguirre v. Cnty. of Riverside*, 131 F.4th 702, 707 (9th Cir. 2025) (citing *A.D.*, 712 F.3d at 450, 456) (the jury's verdict is sufficient to find a Fourth Amendment violation at the first prong of the qualified immunity analysis); *Reese*, 888 F.3d at 1037 (same); *but see A.D.*, 712 F.3d at 458–59 (recognizing that the court may "choose not to accept the jury's conclusion" that the officer violated the Fourth Amendment because the Fourth Amendment uses an objective standard of culpability). We need not resolve this tension here. Even accepting Officer Adgar's position and assessing the reasonableness of his use of force, we conclude that it was unreasonable.

1161 (9th Cir. 2011)). We have already recognized, as does the San Jose Police Department policy and procedures manual, that the 40mm PIW that Officer Adgar used "is a particularly strong method of force" that can cause "serious injury or death." *Id.* And Johnson suffered serious injuries as a result: in addition to bruising and pain, he developed pulmonary embolisms. Thus, Officer Adgar's use of force was "a sufficiently serious intrusion upon liberty that . . . must be justified by a commensurately serious state interest." *Id.* at 914 (quoting *Young*, 655 F.3d at 1162–63); *see also id.* at 909 (recognizing the same for a person who required emergency surgery after being shot with a 40mm PIW, the same weapon).

As to Officer Adgar's interest in using the 40mm PIW, we must consider the totality of the circumstances, focusing on five factors in particular: (1) "the severity of the crime at issue"; (2) "whether the suspect poses an immediate threat to the safety of the officers or others"; (3) whether the suspect "is actively resisting arrest or attempting to evade arrest by flight"; (4) "the availability of less intrusive alternatives to the force employed"; and (5) "whether warnings were given" before force was used. *Puente*, 123 F.4th at 1057–58 (first quoting *Kisela v. Hughes*, 584 U.S. 100, 103 (2018) (per curiam), and then quoting *Felarca v. Birgeneau*, 891 F.3d 809, 817 (9th Cir. 2018)). The immediacy of any threat to physical safety "is generally the most important consideration." *Id.* at 1058 (citing *Young*, 655 F.3d at 1163).

We judge the reasonableness of the force used "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," mindful that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly

evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396–97.

Here, Johnson was not committing a crime, posed no apparent threat to anyone's safety, and was neither resisting arrest nor attempting to flee arrest (indeed, the officers made no attempt to arrest anyone). He was, however, part of a crowd of people, some of whom were committing assault on a peace officer[9] by throwing water bottles and possibly other objects—some of which were glass—at officers. And based on the police response to the 22:24 volley, he was on notice that the police may use force even though no verbal warnings had been given.

On balance, we conclude that Officer Adgar's use of force was unreasonable. Key to this conclusion is the jury's finding that he fired indiscriminately into a fleeing crowd that contained, at most, two bad actors. Given the disproportionate number of peaceful protestors in the part of the crowd at which he fired, there was a significant risk that he would hit someone not engaged in wrongdoing with a weapon that could cause serious injury or death.

Officer Adgar, relying on *Puente*, contends that his use of force was objectively reasonable to respond to the threat of violence. We disagree. Officer Adgar compares his use of force to the force used against two of the protestors in *Puente*: Yedlin and Travis. Neither is comparable to the situation he faced here.

Yedlin was an active participant in a group trying to breach a security fence between the unruly crowd and the

[9] Under California law, this offense is a misdemeanor punishable by up to one year in the county jail, a $2,000 fine, or both. Cal. Penal Code § 241(b).

police. *Puente*, 123 F.4th at 1057. Police officers fired pepper balls at the ground in front of the group, intending the chemical irritant to disperse the group. *Id.* Yedlin briefly retreated but "resumed shaking the fence within 11 seconds of his retreat," at which point officers shot him with pepper balls. *Id.* at 1059.

Conversely, Travis was not hostile and did not pose an active security threat. But after the police announced an unlawful assembly and began issuing dispersal orders, she placed herself between an advancing police skirmish line, which was deploying chemical spray, and the hostile crowd, which was throwing objects at the police. *Id.* at 1046, 1059. In other words, she assumed the risk that she would be caught in the crossfire between the police and the hostile crowd, which did "not diminish the [police's] strong interests in addressing the lawlessness behind her, in maintaining the advance of the skirmish line, and in enforcing the unlawful-assembly order." *Id.*

Officer Adgar's use of force is distinguishable from the force used against Yedlin and Travis. When Officer Adger fired his weapon, neither Johnson nor the crowd he was part of posed an active security threat as did Yedlin and his companions. In contrast, Johnson was part of a fleeing crowd that was almost entirely peaceful; at most, there were two hostile actors in that crowd and they were retreating with the crowd rather than continuing to engage in hostilities. The government interest in preventing those two bad actors from returning for more hostilities does not justify indiscriminately firing a weapon capable of causing serious injury or death into a fleeing crowd. Likewise, Johnson did not invite the risk of injury by stepping deliberately between the police and an actively hostile crowd, as Travis did. He was part of a primarily peaceful crowd and immediately

retreated with the crowd after a few provocateurs threw objects at the police.

While there is a legitimate government interest in protecting police officers by disabling an aggressor who is throwing unknown objects at them, that interest is not reasonably served by firing indiscriminately into a crowd and hoping to hit the aggressor. Officer Adgar's arguments to the contrary rest on the premise that he was aiming at a particular target and missed—a premise the jury rejected when it found that he fired indiscriminately into the crowd. Accordingly, we conclude that Officer Adgar's use of force was unreasonable and he therefore violated Johnson's Fourth Amendment right to be free from excessive force. This satisfies prong one of the qualified immunity analysis.

B

Even though Officer Adgar's use of force was excessive, he is still entitled to qualified immunity unless "the unlawfulness of [his] conduct was clearly established at the time." *Id.* at 1057 (citation modified). To deny qualified immunity, "courts generally 'need to identify a case where an officer acting under similar circumstances . . . was held to have violated' the Constitution." *Zorn v. Linton*, 607 U.S. 568, 572 (2026) (per curiam) (alteration in original) (quoting *Escondido v. Emmons*, 586 U.S. 38, 43 (2019)). "The relevant precedent must define the right with a 'high degree of specificity,' so that 'every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.'" *Id.* (quoting *Wesby*, 583 U.S. at 63). "[S]pecificity is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer

confronts." *Kisela*, 584 U.S. 104 (alteration in original) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam)). In an excessive force case, "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Id.* (quoting *Mullenix*, 577 U.S. at 13).

The parties agree that *Nelson* is the relevant precedent for this inquiry. In *Nelson*, about 1,000 people converged on an apartment complex for "the biggest party in history" at U.C. Davis. 685 F.3d at 872–73. Police officers saw people "rocking a car" and heard bottles breaking. *Id.* at 873. After the complex owner asked police to disperse the crowd, officers arrived in a squad car, which was "overwhelmed by the crowd" and targeted by thrown bottles. *Id.* Officers tried issuing dispersal orders while walking through the crowd, which proved ineffective. *Id.*

They regrouped for a second attempt at dispersal in front of a "very narrow and confined" breezeway, in which 15–20 partygoers had congregated. *Id.* This group was trying to leave but their path was blocked by the gathered officers, who did not provide instructions on how to disperse. *Id.* at 874. The group repeatedly asked the officers to tell them what to do and "raised their hands to show their willingness to comply." *Id.* Although some bottles were being thrown elsewhere in the complex, no one in this group threw anything. *Id.*

Without any apparent warning, officers suddenly shot pepper balls at the group in the breezeway. *Id.* One pepper ball struck Nelson in the eye, causing serious and lasting injury. *Id.* When the case reached us on appeal, we held that firing "a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed

at most minor misdemeanors . . . would constitute unreasonable force in violation of the Fourth Amendment," particularly when the government's interest was simply to disperse the crowd. *Id.* at 883, 886.

Based on material differences between this case and *Nelson*, we conclude that *Nelson* did not clearly establish that Officer Adgar's conduct violated the Fourth Amendment. This is particularly true considering the Supreme Court's admonition about the specificity required in excessive force cases. *See Kisela*, 584 U.S. at 104.

The key distinction is that the crowd fired upon in *Nelson* was an entirely peaceful, non-threatening subset of the larger group. The peaceful subset was physically isolated from the greater crowd in a narrow, confined area and had not engaged in hostile acts. In contrast, the crowd at the San Jose City Hall plaza was not entirely peaceful and non-threatening. Hostile actors in the crowd had repeatedly thrown objects at the police, and two such actors were in the subset of the crowd into which Officer Adgar fired, which was not physically isolated. Further, Office Adgar fired in response to a *second* volley of objects thrown from Johnson's general area, indicating that the bad actors could reload and return for more volleys, which posed a continued safety concern. Those differences convince us that *Nelson* does not clearly establish that Officer Adgar's use of force violated the Fourth Amendment.

Our conclusion is reinforced by later interpretations of *Nelson*. We have recognized that:

> [w]hen a case involves analogous conduct that occurred around the same time as the underlying incident in the matter before us,

> and the case holds that the conduct at issue there violated clearly established law, then that case may indicate that the claim for qualified immunity presently before us should likewise be rejected.

Tan Lam v. City of Los Banos, 976 F.3d 986, 1001–02 (9th Cir. 2020). Contrary to the dissent's assertion, this is not at odds with our holding in *Sanderlin*, which clarified that "subsequent legal developments can[not] be used to demonstrate what law was or was not clearly established at the time of an officer's challenged conduct." *Sanderlin*, 116 F.4th at 916; *See post*, at 30. Because events in *Sanderlin*, *Puente*, and the present case all took place around the same time, we may consider how this Court interpreted *Nelson* when determining what law was clearly established *at the time of those events*. This is not "using subsequent legal developments," rather, it is applying Circuit precedent as to the clearly established law at the time. *Id.* *Puente* and *Sanderlin* both involved police responses to disorderly crowds, the events occurred before the events here, and both relied on *Nelson* to determine if the officers' conduct violated clearly established law. *See Puente*, 123 F.4th at 1042, 1060–61; *Sanderlin*, 116 F.4th at 908, 915. Thus, their analysis of what law *Nelson* clearly established is instructive.

Sanderlin's interpretation is less relevant because it interpreted *Nelson* in materially different circumstances. There, Sanderlin was standing on a sidewalk peacefully holding a sign during protests in San Jose.[10] *Sanderlin*, 116

[10] The events in *Sanderlin* occurred on May 29, 2020, the day before the protest at San Jose City Hall that Johnson attended. *See Sanderlin*, 116

F.4th at 909. An officer warned Sanderlin to move or he was "going to hit you, dude." *Id.* When Sanderlin failed to move, the officer aimed and fired a 40mm foam baton at him. *Id.* We relied on *Nelson*'s holding that firing "a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed at most minor misdemeanors constituted unreasonable force in violation of the Fourth Amendment" to conclude that the officer's conduct violated clearly established law. *Id.* at 915 (omission and alteration omitted) (quoting *Nelson*, 685 F.3d at 886).

Unlike the officer in *Sanderlin*, who deliberately targeted a peaceful, non-threatening, individual, Officer Adgar fired indiscriminately into a crowd mixed with peaceful, non-threatening individuals and bad actors alike. Thus, to the extent *Nelson* clearly established that deliberately firing at a crowd of *entirely* non-threatening, peaceful people violated the Fourth Amendment, that principle does not cover the facts presented here.

Puente's analysis of a third protestor's circumstances is closer to our case because she was part of a mixed crowd. *See Puente*, 123 F.4th at 1060–61. This protestor, Guillen, was standing near the eastern edge of the block on which the disorderly crowd was located. *Id.* at 1060. There "was no apparent misconduct in [her] immediate area." *Id.* at 1061 (emphasis omitted). After police fired an unidentified object into the crowd, most of the protestors in her vicinity (including her) began walking away from the police. *Id.* at

F.4th at 908. *Sanderlin* was an appeal of the denial of qualified immunity at summary judgment, *id.* at 910, so we relied on the facts in the light most favorable to Sanderlin.

1060. She was hit by unidentified projectiles while walking away. *Id.*

We concluded in *Puente* that the officers did not violate clearly established law because "*Nelson* [wa]s 'materially distinguishable' in several respects." *Id.* at 1061. First, the aggressive crowd posed "exigent public safety concerns" to "the safety of the officers, nearby members of the public, and potentially even the" President of the United States' motorcade; similar concerns were not present at the rowdy college party in *Nelson*. *Id.* at 1058, 1061. Second, the officers in *Nelson* targeted a group of entirely peaceful students isolated in a "very narrow and confined" breezeway, whereas Guillen "was not in a discretely separate zone from those down the block" who were engaged in criminal misconduct. *Id.* at 1061. That Guillen was not segregated from the troublemakers meant the absence of hostile activity in her "*immediate* area" was not enough to characterize her general vicinity as peaceful and non-threatening. *Id.* The police were appropriately concerned "about the possibility of troublemakers circulating anonymously within the larger crowd," which extended to her vicinity. *Id.* Finally, the police had displayed "numerous objective indicia that [they] were trying to clear the area" with force, which was not the case in *Nelson*. *Id.*

To be sure, the protest in *Puente* differs in some respects from the protest Johnson attended. The crowd in *Puente* was far larger (6,000 people), much more dangerous, and potentially threatened the President. *See id.* at 1044–47. But the features that materially distinguish *Nelson* from Guillen's situation are also present here. Here, the provocateurs in the crowd posed an ongoing concern to the safety of the officers and other protestors, as they repeatedly threw volleys of bottles and other objects, some made of

glass, from far back in the crowd toward the police line. In addition, Johnson was not segregated from the hostile actors. He was in the same plaza as the provocateurs and two of them fled in the same direction as he did after throwing their second volley, as shown on the video footage. Thus, there was at least some criminal misconduct in his immediate area and troublemakers were circulating in the crowd near him. Finally, the police had demonstrated by their response to the preceding volley that they would respond to hostile action with force.

In sum, we conclude that Officer Adgar did not violate clearly established law because *Nelson* is materially distinguishable from the situation he confronted. Our conclusion is reinforced by our previous decision in *Puente*, which concluded that officers were entitled to qualified immunity as to Guillen based on distinguishing factors similar to those present here.

IV

We hold that Officer Adgar violated Johnson's Fourth Amendment right to be free from excessive force. But because the law was not clearly established, we further hold that he is entitled to qualified immunity as to Johnson's Fourth Amendment claim. We vacate the district court's award of attorneys' fees and remand for recalculation in light of our holding here.

REVERSED IN PART, VACATED, AND REMANDED.

PAEZ, Circuit Judge, dissenting in part:

Following the murder of George Floyd by a former Minneapolis police officer, Plaintiff Kyle Johnson participated in a vastly peaceful protest at San Jose's City Hall Plaza on May 30, 2020. At approximately 10:33 pm, other people in the broader crowd threw a volley of objects—primarily plastic water bottles—at police officers present at the scene. Johnson did not throw any objects nor did he observe any other people in his vicinity throwing any objects. In response, officers, including San Jose Police Officer James Adgar, fired their Projectile Impact Weapons ("PIW"). A jury later concluded that Officer Adgar fired his 40-millimeter projectile impact weapon intentionally and indiscriminately into the crowd. One of the 40-millimeter foam baton rounds Officer Adgar fired struck Johnson in the back of his leg, causing serious bodily injury, including blood clots that resulted in a pulmonary embolism.

I agree with the majority that Officer Adgar violated Johnson's Fourth Amendment right to be free from excessive force. However, the majority further concludes that Officer Adgar is nonetheless entitled to qualified immunity on this claim because the unlawfulness of his conduct was not "clearly established" as of May 30, 2020. On this point, I disagree. Because *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012) clearly established the unlawfulness of shooting a projectile weapon capable of causing serious and permanent injury indiscriminately into a group of protestors who did not pose an imminent risk to public safety, Officer Adgar is not entitled to qualified immunity in this case. I respectfully dissent.

In evaluating a renewed motion for judgment as a matter of law under Rule 50(b) based on an assertion of qualified

immunity after a jury trial, we "analyze the motion based on the facts established at trial, viewing the evidence in the light most favorable to the nonmoving party, and drawing all reasonable inferences in favor of the nonmoving party." *Tan Lam v. City of Los Banos*, 976 F.3d 986, 997 (9th Cir. 2020) (citations omitted). The jury's verdict must be upheld "if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Bell v. Williams*, 108 F.4th 809, 818 (9th Cir. 2024) (citation modified). We "take special care not to reweigh the evidence in our consideration" and "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Tan Lam*, 976 F.3d at 995 (citations omitted).

The majority fails to adhere to this standard of review. Instead, the majority argues that *Nelson* did not clearly establish that Officer Adgar's conduct violated the Fourth Amendment because of two purported "material differences" between this case and *Nelson*: (1) the crowd at the San Jose City Hall Plaza was "not entirely peaceful and non-threatening" because "[h]ostile actors in the crowd had repeatedly thrown objects at the police," and two of those actors "were in the subset of the crowd into which Officer Adgar fired"; and (2) there was a "continued safety concern" based on the fact that Officer Adgar "fired in response to a *second* volley of thrown objects" which "indicated that the bad actors could reload and return for more volleys." Majority at 21.

In drawing these alleged distinctions, the majority overlooks substantially similar factual circumstances in *Nelson*. They also depart from the relevant standard of review on a motion for judgment as a matter of law by viewing the evidence in the light most favorable to the

movant—here, Officer Adgar—and by declining to give appropriate deference to the jury's findings.

Contrary to the majority's depiction, I agree with the district court that "the evidence of objects being thrown from the area in which [] Johnson was standing is, at best, mixed." At trial, the jury had the opportunity to consider video footage showing that protestors were throwing water bottles and other objects at the protest. But they also heard testimony from Johnson's video forensic expert indicating that the location from which bottles were thrown was "relatively far" from Johnson's location, along with testimony from Johnson that he did not see anyone in his immediate vicinity throwing anything. Substantial evidence supports the jury's conclusion that Johnson was not located near any other protestors who were behaving in an unruly or dangerous manner. Accordingly, the evidence at trial established "that Officer Adgar shot his 40-millimeter PIW indiscriminately into a crowd of protestors who were not close in proximity to an individual throwing objects at the police skirmish line or otherwise engaging in unruly conduct." We must analyze the Rule 50(b) motion based on these facts.

In considering the applicable clearly established law, "[t]he 'rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Peck v. Montoya*, 51 F.4th 877, 887 (9th Cir. 2022) (quoting *City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021) (per curiam)). However, a case "directly on point" is not required. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "[O]fficials may 'still be on notice that their conduct violates established law even in novel factual circumstances,'" particularly in the Fourth Amendment context. *Bonivert v. City of Clarkston*, 883 F.3d 865, 872

(9th Cir. 2018) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). Courts generally need to "identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." *District of Columbia vs. Wesby*, 583 U.S. 48, 64 (2018) (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam)) (ellipses omitted).

Nelson satisfies this stringent requirement. Applying the correct standard of review and drawing all reasonable inferences in favor of Johnson, the facts underlying this case are sufficiently analogous. In *Nelson*, police responded to a crowd of over 1,000 people congregating at an apartment complex at the University of California, Davis for "the biggest party in history." 685 F.3d at 872–73. "[O]fficers encountered individuals at various points during their sweeps who threw bottles or other debris at them" but "never saw Nelson throw anything—in their direction or in any other direction." *Id.* at 880. In other words, the crowd was largely peaceful but not *entirely* non-threatening, as the majority suggests. Under these factual circumstances, we concluded that "a reasonable officer would have been on notice that . . . the firing of a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed at most minor misdemeanors . . . would constitute unreasonable force in violation of the Fourth Amendment." *Id.* at 886.

So too here. The evidence presented at trial supports the jury's conclusion that Johnson and the protestors near him were acting peacefully and did not pose any imminent safety risk to law enforcement. *Id*. at 879–81. As was also true in *Nelson*, "while it is undisputed that there were individuals hurling . . . bottles . . . at officers, it is also undisputed that [Johnson] and his companions were not among them, and the individuals causing the problems were not so numerous that

the two categories of [protestors] were indistinguishable." *Id.* at 883. Therefore, as in *Nelson*, the application of force to Johnson cannot be justified by the government's interest in stopping "any and all disorderly behavior." *Id.* And, as the jury properly found, any generalized interest in crowd dispersal was not sufficient to justify a use of force that could cause "serious and permanent injury to one or more individuals," *id.*, particularly the use of a 40-millimeter projectile that officers are expressly prohibited from using for crowd control.

Puente v. City of Phoenix, 123 F.4th 1035 (9th Cir. 2024) is dissimilar. As we have previously explained, while "decisions post-dating [the conduct at issue] may elucidate whether [an] officer has *committed a constitutional violation*," where "there is a violation, the officer cannot take advantage of subsequent developments in the law to argue that the right was not clearly established at the time he committed the violation." *Sanderlin v. Dwyer*, 116 F.4th 905, 917 (9th Cir. 2024). Accordingly, the majority cannot rely on *Puente*, a decision published in 2024—four years after Officer Adgar shot Johnson—to argue that Johnson's Fourth Amendment right was not clearly established in 2020. Moreover, as the majority acknowledges, there were extraordinary factual differences between the protest Johnson attended and the protest in *Puente*, which involved 6,000 people, was "much more dangerous," and "potentially threatened the President," Majority at 24. Because *Puente* is not sufficiently analogous, we cannot apply its reasoning to the case before us. *See Tan Lam*, 976 F.3d at 1001–02.

The majority's use of *Tan Lam* runs into what *Sanderlin* forbids. *Tan Lam* instructed:

> [w]hen a case involves analogous conduct that occurred around the same time as the underlying incident in the matter before us, *and the case holds that the conduct at issue there violated clearly established law*, then that case may indicate that the claim for qualified immunity presently before us should likewise be rejected.

976 F.3d at 1001–02 (emphasis added). The majority overextends *Tan Lam* by reversing its logic. *Puente* did not hold that the conduct at issue violated clearly established law. 123 F.4th at 1060. So, *Tan Lam* does not authorize consideration of *Puente* to determine whether the present qualified immunity claim should be rejected. 976 F.3d at 1001–02.

In sum, under highly similar circumstances to this case, *Nelson* clearly established that shooting a projectile weapon capable of causing serious and permanent injury indiscriminately into a group of protestors who did not pose an imminent risk to public safety constitutes unreasonable force in violation of the Fourth Amendment. *Id.* at 873–74. This ruling offered sufficient notice to Officer Adgar that he used excessive force against Johnson, precluding qualified immunity on Johnson's excessive force claim. In concluding otherwise, the majority overlooks our explicit obligation to analyze the motion based on the facts established at trial, viewing the evidence in the light most favorable to Johnson, and drawing all reasonable inferences in favor of him.

Accordingly, the district court properly denied the Rule 50(b) motion on qualified immunity as to Johnson's Fourth Amendment claim. I would affirm.