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EXCESSIVE FORCE, POLICE DOGS, AND THE FOURTH AMENDMENT IN THE NINTH CIRCUIT: THE USE OF SUMMARY JUDGEMENT IN *LOWRY v. CITY OF SAN DIEGO*

Abstract: On June 6, 2017, in *Lowry v. City of San Diego*, the U.S. Court of Appeals for the Ninth Circuit sitting en banc upheld a district court’s grant of summary judgment, dismissing a claim under 42 U.S.C. § 1983 for use of excessive force in violation of the Fourth Amendment to the U.S. Constitution, in the context of “bite and hold” training for police dogs. This Comment argues that although the use of force in *Lowry* may have been reasonable, the court was incorrect in deciding this question as a matter of law. The fact-intensive objective reasonableness test should only be resolved through summary judgment on those rare occasions where the facts of the situation are not in dispute and the answer is clear as a matter of law.

INTRODUCTION

The use of police dogs is not generally what comes to mind when talking about the use of excessive force by police, but the U.S. Court of Appeals for the Ninth Circuit has addressed this issue in a series of cases arising from police practices in Southern California.¹ Police dogs are primarily used to detect suspects, and the resultant force can sometimes be deployed out of the sight of their handler, with the dog determining the amount of force applied.² Police officers have a range of types of force at their disposal that can be categorized either as deadly or nondeadly.³ The use of deadly force, such as guns, is analyzed under a stringent balancing test that requires a serious threat of bodily harm to be present.⁴ Courts have determined that the use of police dogs does

¹ Mark Weintraub, *A Pack of Wild Dogs? Chew v. Gates and Police Canine Excessive Force*, 34 LOY. L.A. L. REV. 937, 937 (2001). See generally *Lowry v. City of San Diego (Lowry)*, 858 F.3d 1248, 1260 (9th Cir. 2017) (en banc) *petition for cert. filed*, (U.S. Sept. 5, 2017) (No. 17-706); *Lowry v. City of San Diego (Lowry II)*, 818 F.3d 840, 856 (9th Cir. 2016) (involving the use of a police dog to investigate a suspected burglary).

² Weintraub, *supra* note 1, at 937–38. The scenario that generally occurs is the police are called in to locate a suspect or investigate an unknown scene for potential suspects. *Id.* at 938. The officers will warn a suspect of the presence of the dog and if the person does not comply, the canine can and often will be deployed to find and hold the suspect until the officer arrives to order the animal down. *Id.*

³ See *id.* at 939.

⁴ See *id.* at 943–44 (citing *Tennessee v. Garner*, 471 U.S. 1, 11(1985) (explaining that deadly force is only appropriate when an officer has probable cause to believe that a suspect presents a threat of significant physical harm, such as possessing a weapon)). Consequently, there is a greater possibility that the use of deadly force is unreasonable under the Fourth Amendment. *Id.* at 944.

not generally constitute deadly force, therefore these cases are evaluated under a more lenient reasonableness standard as part of a Fourth Amendment inquiry.⁵

In June 2017, in *Lowry v. City of San Diego*, the U.S. Court of Appeals for the Ninth Circuit sitting en banc upheld a district court's grant of summary judgment, dismissing a claim for use of excessive force in violation of 42 U.S.C. § 1983 in the context of "bite and hold" training for police dogs.⁶ One member of the en banc panel dissented, arguing that a reasonable jury could find that the force was severe and the government's interest in the use of that force did not outweigh the intrusion; consequently, the use of force was "unreasonable."⁷

This Comment argues that the majority in *Lowry* incorrectly labeled the amount of force in this case as "moderate" and resolved this case on summary judgment when it should have been left for a jury to evaluate.⁸ Part I of this Comment discusses the development of the "objective reasonableness" test under the U.S. Supreme Court's 1989 decision *Graham v. Connor* as a means of evaluating claims under 42 U.S.C. § 1983 for use of excessive force in violation of the Fourth Amendment to the U.S. Constitution.⁹ Part II explains the

⁵ See *Miller v. Clark County*, 340 F.3d 959, 963 (9th Cir. 2003) (holding that the use of a police dog is generally considered nondeadly force). Currently, deadly force is appropriate "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Weintraub, *supra* note 1, at 944 (citing *Garner*, 471 U.S. at 9–12 (holding a Tennessee statute authorizing the use of deadly force to prevent escape of all felony suspects to be unconstitutional because it is not justified to use deadly force against someone who poses no immediate threat of physical harm to an officer or others)). This Comment is limited to a discussion of nondeadly force.

⁶ 858 F.3d at 1260. Selected panel rulings by a Federal Court of Appeals can be reviewed by the court's full membership, a process called "en banc" review that is rarely invoked. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 214 (1999). The en banc court's ruling subsequently becomes the circuit's decision, vacating any earlier panel decision. *Id.* The decision contemplated the use of "bite and hold" training, which conditions a police dog to find and bite the suspect, maintaining contact until an officer is able to subdue the person. *Lowry*, 858 F.3d at 1254 (stating that the San Diego Police Department trained their dogs to find and control suspects by locating them, biting, and holding until a handler commanded the dog to release); see also Karen Grigsby Bates, *In Los Angeles County, It's 'Bark and Hold' vs. 'Find and Bite'*, NPR (Oct. 9, 2013), <https://www.npr.org/sections/codeswitch/2013/10/08/230550397/in-los-angeles-county-its-bark-and-hold-vs-find-and-bite> [<https://perma.cc/6X9V-KT7P>] (discussing the challenges of using police dogs that are trained to bite and hold). An alternative method of training not discussed in this case is "circle and bark," which involves a dog locating a suspect and, as long as the suspect remains motionless, circling and barking until the handler takes control. Jonathan K. Dorriety, *Police Service Dogs in the Use-of-Force Continuum*, 16 CRIM. JUST. POL'Y REV. 88, 94–95 (2005) (detailing the two primary apprehension techniques taught to police dogs, "bite and hold" and "circle and bark," and noting that even dogs trained to "circle and bark" will bite if suspect attempts to flee).

⁷ *Lowry*, 858 F.3d at 1261 (Thomas, C.J., dissenting).

⁸ See *infra* notes 12–132 and accompanying text.

⁹ See *infra* notes 12–53 and accompanying text.

majority's opinion after the en banc rehearing of *Lowry*, the relevant case law on police dogs, and how the precedent cases were used to support different conclusions between the first appeal and rehearing.¹⁰ Lastly, Part III argues that the Ninth Circuit erred in maintaining the district court's evidentiary rulings and should not have upheld grant of summary judgment because the fact-intensive *Graham* analysis is best left to a jury and it precluded an examination of municipal liability.¹¹

I. EXCESSIVE FORCE AND "OBJECTIVE REASONABLENESS"

Section A of this Part will develop and discuss the history of excessive force claims against police officers in the context of police dogs and will lay out the governing constitutional provisions and subsequent judicial standards applied.¹² Section B of this Part will review the Fourth Amendment objective reasonableness test that was developed in *Graham* and subsequently used as the foundation for analysis throughout *Lowry*.¹³ Lastly, Section C of this Part will provide the factual and procedural history of *Lowry*.¹⁴

A. History of Constitutional Protections Against Use of Excessive Force by Police Officers

Claims of use of excessive force by police officers are most often brought in federal court under 42 U.S.C. § 1983, which authorizes private parties to enforce their federal constitutional rights against defendants.¹⁵ Over time, the courts have distinguished between the different constitutional protections and

¹⁰ See *infra* notes 54–112 and accompanying text.

¹¹ See *infra* notes 113–132 and accompanying text.

¹² See *infra* notes 15–24 and accompanying text.

¹³ See *infra* notes 25–35 and accompanying text.

¹⁴ See *infra* notes 36–53 and accompanying text.

¹⁵ 42 U.S.C. § 1983 (2012); 21 AM. JUR. PROOF OF FACTS 3D *Excessive Force* § 6, Westlaw (database updated Dec. 2017). The statute holds state actors responsible for the harms they cause when, in their official capacity, they infringe upon the rights of a United States citizen. 42 U.S.C. § 1983. Most commonly, defendants are government employees, who act under the color of state law because their jobs require them to exercise authority on behalf of the state. Ivan E. Bodensteiner & Rosalie B. Levinson, 1 STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1.3, Westlaw (database updated Nov. 2017). In order establish a claim under § 1983, a plaintiff must allege and prove that (1) the plaintiff was deprived of a federally protected right (2) by the defendant acting under color of state law, and (3) that as a proximate result of that deprivation (4) the plaintiff was injured. 21 AM. JUR. PROOF OF FACTS 3D *Excessive Force* § 6. The focus of these sorts of civil rights claims is often on the individual officer responsible for deploying the force, but sometimes plaintiffs go straight to the city itself, hoping to impose municipal liability. Amit Singh, *Accountability Matters: An Examination of Municipal Liability in Sec. § 1983 Actions*, 47 U. OF PAC. L. REV. 105, 109 (2015). Individual defendants may assert a qualified immunity defense, which excuses the officer from liability if his or her actions do not infringe established constitutional rights; however, a municipal defendant may not use this defense. Glen N. Lenhoff, *View of the Present and Future of 42 U.S.C. 1983*, MICH. B.J., May 2015, at 29.

corresponding standards that are used to evaluate excessive force claims in different contexts.¹⁶

Prior to the U.S. Supreme Court's 1989 decision in *Graham*, early analysis of excessive force claims derived from several different constitutional provisions.¹⁷ Courts either applied substantive due process or assumed that there was a basic "right to be free from excessive force" within in the principles of § 1983 rather than enumerated constitutional rights.¹⁸ Since *Graham*, instead of using a one-test-fits-all approach when dealing with § 1983 excessive force actions, courts apply different constitutional provisions depending on the circumstances.¹⁹ First, the court identifies the particular constitutional right that has allegedly been violated by the use of force; the court then evaluates that claim in the context of the specific constitutional standard that governs that right.²⁰

The two main sources of constitutional protection against violent actions by public officers are the Fourth and Eighth Amendments of the Constitution of the

¹⁶ See, e.g., *Graham v. Connor*, 490 U.S. 386, 394 (1989) (evaluating excessive force under the Fourth Amendment); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (evaluating excessive force under the Eighth Amendment); *Johnson v. Glick*, 481 F.2d 1028, 1031 (1973) (evaluating excessive force under the Fourteenth Amendment).

¹⁷ See Nicholas T. Davis & Philip B. Davis, *Qualified Immunity and Excessive Force: A Greater or Lesser Role for Juries?*, 47 N.M. L. REV. 291, 296 (2017); see also Jonathan R. Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. REV. 171, 178–79 (2012) (recalling that prior to *Graham*, lower federal courts applied a single multi-factor test in all § 1983 actions alleging excessive force by government agents, regardless of whether the context of the force invoked a particular constitutional standard).

¹⁸ *Graham*, 490 U.S. at 393 (citing *Glick*, 481 F.2d at 1033 (applying substantive due process standard to a case involving a pre-trial detainee by evaluating the need for force compared to the total force used, the extent of the harm caused, and whether the force was applied in a good faith attempt to preserve or return to order or if it was applied to "maliciously or sadistically" cause harm)). The district court decision in *Graham* evaluated the case involving a free citizen using the *Glick* due process standard. *Graham v. City of Charlotte*, 644 F. Supp. 246, 248–49 (W.D.N.C. 1986). The dissenting judge on appeal argued that the court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Tennessee v. Garner*, 471 U.S. 1 (1985) required investigatory stops that give rise to excessive force claims be evaluated under the Fourth Amendment's "objective reasonableness standard." *Graham*, 490 U.S. at 392. The Supreme Court agreed with the dissent and determined that because the plaintiff in *Graham* was neither a pre-trial detainee nor a prisoner, but was in fact a free citizen, the substantive due process standard was inappropriate and the Fourth Amendment reasonableness standard should be used instead. *Id.* at 394; see also John Wetherell, *Civil Rights—Claims That Law Enforcement Officials Exercised Excessive Force in the Course of an Arrest, Investigatory Stop, or Other Seizure of a Free Citizen Are Properly Analyzed Under the Fourth Amendment's Reasonableness Standard*, 40 DRAKE L. REV. 639, 643 (1991).

¹⁹ See *Graham*, 490 U.S. at 393–94 (citing *Garner*, 471 U.S. at 7–22 (stating that the validity of the claim must be analyzed using a specific constitutional standard that governs that particular right to be free from physical force, rather than a broader excessive force standard)) (addressing a claim that use of deadly force to apprehend a fleeing suspect who did not appear dangerous violated the suspect's constitutional rights). The Court in *Graham* rejected the idea that all excessive force claims brought under § 1983 are governed by a single generic standard. *Id.* at 393.

²⁰ *Id.* at 394.

United States.²¹ *Graham* established that the Fourth Amendment governs all excessive use of force cases in investigatory stops and arrest situations involving “free citizens.”²² Alternatively, when a plaintiff brings an excessive force claim after a criminal conviction and in the context of punishment, the claim is judged under the Eighth Amendment’s prohibition against cruel and unusual punishment.²³ Whereas the Fourth Amendment requires an objective reasonableness standard, the Eighth Amendment standard of “cruel” and “unusual” suggests the need for an inquiry into the subjective state of mind of the officer.²⁴

B. The Fourth Amendment Objective Reasonableness Test

The Fourth Amendment reasonableness test is an objective standard that balances the nature and quality of the intrusion on the individual’s Fourth Amendment rights with the governmental interests in using force that gave grounds to the intrusion.²⁵ An officer is often required to make quick decisions

²¹ *Id.* A third, more complicated category exists for pre-trial detainees who are neither free citizens nor convicted criminals, in which case the applicable test is the Fourteenth Amendment substantive due process analysis. *See id.* at 395 n.10 (citing *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979)); Douglas B. McKechnie, *Don’t Daze, Phase, or Lase Me, Bro! Fourth Amendment Excessive-Force Claims, Future Nonlethal Weapons, and Why Requiring an Injury Cannot Withstand a Constitutional or Practical Challenge*, 60 U. KAN. L. REV. 139, 142 (2011) (discussing the circuit split on pre-trial detainees and excessive force claims). The Fourteenth Amendment substantive due process test is a subjective test that generally involves evaluating the need for force compared to the total force used, the extent of the harm caused, and whether the force was applied in a good faith attempt to preserve or return to order or if it was applied with the malevolent purpose of causing harm. Wetherell, *supra* note 18, at 641–42 (citing *Glick*, 481 F.2d at 1033).

²² *Graham*, 490 U.S. at 395. *Graham* involved a diabetic man who brought a § 1983 claim for injuries sustained when law enforcement officers used physical force against him during an investigatory stop. *Id.* at 389–90. Under the Fourth Amendment, an individual within the United States has a right to be free from an unreasonable search and seizure by a government official. *See* U.S. CONST. amend. IV. The Fourth Amendment reads in relevant part: “The right of people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.” *Id.*

²³ *See Whitley*, 475 U.S. at 327 (analyzing excessive force to subdue a convicted prisoner under an Eighth Amendment standard); *see also* *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (quoted in *Graham*, 490 U.S. at 398 (“[T]he less protective Eighth Amendment standard applies ‘only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.’”)).

²⁴ *See Graham*, 490 U.S. at 398 (reasoning that the terms “cruel” and “punishment” under the Eighth Amendment require analysis of the officer’s subjective state of mind whereas the term “unreasonable” in the Fourth Amendment is objective and has no place for subjective elements such as “malice” and “sadism”). To establish an excessive force claim under the Eighth Amendment, a prisoner must demonstrate that the force was “sadistically and maliciously applied for the very purpose of causing harm.” *Id.* at 398 n.11; McKechnie, *supra* note 21, at 141–42. In *Graham*, the *Glick* test was inappropriate for the Fourth Amendment claim because the test required a consideration of whether the officers were acting in good faith or malevolently for the purpose of causing harm, factors that look at the subjective motivations of individual officers and have no bearing on an objective evaluation. *Graham*, 490 U.S. at 397 (citing *Glick*, 481 F.2d at 1034).

²⁵ Mitchell W. Karsch, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 825 (1990) (citing *Graham*, 490 U.S. at 394). The “reasonableness” of any

during high-pressure, potentially dangerous situations, therefore the “reasonableness” of the action should be judged from the “perspective of a reasonable officer on the scene,” rather than an officer with the “20/20 vision of hindsight.”²⁶ The proper inquiry in the Fourth Amendment context asks whether the police officer’s decision to use force was objectively reasonable given the situation, without giving consideration to the officer’s state of mind.²⁷

As a result of the Supreme Court’s decision in *Graham* and subsequent cases applying the framework, the analysis of Fourth Amendment excessive force claims has evolved into a three-step process.²⁸ The analysis begins with an assessment of the severity of the alleged violation of the individual’s Fourth Amendment rights by considering the “type and amount of force inflicted.”²⁹ This is followed by an evaluation of the government’s interest in using the force and concluded by weighing the nature and quality of the intrusion against the government’s interest in the use of force.³⁰

The Court in *Graham* laid out three factors that should be considered when evaluating the government’s interest in a particular use of force: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.”³¹ It is important to note, however, that these factors are not exclusive; rather, the court should examine the

given seizure rests not only upon its timing and circumstances, but also on the manner in which it is effectuated. *Graham*, 490 U.S. at 395 (citing *Garner*, 471 U.S. at 5). The *Graham* Court explicitly stated the implicit reasoning from *Garner*, that the Fourth Amendment “reasonableness” standard governs all excessive force claims in the context of an arrest or investigatory stop. *Id.*

²⁶ See *Graham*, 490 U.S. at 396–97 (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (explaining that Fourth Amendment precedent has recognized that an officer’s right to stop a person for arrest or investigation is necessarily accompanied by a right to use some amount of coercion to carry it out)); see also *Glick*, 481 F.2d at 1033 (finding that not all physical contact, even if in hindsight it seems unduly rough, necessarily violates the Fourth Amendment).

²⁷ *Graham*, 490 U.S. at 397.

²⁸ See *id.* at 396 (laying out the reasonableness test under the Fourth Amendment as a fact-intensive inquiry); see, e.g., *Glenn v. Washington County*, 673 F.3d 864, 871 (9th Cir. 2011) (citing *Graham*, 490 U.S. at 397) (evaluating an excessive force claim involving a beanbag shotgun using the *Graham* Fourth Amendment analysis).

²⁹ See *Glenn*, 673 F.3d at 871 (citing *Graham*, 490 U.S. at 396) (beginning analysis by considering the amount of force used when officers shot suspect with the beanbag gun).

³⁰ See *id.* 871–72 (evaluating the strength of the government’s interest in using force by examining the totality of the circumstances based on the *Graham* factors).

³¹ See *Graham*, 490 U.S. at 396 (instructing courts to pay careful attention to the facts and circumstances of each particular case); see also *Garner*, 471 U.S. at 8–9 (evaluating whether the totality of the circumstances justifies a particular sort of seizure). The Ninth Circuit has often said that the most important factor in the analysis is whether the individual posed an “immediate threat to the safety of the officers or others.” See, e.g., *Glenn*, 673 F.3d at 872–75 (analyzing the *Graham* factors to evaluate the government’s interest in using force); *Bryan v. MacPherson*, 630 F.3d 805, 826, 831 (9th Cir. 2010) (concluding that the *Graham* factors are not exclusive and considering other factors such as whether officers issued a warning prior to using force, and whether there were less intrusive means available).

totality of the circumstances and consider the specific factors in any given case that may be appropriate beyond the *Graham* factors.³²

The Fourth Amendment “reasonableness” test is not only an objective test, but is also a fact intensive inquiry into the circumstances of the particular case.³³ In the excessive force context, juries often have to sort through factual disputes and make inferences, leading the Ninth Circuit to caution that summary judgment or judgment as a matter of law in excessive force cases should not be granted frequently.³⁴ The analysis done on the merits of the question of whether the use of force was objectively reasonable based on the *Graham* factors should be taken into consideration by the jury.³⁵

C. Factual and Procedural History of *Lowry v. City of San Diego*

Lowry v. City of San Diego is a case involving a § 1983 claim, alleging that a police officer’s use of force during an investigatory sweep constituted a violation of the plaintiff’s Fourth Amendment rights.³⁶ On February 11, 2010 at around 10:40 p.m., three San Diego Police Department officers, including Sergeant Bill Nulton and his police service dog Bak, responded within minutes to a burglar alarm that was triggered in a two-story San Diego office building.³⁷ As the officers approached the building, they saw an open suite door on the second-story balcony.³⁸ Outside the door to the dark suite and unable to see inside, Sergeant Nulton yelled loudly, “This is the San Diego Police Depart-

³² *Glenn*, 673 F.3d at 872 (citing *Bryan*, 630 F.3d at 826). Other relevant factors that can be considered include the potential for less invasive alternatives to the force used and whether the government agents cautioned the citizen of the potential use of force. *See id.*

³³ *See id.* at 871 (citing *Graham*, 490 U.S. at 397) (asking whether the officers’ use of force was objectively reasonable given the facts and circumstances of the situation facing them).

³⁴ *See id.* (citing *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc)) and *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 537 (2010) (“[T]his court has often held that in police misconduct cases, summary judgment should only be granted ‘sparingly’ because such cases often turn on credibility determinations by a jury.”).

³⁵ Karen Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of 1983 as It Applies to Fourth Amendment Excessive Force Cases*, 21 *TOURO L. REV.* 571, 577–78 (2005) [hereinafter Blum, *Qualified Immunity*]. It should be noted that the excessive force Fourth Amendment inquiry is different from the qualified immunity inquiry, which often also occurs in context such as these because the claims involve government officers. *See id.* Qualified immunity asks whether a reasonable officer would have understood that the law, as established at the time and applied to the officer’s conduct, was clear enough to give him notice or fair warning that the officer’s conduct was considered unreasonable under the Fourth Amendment. *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 200 (2001)).

³⁶ *Lowry*, 858 F.3d at 1248.

³⁷ *Id.* at 1253.

³⁸ *Id.* The plaintiff argued that there was a genuine dispute of fact as to whether the door leading to the suite was actually open, however the court ultimately decided that she did not present admissible evidence to dispute the officer’s testimony that the door was open. *Id.* at 1255.

ment! Come out now or I'm sending in a police dog! You may be bitten!"³⁹ When no one responded, the officers reasoned that a burglary might be underway and that the perpetrator was still inside.⁴⁰ After the officer repeated the warning, again to no response, Nulton unleashed Bak into the suite to search the offices and immediately followed, searching with his flashlight.⁴¹ When Nulton and Bak entered the final office in the suite, Nulton detected a person covered by a blanket on the couch.⁴² At the same time, Bak jumped onto the couch and bit the person on the lip before Nulton promptly gave Bak the command to stand down.⁴³

The person asleep under the blanket was an employee of the office suite where the incident occurred named Sara Lowry.⁴⁴ After visiting a few bars that evening and drinking with friends, Lowry had returned to the office around 9:30 p.m. and fell asleep on the couch.⁴⁵ When she woke up to use the bathroom some time later, she instinctively went to the bathroom she normally used during the workday, accidentally setting off the burglar alarm.⁴⁶ Afterward, she returned to her own office and fell back asleep on the couch until the encounter with Nulton and Bak.⁴⁷ Lowry was taken to the hospital where she received three stitches to her upper lip.⁴⁸

Lowry subsequently filed suit under 42 U.S.C. § 1983, asserting a single cause of action against the City of San Diego, alleging that the city's policy and practice of training police service dogs to "bite and hold" individuals resulted in a violation of her Fourth Amendment rights.⁴⁹ The district court

³⁹ *Id.* at 1253. Sergeant Nulton waited between thirty and sixty seconds and repeated the warnings. *Id.* Lowry contended that there was a genuine dispute of fact as to whether the warnings were given and whether the suite was actually dark, however the court decided that the district court had not abused its discretion in finding that Lowry had provided no admissible evidence to establish the dispute of fact. *Id.* at 1255.

⁴⁰ *Id.* at 1253.

⁴¹ *Id.*

⁴² *Id.* at 1253–54.

⁴³ *Id.* at 1254.

⁴⁴ *Id.*

⁴⁵ *Id.* Lowry had five vodka drinks that evening before returning to the office suite. *Id.*

⁴⁶ *Id.* She typically used a bathroom in a neighboring suite occupied by a separate company and in the process of entering that suite, she triggered the burglar alarm. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* Lowry did not sue the individual police officers, but rather sought to establish the city's liability under the case *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *Id.* at 1255. A plaintiff hoping to prove municipal liability under § 1983 must show that the municipality's custom or policy demonstrated a "deliberate indifference" to his or her constitutional rights, a standard that puts a large burden on any plaintiff and often results in plaintiffs left without relief because they are unable to meet it. Karen M. Blum, *Making Out the Monell Claim under Section 1983*, 25 TOURO L. REV. 829, 829–30 (detailing methods of showing municipal liability); Singh, *supra* note 15, at 109 (quoting *City of Canton v. Harris*, 489 U.S. 378, 379 (1989) (expanding on the *Monell* decision by providing the "deliberate indifference" standard for determining municipal liability)). The theory of respondeat

granted the city's motion for summary judgment.⁵⁰ Lowry appealed, and a divided three-judge Ninth Circuit panel reversed the summary judgment and remanded for further proceedings.⁵¹ The Ninth Circuit granted the City of San Diego's petition for rehearing en banc and ultimately affirmed the district court's grant of summary judgment.⁵² Lowry subsequently filed a Petition for Certiorari on September 5, 2017 and the United States Supreme Court has docketed that petition.⁵³

II. BALANCING THE SEVERITY OF THE INTRUSION WITH GOVERNMENT INTERESTS: THE NINTH CIRCUIT'S PRECEDENT ON POLICE DOGS

Lowry v. City of San Diego was not the first time that the Ninth Circuit had been confronted with the issue of excessive force in the context of police dogs.⁵⁴ The Ninth Circuit has consistently upheld the reasonableness of the use of police dogs, labeling their use generally as severe, but nondeadly force.⁵⁵ *Lowry* added to this body of Ninth Circuit law when it determined that the force in this case was moderate and reasonable in light of the circumstances.⁵⁶ Section A of this Part will discuss the Ninth Circuit's precedent regarding police dog excessive force cases.⁵⁷ Section B of this Part will delve into the reasoning of the en banc decision in *Lowry* in light of these prior Ninth Circuit cases.⁵⁸

superior does not apply to municipalities, so in order to prevail, the plaintiff must identify a policy or custom as the cause of injury rather than the action of the officer specifically. Singh, *supra* note 15, at 114 (citing Bd. Cty. Comm'rs v. Brown, 520 U.S. 397, 401 (1997)). To prevail on that claim, Lowry needed to have established that (1) SDPD's use of Bak amounted to an unconstitutional application of excessive force, and (2) the city's policy caused the constitutional wrong. *Lowry*, 858 F.3d at 1255. It is undisputed that SDPD trains dogs to "locate and control persons on command" by finding a person, biting them, and holding that bite until a police officer handler commands the dog to release the bite. *Id.* at 1254. Police dogs may be left on the bite until an officer has handcuffed the suspect, taking him or her into custody. *Id.*

⁵⁰ *Lowry v. City of San Diego (Lowry I)*, No. 11-CV-946-MMA, 2013 WL 2396062 *1, *8 (S.D. Cal. 2013).

⁵¹ *Lowry II*, 818 F.3d at 856.

⁵² *Lowry*, 858 F.3d at 1248, 1260.

⁵³ *Lowry v. City of San Diego*, 858 F.3d 1248 (9th Cir. 2017), *appeal docketed*, No. 17-706 (U.S. Sept. 5, 2017).

⁵⁴ *See, e.g., Smith v. City of Hemet*, 394 F.3d 689, 707 (9th Cir. 2005) (reversing summary judgment where a reasonable jury could have concluded that force was excessive); *Miller v. Clark County*, 340 F.3d 959, 968 (9th Cir. 2003) (affirming summary judgment where under the totality of the circumstances, the government's interest in using force outweighed the plaintiff's interest in not having force exerted on him); *Chew v. Gates*, 27 F.3d 1432, 1462 (9th Cir. 1994) (reversing summary judgment).

⁵⁵ *See e.g., Smith*, 394 F.3d at 689; *Miller*, 340 F.3d at 959; *Chew*, 27 F.3d at 1432.

⁵⁶ *See Lowry v. City of San Diego (Lowry)*, 858 F.3d 1248, 1260 (9th Cir. 2017) (en banc) *petition for cert. filed*, (U.S. Sept. 5, 2017) (No. 17-706).

⁵⁷ *See infra* notes 59–76 and accompanying text.

⁵⁸ *See infra* notes 77–112 and accompanying text.

A. Police Dogs in the Ninth Circuit

In the Ninth Circuit, there are two precedent cases reversing the district courts' uses of summary judgment in excessive force dog bite incidents.⁵⁹ In 1994, the Ninth Circuit in *Chew v. Gates* found that the district court had erred in granting summary judgment to the defendant because there was a genuine issue of material fact as to whether the release of the dog was unreasonable.⁶⁰ Given that the dog in *Chew* bit the plaintiff three times and dragged him from his hiding place, the court determined that the type and amount of force used was severe.⁶¹ The court analyzed the *Graham v. Connor* factors, which include the severity of the crime, whether or not the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting or evading the officers.⁶² Because the *Graham* factors did not all clearly support one side or the other, the court reversed summary judgment on the question of Fourth Amendment reasonableness and concluded that this was a question for the jury.⁶³ The court also addressed municipal liability under *Monell v. Department of Social Services*, questioning whether the district court's grant of summary judgment for the city could be upheld on the grounds that the plaintiff's injury did not result from the use of force under an official city policy or custom.⁶⁴ Summary judgment was reversed on this issue because given the facts, a jury could reasonably find that the plaintiff's injuries came as

⁵⁹ See *Smith*, 394 F.3d 689; *Chew*, 27 F.3d 1432.

⁶⁰ *Chew*, 27 F.3d at 1435, 1443 (9th Cir. 1994).

⁶¹ *Id.* at 1441.

⁶² See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (establishing these factors); *Chew*, 27 F.3d at 1441–43 (applying the factors set out in *Graham*).

⁶³ See *Graham*, 490 U.S. at 396 (laying out the factors to be considered when evaluating the government's interest in the use of force, including the severity of the crime involved, whether the suspect presents an immediate danger to the officers or others, and whether he is actively resisting or evading arrest); *Chew*, 27 F.3d at 1443. The absence of an immediate threat to the officers or others, the most important factor in the analysis, weighed in favor of the plaintiff. *Chew*, 27 F.3d at 1441–42. Officers initially stopped the plaintiff for a traffic violation when he fled the scene and hid in a scrapyard. *Id.* at 1442. They subsequently discovered that there were outstanding arrest warrants for the suspect and a police perimeter was set and K9 units were called in to locate the plaintiff. *Id.* According to *Chew*, when he saw the police dog, he had yelled to surrender, however both sides agree that at that point, the K9 officer was not in sight and that the officer did not immediately accede to the plaintiff's request, allowing the dog to bite him. *Id.* The other two factors cut only slightly in favor of the defendants. *Id.* Although he may not have been physically resisting arrest, he did flee the scene, and although the initial crime being responded to was a traffic violation, the existence of three felony arrest warrants for the plaintiff put the officers on guard, although the danger may have been diminished by the presence of a police perimeter. *Id.* at 1442–43.

⁶⁴ *Chew*, 27 F.3d. at 1444–45 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (analyzing whether the plaintiff's injury came as a result of city policy). Under *Monell*, a city's policy or custom causes a constitutional injury where it is the "moving force" behind the harm. See *Monell*, 436 U.S. at 694.

a result of the execution of city policy.⁶⁵ The case was remanded for trial and police departments were warned that the “bite and hold” policy may be unconstitutional.⁶⁶

Similarly, in 2005, the Ninth Circuit in *Smith v. City of Hemet* reversed the district court’s grant of summary judgment, concluding that a reasonable jury could have concluded that the defendant’s use of a police dog was excessive force.⁶⁷ Analyzing the *Graham* factors, the court determined the cumulative force used against him was severe and once again not all of the factors weighed in favor of the government.⁶⁸ Therefore there was enough evidence from which a reasonable jury could have concluded that the force was excessive.⁶⁹

In contrast, in 2003, the Ninth Circuit in *Miller v. Clark County* determined that there was no use of excessive force, despite the seriousness of the plaintiff’s injuries, and affirmed summary judgment in favor of the defendant.⁷⁰ Similar to *Chew*, the court determined that the type and amount of force

⁶⁵ See *Chew*, 27 F.3d at 1444 (noting that the officer had acted under instructions based on city policy, which authorized officers to use police dogs trained to bite and hold to seize all hidden suspects, regardless of the level of danger the person posed to the officers and therefore, a reasonable jury could find that the city’s policy was the “moving force” behind the plaintiff’s injuries). The court also explained that municipal liability does not need to be based on an unreasonable action by an officer, noting that a jury could find that despite the reasonableness of an officer’s decision on the scene, the city was still at fault for providing officers with dogs trained to bite any concealed suspect. See *id.* at 1445 (suggesting that in order to prove this, plaintiff would have to show that a less dangerous training method for dogs was feasible and effective).

⁶⁶ See *id.* at 1435 (remanding the case to trial by jury, reversing the summary judgment on both the reasonableness analysis and the municipal liability issue); David G. Savage, *When Bites Are Worse Than Barks*, ABA J., Sept. 1996, at 38, 39.

⁶⁷ *Smith*, 394 F.3d at 694, 701–03 (addressing a case in which the suspect refused to obey police orders, attempted to re-enter residence and was subsequently attacked by police dog in right shoulder and neck area, on his left side, and on his buttock). In addition to the use of a police dog, the force used also included four blasts of pepper spray, slamming the defendant face down onto the ground, and dragging him off the porch. *Id.* at 703–04. It is, however, important to note that lesser force can still be considered unreasonable in certain circumstances. See *id.* at 704 (citing *Santos v. Gates*, 287 F.3d 846, 853–54 (holding that shoving can be excessive when it is unreasonable)).

⁶⁸ See *id.* at 701–03 (referring to the totality of the force used, including but not limited to the police dog).

⁶⁹ *Id.* at 703. There was no evidence of any immediate threat to officers or others and the situation in question involved a domestic dispute, which provided little basis for the officers’ use of physical force. *Id.* at 702–03. The defendant did not show any signs of fleeing the area or violent resistance, although he did refuse to follow the orders of the officers. *Id.* at 703

⁷⁰ See *Miller*, 340 F.3d at 963, 968 (affirming summary judgement for the defendant, deciding that given the totality of the circumstances, the government’s interest in using a police dog to seize the plaintiff outweighed the plaintiff’s interest in not being bitten and was not a violation of his Fourth Amendment rights). The court in *Miller* also re-emphasized that the ability of a well-trained police dog to fatally injure a suspect under abnormal circumstances does not transform otherwise nondeadly force into deadly force. See *id.* at 963 (citing *Vera Cruz v. City of Escondido*, 139 F.3d 623, 663 (9th Cir. 1996) (holding that in order for force to be categorized as deadly, the force must pose “more than a remote possibility” of death under the circumstances that it is being used)).

used in this case was “serious,” given how deep and significant the wounds were to his arm.⁷¹ In assessing the government’s interest in using force in this case however, the court found that all three of the *Graham* factors weighed in favor of the government.⁷² First, the severity of the crime weighed in favor of the government because the plaintiff was wanted for both a traffic violation and a prior felony, which gives the government a legitimate interest in apprehending the individual.⁷³ Second, the plaintiff in this case presented an immediate threat to the officers’ safety because he had refused to follow police orders, officers knew he had been in possession of a large knife, and if the encounter turned violent, the plaintiff would have possessed an advantage over the officers.⁷⁴ And finally, the plaintiff was actively evading arrest by flight while he was hiding in the woods.⁷⁵ When balancing the government’s interests with the use of force, the court determined that the force was reasonably necessary under the circumstances.⁷⁶

B. The *En Banc* Decision in *Lowry*

In *Lowry*, on rehearing en banc in 2017, the Ninth Circuit Court of Appeals held that the district court had not erroneously determined that there was no genuine issue of material fact and that when evaluated, the *Graham* factors

⁷¹ See *id.* at 964 (citing *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998)) (acknowledging that the prolonged duration of a bite could constitute excessive force and concluding the force in this case was “serious”); *Chew*, 27 F.3d at 1441 (reasoning that because the dog bit and held the plaintiff for a long period of time, which could cause a suspect pain and bodily injury, the force constituted a serious intrusion on the plaintiff’s Fourth Amendment rights). Due to the dark and unfamiliar woods in which the plaintiff was found, it took the officer in *Miller* almost a minute to locate the dog and suspect, at which point the dog was ordered to release the suspect when the officer ascertained that the suspect was not armed. *Miller*, 340 F.3d at 961.

⁷² *Miller*, 340 F.3d at 964–65 (citing *Graham*, 490 U.S. at 396).

⁷³ See *id.* at 964 (citing *United States v. Hensley*, 469 U.S. 221, 229 (1985) (noting the government’s vested interest in investigating crimes and holding perpetrators accountable)).

⁷⁴ See *id.* at 965 (explaining that officers believed the plaintiff would attempt to stage an ambush and the dark woods and his unknown location would have given Miller an advantage over the officers, putting them in danger). Additionally, deputies told the officers responding that the house where the plaintiff lived was “not law-enforcement friendly” and that a mentally ill person lived there. *Id.* at 960. The K9 deputy was told the plaintiff had been seen running away from the house minutes before and he observed a knife in the back of the plaintiff’s car, which he claims made it more likely that the plaintiff was armed. *Id.* The officer’s search party tracked the plaintiff through the woods and eventually the officer let the dog loose, commanding him to search, at which point the officers located the plaintiff when they heard him scream after being bitten by the dog. *Id.*

⁷⁵ See *id.* at 965–66 (citing *Chew*, 27 F.3d at 1442 (finding the third *Graham* factor in favor of defendants where plaintiff fled and hid from police prior to arrest)).

⁷⁶ See *id.* at 968 (reasoning that under the circumstances confronting the police, the use of a dog was proper to aid the officers in safely arresting the suspect). Because the plaintiff’s Fourth Amendment rights were not violated, the court did not reach the question of municipal liability. See *id.* at 968 n.14 (citing *Monell*, 436 U.S. at 658).

cumulatively weighed in favor of the city.⁷⁷ Conversely, both the Ninth Circuit panel on the first appeal and the dissent to the final en banc opinion asserted that the city failed to demonstrate that there were no questions of fact.⁷⁸ Therefore, the district court had erred in concluding that no reasonable jury could find that the force in question was excessive and unconstitutional.⁷⁹

The plaintiff's arguments on appeal were threefold.⁸⁰ First, she contended that the court erred in granting summary judgment because there was a genuine dispute of fact that the court failed to account for when it inappropriately excluded evidence that would have established the dispute.⁸¹ Second, Lowry argued that the use of the dog against her violated her Fourth Amendment rights because it was unreasonable and excessive.⁸² Lastly, she claimed that the city's police dog policy was itself unconstitutional and the cause of her injury.⁸³

In considering whether there were disputed facts, the court en banc upheld the district court's conclusion that there were no genuine disputes of material fact because the plaintiff did not present admissible evidence to dispute the testimony of the officers.⁸⁴ The district court's grant of summary judgment was reviewed de novo to determine whether, in looking at the evidence and drawing all reasonable inferences "in the light most favorable to the nonmoving party,"

⁷⁷ *Lowry*, 858 F.3d at 1260. The Ninth Circuit determined that the force used did not violate Lowry's Fourth Amendment rights, and therefore the officers' actions were constitutional, so the city could not be held liable under the precedent set in *Monell*. *Id.* In *Monell*, the Court held that for the purposes of a 42 U.S.C. § 1983 action, a local government is a "person" subject to suit and can be held liable when the constitutional deprivation comes as a result of government custom. *See* 436 U.S. at 690–91 (involving female employees of New York City who brought an action challenging policies requiring pregnant employees to take unpaid leaves of absence, which the Court found constitutional). If the Court in *Lowry* had instead determined the officer's actions were unreasonable, the next step in the analysis would have been to evaluate whether or not the "bite and hold" police dog policy in general was unconstitutional. *See id.* (holding that a city can only be held liable if the officer's actions were unconstitutional); *Lowry*, 858 F.3d at 1260 (concluding that because Lowry did not suffer a constitutional injury, she would be unable to establish the city's liability and therefore the court would not reach a municipal liability analysis under *Monell*).

⁷⁸ *Lowry*, 858 F.3d at 1262–63 (Thomas, C.J., dissenting); *Lowry v. City of San Diego (Lowry II)*, 818 F.3d 840, 854 (9th Cir. 2016).

⁷⁹ *Lowry*, 858 F.3d at 1263 (Thomas, C.J., dissenting); *Lowry II*, 818 F.3d at 854.

⁸⁰ *See Lowry*, 858 F.3d at 1255.

⁸¹ *See id.* (concerning the evidentiary decision).

⁸² *See id.* (concerning the *Graham* reasonableness analysis).

⁸³ *See id.* (concerning the issue of municipal liability).

⁸⁴ *See id.* at 1256. The plaintiff claimed that the door was not open, that it was dark in the suite, and that she did not hear the warning given by the officers. *Id.* at 1255–56. Because she failed to offer firsthand testimony or contradicting evidence of these facts, the court determined that there was no genuine dispute of fact. *Id.* She testified that the door automatically closes, and because of that speculated that the door was closed, which the court rejected. *Id.* at 1255. She testified that the room was dark, yet she presented no contradicting evidence of that. *Id.* Lastly, the plaintiff's testimony that she did not hear a warning is not dispositive or admissible because, given that she was sleeping at the time the warning would have been announced, she was in no position to know what was said. *Id.* at 1255–56.

there was a genuine issue of material fact.⁸⁵ The court found that Lowry's testimony was speculative and it was not manifestly erroneous for the district court to conclude that the plaintiff's testimony lacked personal knowledge and was therefore not sufficient to create a genuine dispute of fact.⁸⁶

In his dissent for the en banc opinion, Judge Thomas took issue with the district court's evidentiary rulings, arguing that the district court's exclusion of the plaintiff's testimony was "manifestly erroneous and prejudicial."⁸⁷ The dissent reasoned that even the sort of "uncorroborated and self-serving testimony" like the evidence in question here could be sufficient to establish a genuine dispute of fact because it was legally relevant, internally consistent, and based on her personal knowledge of the door.⁸⁸ Therefore, the dissent argued, the district court erred when it assessed the plaintiff's credibility, which is the function of the jury and not the judge, and subsequently excluded her testimony.⁸⁹

⁸⁵ *Id.* at 1254 (citing *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011)) (noting that without a material factual dispute, the objective reasonableness of the police officer's actions was a "pure question of law"). Rule 56(a) of the Federal Rules of Civil Procedure states that a judgment as a matter of law is appropriate where the movant shows there is not genuine dispute of material fact. FED. R. CIV. P. 56.

⁸⁶ *See Lowry*, 858 F.3d at 1254 (citing *Bias v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007) (stating that the standard for reviewing evidentiary rulings made in the context of summary judgment is "abuse of discretion" and can only be reversed if the decision was "manifestly erroneous and prejudicial")).

⁸⁷ *Id.* at 1262 (Thomas, C.J., dissenting) (citing *Bias*, 508 F.3d at 1224).

⁸⁸ *Id.* at 1262–63 (citing *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015) (citing *S.E.C. v. Phan*, 500 F.3d 895, 909 (9th Cir. 2007)) (acknowledging that uncorroborated declarations are often self-serving)); *see also* Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 437 (2014) (noting that the judicial system has consistently undermined the jury's ability to evaluate evidence and make inferences); Don Zupanec, *Summary Judgment—Credibility Assessment*, 12 FED. LITIGATOR 6 (2005) (stating that in the context of summary judgment, assessments of credibility and determinations based on conflicting versions of events are duties of the jury and that in deciding a summary judgment motion, a court should not weigh evidence or make credibility assessments). *But see* James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1554 (1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1990)) (noting that the question of whether a judge may weigh evidence when deciding a summary judgment motion has conflicting answers).

⁸⁹ *See Lowry*, 858 F.3d at 1263 (Thomas, C.J., dissenting) (citing *Nigro*, 784 F.3d at 498) (cautioning that a piece of evidence should not be ignored simply because of its self-serving nature and advising that even this sort of evidence can be sufficient to create a genuine dispute of fact where it is based on the individual's own knowledge, legally relevant, and internally consistent). The dissent points out that a district court generally cannot grant summary judgment based on a credibility assessment of the evidence because that is a function of the jury along with weighing the evidence and drawing inferences. *See id.* (citing *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (explaining that a district court usually cannot grant summary judgment on the basis of a credibility assessment of the evidence) and *Schulp v. Delo*, 513 U.S. 298, 332 (1995) (observing that conclusions regarding credibility, considerations of evidence, and the making of legitimate inferences based on the facts are functions of the jury)).

In evaluating the reasonableness of the use of force in this case, each court first analyzed the severity of the physical intrusion on the plaintiff's Fourth Amendment rights by assessing the type and amount of force used.⁹⁰ On rehearing, the Ninth Circuit agreed with the district court's conclusion that the force in this case was "moderate."⁹¹ The Ninth Circuit distinguished this case from *Chew*, because unlike in *Chew*, where the police dog was out of sight and out of the reach of an order, the officer in this situation followed close behind his dog and immediately called the dog off.⁹² Therefore, the risk of harm was diminished and the Ninth Circuit determined the force was moderate.⁹³

In contrast, the initial Ninth Circuit in *Lowry II* determined that a reasonable juror could have found that unleashing Bak into the office posed a high risk of severe harm to anyone inside.⁹⁴ The analysis in the *Lowry II* decision

⁹⁰ See *id.* at 1256 (finding that the risk of harm and the actual harm caused was moderate because of the brevity of the contact, due in part to the handler's close proximity to the dog); *Lowry II*, 818 F.3d 847 (citing *Chew*, 27 F.3d at 1441) (emphasizing that both the amount and type of force, including the inherent risk of harm in using that type of force, should be considered and concluding that the force was severe because the plaintiff could have ended up with far worse injuries, similar to *Chew*); *Lowry v. City of San Diego (Lowry I)*, No. 11-CV-946-MMA, 2013 WL 2396062 *1, *1 (S.D. Cal. 2013) (distinguishing from *Chew* and finding the amount of force used to be moderate due to the brevity of the encounter and relatively minor injuries).

⁹¹ *Lowry*, 858 F.3d at 1256; *Lowry I*, 2013 WL at *1. Determining the type and amount of force within the context of police dogs depends on the specific factual circumstances. *Lowry*, 858 F.3d at 1256; see *Smith*, 394 F.3d at 701–02 (holding that use of police dog was excessive force when dog was sicced on plaintiff three times); *Chew*, 27 F.3d at 1441 (holding that use of dog was severe because dog bit plaintiff three times, dragged him, and caused significant injury to his arm). But see *Miller*, 394 F.3d at 964 (concluding that although the force from the dog was considerable and serious, it was reasonable when the dog apprehended a fleeing suspect with a bite that lasted close to a minute, causing significant injury to plaintiff's arm).

⁹² See *Lowry*, 858 F.3d at 1257 (concluding that the officer's proximity to the dog resulted in a shorter period of contact and therefore a more moderate use of force); *Chew*, 27 F.3d at 1441 (involving a dog that was out of contact with his handler and had nearly severed the arm of the plaintiff before his handler was able to call him off, resulting in a more severe use of force). The encounter between the plaintiff and the dog was so brief the officer did not know if contact had actually occurred. *Lowry*, 858 F.3d at 1257. The analysis adopted by the en banc court was consistent with the evaluation by the district court, which also found the force inflicted to be moderate. See *id.*; *Lowry I*, 2013 WL at *5 (concluding the force was moderate based on the brevity of the contact and extent of injury).

⁹³ See *Lowry*, 858 F.3d at 1257 (citing *Chew*, 27 F.3d at 1441) (reasoning that despite Ninth Circuit precedent labeling dog bites as severe, the force in this case was moderate given that the officer in this case quickly called off the dog, diminishing the risk of harm.); see also *id.* at 1262 (Thomas, C.J., dissenting) (outlining Ninth Circuit precedent for determining this sort of intrusion to be serious).

⁹⁴ *Lowry II*, 818 F.3d at 849. The court reasoned that the district court overlooked the type of force employed and focused only on the consequences of the force instead of also considering the inherent risk of a particular type of force. *Id.* (citing *Miller*, 340 F.3d at 964 (assessing the gravity of the Fourth Amendment intrusion by evaluating both the type and amount of force used), *Glenn*, 673 F.3d at 871–72 (considering the dangerous capabilities of a beanbag shotgun), and *Chew*, 27 F.3d at 1441 (concluding the police dog force was severe not only because of the injuries caused, but also because of the dog's training and undisputed testimony that dog bites could be fatal)). The dissent to the en banc opinion, rather than labeling the force as severe or moderate, determined that a reasonable jury could find that the use of force was moderate or severe when assessing the reasonableness of the

likens the present case to *Chew* and concludes that the force in this case was severe, relying on precedent from previous dog bite cases.⁹⁵ Similar to *Chew*, the K9 officer admitted that dog bites could be fatal and that the dog in this case was similarly trained to “bite and hold,” without any ability to differentiate between suspects and other people.⁹⁶ Combined with the dog being off leash and its precise location being unknown to the handler for a brief duration, the court reasoned that a reasonable juror could find that releasing the dog into the suite posed an increased danger to anyone in the room.⁹⁷

When evaluating the government’s interest in the use of force, the first *Graham* factor to consider is whether or not there was an immediate threat to the safety of officers or others, which the Ninth Circuit determined in this case weighed in favor of the government.⁹⁸ Comparing the case to *Miller*, where the court had concluded that the officers were entitled to their assumptions about the potential danger of the suspect, the court concluded that the situation in the present case was also objectively threatening.⁹⁹ In contrast, the dissent to the

force at the time the decision was made to use the dog, not in hindsight. *Lowry*, 858 F.3d at 1262 (Thomas C.J. dissenting).

⁹⁵ See *Lowry II*, 818 F.3d at 848 (finding that the use of force in this case was severe); *Smith*, 394 F.3d 701–02 (holding police dog are the most severe form of force that can be authorized short of deadly force); *Miller*, 340 F.3d at 964 (holding that use of police dog was a severe intrusion on the plaintiff’s Fourth Amendment rights); *Chew*, 27 F.3d at 1441 (holding that use of police dog was severe force).

⁹⁶ See *Lowry II*, 818 F.3d at 848–49 (comparing to *Chew*, 27 F.3d at 1441). Handlers are trained to keep their dogs within range of communication at all times and that if there is a possibility of separation, the officer should not dispatch the dog, although this is not always the case. Dorriety, *supra* note 6, at 94. When the dog is out of communication range, the dog in a sense becomes the decision-maker and the handler loses control of the apprehension, which is contrary to what the bite and hold method teaches. See *id.*

⁹⁷ See *Lowry II*, 818 F.3d at 849 (citing *Torres*, 648 F.3d at 1126 (finding that a jury could determine that any belief by an officer that a situation was dangerous could be unjustified and finding that there was a genuine dispute of material fact regarding whether an officer had correctly assessed the dangerousness of the circumstances when deciding to use force)).

⁹⁸ See *Lowry*, 858 F.3d at 1257 (reasoning the triggered burglar alarm and lack of response to the officers’ warnings gave the officers reason to believe a burglary was in progress and that they were entitled to protect themselves from danger). See generally *Graham*, 490 U.S. at 396 (establishing the immediate threat to safety as a factor in the analysis).

⁹⁹ *Lowry*, 858 F.3d at 1258 (citing *Miller*, 340 F.3d at 965) (reasoning that the officers were entitled to their assumptions in *Miller* because the suspect was hiding in the woods, they did not know if he had any weapons, and he had ignored the officers warning about the police dog). The majority relied on *Frunz v. City of Tacoma* to assert that when officers suspect an active burglary and do not know what might be inside, they may reasonably assume that a confronted suspected may flee or put up armed resistance. *Id.* (citing *Frunz v. City of Tacoma*, 468 F.3d 1141, 1145 (9th Cir. 2006) (concluding that so long as officers have probable cause for believing a burglary is in progress, “in such exigent circumstances,” the police may use all appropriate force upon entering)). Alternatively, the dissent criticized the majority’s use of *Frunz*, asserting that the case only stood for the proposition that officers must consider all known facts and circumstances in determining whether armed resistance from a suspected burglar is likely. See *id.* at 1264 (Thomas, C.J., dissenting) (explaining that *Frunz* merely stated that burglars can sometimes be considered dangerous).

en banc opinion disagreed with the district court's evaluation of the immediate threat to safety.¹⁰⁰ Unlike in *Miller*, where officers knew of the suspect's propensity to carry a weapon, the officers in this case had no specific reason to assume that the person inside of the office was armed.¹⁰¹

Turning to the second *Graham* factor, the severity of the crime at issue, the en banc majority determined that given the facts of the situation, the officers reasonably believed they were responding to a burglary.¹⁰² The court cited precedent demonstrating that burglary and attempted burglary carry an inherent risk of violence, often because both crimes can end in a violent confrontation, which weighed in favor of the city.¹⁰³ Conversely, the dissent asserted that even if officers considered burglary to be a serious crime, the dispute here centered on whether or not the circumstances indicated that a burglary was actually taking place.¹⁰⁴ If all reasonable inferences were drawn in favor of the plaintiff, a reasonable jury could have found that a closed door made it more likely that there had been a false alarm rather than an active burglary.¹⁰⁵ In regards to the final *Graham* factor, whether or not the suspect was resisting or evading arrest, although the en banc majority asserted that the factor did not weigh substantially in favor of either party, the dissent asserted that there was nothing to indicate resistance on the plaintiff's part, weighing the factor in favor of her.¹⁰⁶

¹⁰⁰ *See id.* (finding the factor in favor of the plaintiff because a reasonable jury could find that the officers' beliefs were unreasonable and that they had little indication that there was an armed suspect inside that posed a threat to the officers).

¹⁰¹ *Id.* At 1258 (majority opinion). The first Ninth Circuit panel also distinguished the *Lowry* case from *Miller*, asserting that the officers in *Miller* were reasonable in their assumption that the suspect posed an immediate threat because the officer was chasing a felony suspect, who had recently possessed a weapon, had mental health issues, ignored warnings, and had a strategic advantage over the officers in the woods. *Lowry II*, 818 F.3d at 849–50 (citing *Miller* 340 F.3d at 965–66). Instead the court likens the case to *Chew*, pointing out that the plaintiff did not engage in behavior that could be considered threatening and concluding that the circumstances here may not lead a reasonable jury to conclude that the plaintiff had posed an immediate threat. *Id.* at 849 (citing *Chew*, 27 F.3d at 1441).

¹⁰² *Lowry*, 858 F.3d at 1257 (considering factors like the burglar alarm had been triggered late at night, the door to the suite was slightly open, lack of response to the officer's warnings and reasoning that officers had reasonably concluded that a burglary may be ongoing).

¹⁰³ *Id.* at 1257–58 (citing *Sykes v. United States*, 564 U.S. 1, 9 (2011) and *Sandoval v. Las Vegas Metro Police Dep't*, 756 F.3d 1154, 1163 (9th Cir. 2014)).

¹⁰⁴ *Id.* at 1264–65 (Thomas, C.J. dissenting).

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 1258 (majority opinion) (reasoning that the lack of response to the warning and the dark room gave officers little to no information about whether someone was resisting or evading arrest and although the lack of response could be perceived as evading, the factor does not weigh in favor of either party); *id.* at 1265 (Thomas, C.J., dissenting) (citing *Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010)) (asserting that when a suspect's only form of resistance is a failure to comply with an order and when that resistance is not belligerent, the resistance is considered passive and does not factor heavily in favor of the government). It is also worth noting that although the court may consider additional factors, such as whether or not less intrusive means were available or whether a warning was given, because neither one of these was sufficiently raised in this case, a discussion of these factors has been omitted. *See id.* at 1259–60 (majority opinion) (mentioning briefly these alternative

The final part of the *Graham* reasonableness analysis requires the court to balance the seriousness of the intrusion on an individual's Fourth Amendment rights with the government's countervailing interests.¹⁰⁷ The en banc majority determined that the officers had a compelling interest in protecting themselves in this uncertain and potentially dangerous situation and therefore the use of force, which was not severe, did not violate the plaintiff's rights.¹⁰⁸ The dissent on the other hand concluded that when balancing this severe intrusion with the government's interest in using force, a reasonable jury could have concluded that the city's use of force did not justify the level of force in this case and therefore the case should go to a jury.¹⁰⁹

In regard to the issue of municipal liability, the court in *Lowry* held that as a result of the determination that the force was not excessive and therefore constitutional, the City of San Diego could not be held liable.¹¹⁰ The dissent disagreed, stating the court erred in concluding that the city could not be liable even if unreasonable force has been established.¹¹¹ *Lowry* claimed the city's affirmative "bite-and-hold" policy was the source of her constitutional injury and given the city's admission that the officer acted pursuant to an official policy, the dissent determined a reasonable jury could find that the policy was the cause of the harm, thus subjecting the city to *Monell* liability.¹¹²

III. THE NINTH CIRCUIT WAS INCORRECT IN ITS GRANT OF SUMMARY JUDGMENT: THE IMPLICATIONS OF SUMMARY JUDGMENT IN EXCESSIVE FORCE CASES

Continuing prior Ninth Circuit precedent, the en banc decision in *Lowry v. City of San Diego* substantively added to the body of law in the Ninth Circuit upholding the constitutionality of the use of the "bite and hold" technique by

factors and noting that officers are not required to use least intrusive means); *id.* at 1265–66 (Thomas, C.J., dissenting) (mentioning these alternative factors and noting because the record is lacking on this issue, the existence of alternative methods does not influence the excessive force analysis here).

¹⁰⁷ *Graham*, 490 U.S. at 396; *see, e.g.*, *Miller*, 340 F.3d at 966 (balancing the seriousness of the intrusion with the government's interest of the use of force by considering whether the force that was applied was reasonably necessary given the circumstances).

¹⁰⁸ *See Lowry*, 858 F.3d at 1260 (concluding that the officers reasonably suspected that a burglary was in progress and the force was not severe).

¹⁰⁹ *See id.* at 1266 (Thomas, C.J., dissenting) (holding that the district court erred in deciding this case as a matter of law).

¹¹⁰ *See id.* at 1260 (majority opinion).

¹¹¹ *See id.* at 1266 (Thomas, C.J., dissenting) (citing *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Monell*, 436 U.S. at 694; *Chew*, 27 F.3d at 1444) (reiterating the standards for municipal liability and explaining that a city's policy or custom causes harm where it is the "moving force" behind the constitutional injury).

¹¹² *See id.* (discussing the plaintiff's *Monell* claim).

police dogs.¹¹³ The issue on appeal is one noteworthy to all cities in the Ninth Circuit who use police dogs to search buildings and find criminals.¹¹⁴ Resolving this case on summary judgment based on the reasonableness of the specific situation precluded the plaintiff from moving to the next step, a constitutional analysis of the use of police dogs as a policy and government custom.¹¹⁵ Labeling the canine force as moderate and granting summary judgment strengthens the ability of municipal and individual defendants to avoid liability and further diminishes the effectiveness of § 1983 claims as a tool for plaintiffs who have been harmed by government actors.¹¹⁶

In regards to the summary judgment in this case, there was a factual dispute here based on testimony from the plaintiff of her firsthand knowledge of

¹¹³ See *Lowry v. City of San Diego (Lowry)*, 858 F.3d 1248 (9th Cir. 2017); *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003).

¹¹⁴ Brief of Amicus Curiae League of California Cities After Grant of Rehearing En Banc *ex rel. City of San Diego for Affirmance of the District Court's Order at 1, Lowry*, 858 F.3d 1248, No. 13-56141, 2016 WL 5929183. Dogs have been a part of law enforcement since the early 1900s in the northeastern part of the country, however it was not until the 1960s that their use really began to spread throughout the country. Dorriety, *supra* note 6, at 89. Most, if not all, law enforcement agencies use a continuum in their use-of-force training programs, which helps officers to determine the appropriate level of conduct for a given situation based on a reasonable assessment of the circumstances. See *id.* at 90–91. The continuum typically includes “hard” and “soft” categories based on the likelihood and severity of injury, a range from deadly force to officer presence, and a variety of intermediate categories based on the types of force an officer may employ. See *id.* at 91. Once police dogs became commonplace, agencies included them in the use-of-force continuum and chose to classify them as “less-than-lethal.” See *id.* at 93 (citing *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) (addressing the use of deadly force and police dogs for the first time and holding that the use of police dogs was not deadly force because dog bites are rarely fatal)). The reasoning for classifying them as “less-than-lethal” was that dog bites rarely resulted in death and it gave officers an alternative to using actually deadly force like a gun. *Id.* at 93. Additionally, many police departments have separate policies regarding the use of police dogs as they are often used solely for locating people or items with no force involved. *Id.* at 96–97.

¹¹⁵ See *Lowry v. City of San Diego (Lowry II)*, 818 F.3d 840, 854 (9th Cir. 2016) (reasoning that because the officer's actions were reasonable, the city could not be held liable, which eliminates an evaluation of the city's police dog policy); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978) (explaining that in order to succeed in a § 1983 claim against a city, the public must prove that the constitutional violation was caused pursuant to a “city policy, regulation, custom, or usage”); *Singh, supra* note 15, at 120 (pointing out that resolving § 1983 questions on summary judgment insulates city policy from review).

¹¹⁶ See *Lowry*, 858 F.3d at 1257; Shad E. Christman, Note, *Excessive Force Cases and Incidents of Deadly Police Force Ignite Possibilities for Change in Eighth Circuit § 1983 Law*, 62 S.D. L. REV. 418, 451 (2017) (emphasizing that excessive force disputes are complex and mixed questions of law and fact and that the use of summary judgment in this context weakens the effectiveness of § 1983 claims). The dissent in *Lowry* noted that a reasonable jury could find that the force in this case was severe or moderate, however the *Graham* factors all weigh in favor of the plaintiff if the facts are construed in her favor, meaning that a reasonable jury could have found that the force was unreasonable. See *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Lowry*, 858 F.3d at 1266, 1268 (Thomas, C.J., dissenting) (emphasizing that where a plaintiff has succeeded in raising a dispute of fact in regard to the violation of her Fourth Amendment rights, it is for a jury to determine if there was a violation and whether the government was responsible for that injury).

the office.¹¹⁷ Although the force itself may have been reasonable given the circumstances, the en banc court erred in affirming the district court's exclusion of the plaintiff's testimony and furthermore in granting summary judgment, as this case should have been left to a jury to decide.¹¹⁸ Lowry's testimony, albeit self-serving, was based on her own personal knowledge of the door and the situation, was legally relevant, and consistent and therefore should have been sufficient to raise a dispute of fact sufficient to overcome summary judgment.¹¹⁹ The analysis of the *Graham v. Connor* factors hinges on whether or not the door to the suite was open or closed; inappropriately excluding this evidence significantly affected the *Graham* analysis.¹²⁰ Due to the fact-intensive nature of the reasonableness analysis, the evaluation of the *Graham* factors and the question of reasonableness are not well suited for precise legal determinations and should therefore be left for a jury.¹²¹

Defendants often move for summary judgment in Fourth Amendment excessive force cases and when summary judgment is granted, the plaintiff is prevented from presenting the facts before a jury, whose role it is to evaluate the reasonableness of human behavior.¹²² In both *Chew v. Gates* and *Smith v. City of Hemet*, the question of whether or not the use of a dog was unreasonable was heard by a jury, because not all the *Graham* factors weighed in favor of one party and consequently a reasonable person could have found that the force was unreasonable.¹²³ In contrast, the court in *Miller v. Clark County de-*

¹¹⁷ See *Lowry*, 858 F.3d at 1262–63 (Thomas, C.J., dissenting) (concluding that the exclusion of the plaintiff's testimony denied her the opportunity to demonstrate a dispute of fact and explaining that at the summary judgment stage when there is conflicting testimony, the court cannot weigh one party's evidence against the others, but rather must assume the trust of the evidence put forward by the nonmoving party).

¹¹⁸ See *id.* at 1263–65 (stating that a reasonable jury could have concluded that the government did not have a strong enough interest in using force that would outweigh the severity of the intrusion of the police dog). In the context of summary judgment, when there are no material factual disputes, the objective reasonableness of law enforcement actions is a "pure question of law." *Lowry II*, 818 F.3d at 846 (citing *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011) (quoting *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007))). When there are disputed issues of material fact, the objective reasonableness of conduct becomes a question of fact that is best left to the jury. *Id.* (citing *Torres*, 648 F.3d at 1123).

¹¹⁹ See *Lowry*, 858 F.3d at 1263 (Thomas, C.J. dissenting).

¹²⁰ See *id.* (reasoning that because Lowry's testimony was based on her first-hand knowledge of the situation and her personal memory that she did not prop the door open, her testimony was specific, "legally relevant, and internally consistent" and was sufficient to raise the genuine dispute of material fact necessary to avoid summary judgment).

¹²¹ See *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994) (citing *Barlow v. Ground*, 943 F.3d 1132, 1135 (9th Cir. 1991)) (explaining that due to its fact intensive nature, a determination of reasonableness is not easily decided as a precise question of law and therefore is generally an issue for the jury); Blum, *Qualified Immunity*, *supra* note 35, at 577 (stating that the analysis established in *Graham* consist of questions that should be considered by the jury).

¹²² *Davis*, *supra* note 17, at 294 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

¹²³ See *Smith v. City of Hemet*, 394 F.3d 698, 707 (9th Cir. 2005) (drawing all inferences in favor of the nonmoving party and finding that a reasonable jury could have found that the force in this case,

terminated that based on what the officers knew before the decision, the court found no material dispute of fact and concluded as a matter of law that the force was reasonably necessary given the circumstances because all of the factors overwhelming weighed in favor of the government in the balancing test.¹²⁴ In *Lowry*, not all of the factors weighed in favor of the government.¹²⁵ Whether or not the suspect was resisting does not weigh strongly in favor of either party here and even if the officers were entitled to consider burglary a serious crime, the immediacy of the threat in this case was not quite as clear as the majority suggests, especially if the door was closed.¹²⁶ The *Graham* factors in this case were not clear-cut, therefore it would have been more appropriate to have the jury resolve this issue given that a reasonable jury could have concluded that the force in this case was excessive.¹²⁷

Further, the court's grant of summary judgment prevented the possibility of digging deeper into a constitutional analysis of the use of police dogs in general through the issue of municipal liability.¹²⁸ Unlike in *Chew*, where the court reversed summary judgment on the issue of municipal liability, the majority in *Lowry* did not reach an analysis of municipal liability, which entails an evaluation of the practice as a government policy, because it was barred by the determination on summary judgment that the force used in this particular case was reasonable under the Fourth Amendment.¹²⁹ Even if the officer's ac-

which included pepper spray, rough physical handling, dog bites, and physical assaults, was unreasonable and therefore the defendant was not entitled to summary judgment); *Chew*, 27 F.3d at 1443 (holding that the question of reasonableness in this case must be submitted to a jury because not all of the *Graham* factors supported one party or the other); Brief of Amicus Curiae League of California Cities, *supra* note 114, at 6 (discussing the differences between *Chew*, *Miller*, and *Smith*).

¹²⁴ See *Miller*, 340 F.3d at 968 (concerning officers who were actively pursuing a suspect whom they knew to be hiding in unfamiliar woods, potentially with a weapon, a history of mental illness, and a warrant for his arrest in connection to a felony).

¹²⁵ See *Lowry*, 858 F.3d at 1257–59 (finding that the severity of the crime and the immediate threat to safety factors weighed in favor of the government whereas the evading and resisting arrest factor did not weigh in favor of either party).

¹²⁶ See *id.* at 1265 (Thomas, C.J., dissenting) (noting that if all reasonable inferences were drawn in the plaintiff's favor, a reasonable jury could have found that the officers had reason to be skeptical that a burglary was occurring and would therefore tip the balance of factors in favor of *Lowry*).

¹²⁷ See *id.* at 1248 (majority opinion) (granting summary judgment where all factors either weighed in favor of the government or were neutral); *Lowry II*, 818 F.3d at 840 (reversing summary judgment where the *Graham* factors did not all weigh in favor of one party); *Smith*, 394 F.3d at 698, 703 (reversing summary judgment where the *Graham* factors did not all weigh in favor of one party and a reasonable jury could have determined the force was unreasonable); *Miller*, 340 F.3d at 959 (granting summary judgment where all factors weighed in favor of government); *Chew*, 27 F.3d at 1432 (reversing summary judgment where not all the factors weighed in favor of one party).

¹²⁸ See *Lowry*, 858 F.3d at 1260 (concluding that because the plaintiff did not establish a constitutional injury, she cannot demonstrate liability on the part of the city); *Chew*, 27 F.3d at 1444–45 (reversing summary judgment on grounds that a reasonable jury could have found that the city's policy was responsible for the constitutional injury).

¹²⁹ See *Lowry*, 858 F.3d at 1260 (holding that because the officer's actions were reasonable and therefore constitutional, the city of San Diego could not be held liable under *Monell*, which establishes

tions were reasonable, summary judgment in this case precluded the plaintiff from presenting evidence to the jury to prove that despite a reasonable action here, the city was still at fault for providing its officers with bite-and-hold dogs when less dangerous means were available.¹³⁰ The use of summary judgment in this case and other excessive force cases expands the government's ability to use force against citizens while also diminishing an individual's ability to effectively challenge a forceful intrusion on his or her right to be free from unreasonable seizures.¹³¹ Section 1983 excessive force cases require fact intensive inquiries in order to evaluate the reasonableness of the situation, therefore summary judgment should be used sparingly to prevent excessive insulation of potentially harmful and even unconstitutional government policies and actions.¹³²

CONCLUSION

When evaluating a claim of excessive force using the objective Fourth Amendment reasonableness test established in *Graham*, courts should use summary judgment sparingly. The reasonableness test is a fact-intensive inquiry; unless all the factors weigh overwhelmingly in favor of one party, it is difficult to justify deciding the case as a matter of law. That determination depends on a thorough analysis of the facts, a job traditionally left to the jury. Even if a reasonable jury would have found that the force in this case was moderate and that the force here was reasonable, the dispute of fact raised by the plaintiff was nonetheless enough to create a question as to what a reasonable jury would decide. The Ninth Circuit's decision in this case has created potentially problematic precedent for future canine excessive force cases, raising the bar that plaintiffs will have to meet to successfully demonstrate that the use of canines was unreasonable in their own cases.

NATASHA DOBROTT

municipal liability); Blum, *Qualified Immunity*, *supra* note 35, at 578. If the *Lowry* case had gone to a trial, the jury would have had to consider not only whether this particular use of force was reasonable, but also whether the general policy of "bite and hold" police dogs was constitutional or in violation of the Fourth Amendment. *See Monell*, 436 U.S. at 690 (concluding that Congress did intend for municipalities to be included among persons to whom § 1983 applies); *Lowry*, 858 F.3d at 1255 (establishing that in order to prevail on her claim, plaintiff must have established that "(1) SDPD's use of a dog amounted to an unconstitutional application of excessive force, and (2) the city's policy caused the constitutional wrong").

¹³⁰ *See Chew*, 27 F.3d at 1445 (explaining if plaintiff could prove there was a less dangerous, but effective means of dog training was available, then a jury could decide the city's failure to use that alternative method constituted "unreasonable municipal action" regarding the use of force).

¹³¹ *See Davis*, *supra* note 17, at 302.

¹³² *See Christman*, *supra* note 116, at 451 (noting that summary judgment should also be used sparingly in excessive force cases where the individual officer is the defendant to prevent qualified immunity, a legal protection for government officers in cases like this, from becoming an insurmountable defense).

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