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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10
11 DAVID TOVAR SR., individually; D.T.M., a
12 minor, individually and as co-successor-in-interest
13 to Decedent DAVID TOVAR JR. by and through
14 Guardian Ad Litem, ELLIOT TOVAR; J.M., a
minor, individually and as co-successor-in-interest
to Decedent DAVID TOVAR JR. by and through
Guardian Ad Litem, ELLIOT TOVAR;

15 Plaintiffs,

16 v.

17 CITY OF SAN JOSE, a municipal corporation; and
18 DOES 1-50, inclusive.

19 Defendants.

Case No.: 3:21-cv-2497

COMPLAINT FOR DAMAGES
(42 U.S.C §1983)

JURY TRIAL DEMANDED

20
21 **INTRODUCTION**

22 1. On the morning of Thursday, January 21, 2020, at approximately 10:22 a.m., 27-year-old
23 unarmed David Tovar Jr. was leaving the Villa Fairlane Apartment Complex. As he was leaving,
24 yet-to-be-identified uniformed and plain-clothes San Jose Police Officers armed with military
25 style semi-automatic assault rifles descended upon the occupied apartment complex.

1 2. Mr. Tovar began running away and Officers shot Mr. Tovar several times with their high
2 velocity semi-automatic assault rifles. The Officers never warned Mr. Tovar they intended to
3 use deadly force prior to shooting and killing him. Officers appeared to shoot Mr. Tovar's in the
4 back as he ran for his life.

5 3. The assembled Officers let Mr. Tovar lay on the ground bleeding to death from the
6 gunshot wounds for at least two minutes without providing any medical care. Then an Officer
7 inexplicably unleashed his police canine to attack and maul Mr. Tovar's making certain that Mr.
8 Tovar's last moments were a painful, agonizing and torturous death.



22 4. The shooting and dog mauling was captured on video. It is clear from the video and
23 witnesses that Mr. Tovar did not verbally threaten any of the officers or brandish a gun. In fact,
24 Mr. Tovar was unarmed. Although Police claim they suspected Mr. Tovar of committing one or
25 more felonies many days prior to this contact with the police, he did not pose a deadly threat to

1 the Officers or anyone else at the time he was confronted at the Villa Fairlane Apartment
2 Complex.

3 5. The Officers failed to make any reasonable efforts to bring Mr. Tovar into custody
4 without using deadly force. Instead, Officers recklessly opened fire within mere seconds of
5 approaching Mr. Tovar without using less-lethal weapons or any other de-escalation techniques
6 which endangered the innocent tenants of the apartment complex and ultimately killed Mr.
7 Tovar. Mr. Tovar's father and children bring this lawsuit for the loss of their son and father.

8 **JURISDICTION**

9 6. This action arises under Title 42 of the United States Code, Section 1983. Title 28 of the
10 United States Code, Sections 1331 and 1343 confers jurisdiction upon this Court. The unlawful
11 acts and practices alleged herein occurred in SAN JOSE, California, which is within this judicial
12 district. Title 28 United States Code Section 1391(b) confers venue upon this Court.

13
14 **PARTIES**

15 7. Plaintiff DAVID TOVAR, SR., is a competent adult and sues in his individual capacity
16 for the loss of Decedent DAVID TOVAR JR. Plaintiff TOVAR is the biological father of
17 Decedent.

18 8. PLAINTIFFS D.T.M. and J.M. are minors who bring their claims both in their individual
19 capacity and as co-successors-in-interest to Decedent DAVID TOVAR JR. by and through their
20 guardian ad litem ELLIOT TOVAR. Minors D.T.M. and J.M. are the biological children of
21 Decedent. Decedent DAVID TOVAR JR. died unmarried. Plaintiffs D.T.M. and J.M. bring
22 these claims individually and on behalf of Decedent DAVID TOVAR JR. pursuant to California
23 Code of Civil Procedure §§377.20 et seq. and 377.60 et seq., which provide for survival and
24 wrongful death actions. The wrongful death and survival claims survive the death of DAVID
25 TOVAR JR.; both arise from the same wrongful act or neglect of another; and such claims are

1 properly joined pursuant to California Code of Civil Procedure §377.62. Plaintiffs also bring
2 their claims on the basis of 42 USC §§1983 and 1988, the United States Constitution, and
3 federal civil rights law. Plaintiffs also bring these claims as Private Attorney General, to
4 vindicate not only their rights, but also others' civil rights of great importance.

5 9. Defendant SAN JOSE ("Defendant City") is and at all times herein mentioned a
6 municipal entity duly organized and existing under the laws of the State of California that
7 manages and operates the SAN JOSE POLICE DEPARTMENT.

8 10. Plaintiffs are ignorant of the true names and/or capacities of defendants sued herein as
9 DOES 1 through 50, inclusive, and therefore sue said defendants by such fictitious names.
10 Plaintiffs will amend this complaint to allege the true names and capacities when ascertained.
11 Plaintiffs believe and allege that each of the DOE defendants is legally responsible and liable for
12 the incident, injuries and damages hereinafter set forth. Each defendant proximately caused
13 injuries and damages because of their negligence, breach of duty, negligent supervision,
14 management or control, violation of public policy, and false arrests. Each defendant is liable for
15 his/her personal conduct, vicarious or imputed negligence, fault, or breach of duty, whether
16 severally or jointly, or whether based upon agency, employment, ownership, entrustment,
17 custody, care or control or upon any other act or omission. Plaintiffs will ask leave to amend
18 this complaint subject to further discovery.

19
20 11. In doing the acts alleged herein, Defendants and each of them, acted within the course
21 and scope of their employment for CITY OF SAN JOSE.

22 12. In doing the acts and/or omissions alleged herein, Defendants, and each of them, acted
23 under color of authority and/or under color of law.

24 13. Due to the acts and/or omissions alleged herein, Defendants, and each of them, acted as
25

1 the agent, servant, and employee and/or in concert with each of said other Defendants herein.

2 **FACTUAL ALLEGATIONS**

3 14. On Thursday January 21, 2020, at around 10:22 a.m., 27-year-old unarmed David Tovar
4 Jr. was leaving the Villa Fairlane Apartment Complex. As he was leaving, yet-to-be-identified
5 uniformed and plain-clothes officers armed with semi-automatic military style assault rifles
6 descended upon the occupied apartment complex.

7 15. Mr. Tovar was walking along the complex's second-story walkway when Officers
8 startlingly entered the ground floor courtyard. The Officers surrounded Mr. Tovar and pointed
9 their semi-automatic assault rifles at him which prompted him to run for his life. As Mr. Tovar
10 ran across the walkway above the officers, he was not holding a gun, making any threatening
11 movements, gestures or statements. Indeed, he was not even looking toward any of the officers.

12 16. Within seconds of Mr. Tovar running away from the officers and without any warning,
13 several officers gunned him down: shooting him in his front, side and back. The shooting was
14 captured on video and the video shows at least three yet-to-be-identified San Jose Police
15 Officers opened fire on Mr. Tovar with their semi-automatic assault rifles..

16 17. Officers continued shooting at Mr. Tovar even while he was laying face down on the
17 ground obviously wounded and incapacitated. After two minutes of Mr. Tovar laying
18 motionless and bleeding on the ground, officers shockingly released a canine to attack and maul
19 Mr. Tovar's defenseless and dying body.

20 18. Mr. Tovar never verbally threatened any of the officers or brandished a gun. Although
21 Mr. Tovar was suspected of being involved in the crimes many days prior to this police contact,
22 he did not pose a deadly threat to the Officers or anyone else at the time he was confronted and
23 killed at the Villa Fairlane Apartment Complex.

1 19. Officers failed to make any reasonable efforts to bring Mr. Tovar into custody without
2 using deadly force. Instead, Officers recklessly opened fire within mere seconds of approaching
3 Mr. Tovar without using less lethal weapons or any other de-escalation techniques.

4 20. Officers rapidly and recklessly fired their rifles into a fully occupied apartment complex
5 during the morning hours of a work week while families were foreseeably inside their
6 apartments, endangering everyone in the complex.



DAMAGES

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2 21. As a direct and proximate result of each of the Defendant’s unreasonable and excessive
3 force, Decedent and Plaintiffs suffered injuries, emotional distress, fear, terror, anxiety,
4 humiliation, and loss of sense of security, dignity, and pride as United States Citizens.

5 22. As a direct and proximate result of each Defendant’s acts and/or omissions as set forth
6 above, Plaintiffs sustained the following injuries and damages, past and future, among others.

- 7 a. Wrongful death of DAVID TOVAR JR.;
- 8 b. Hospital and medical expenses;
- 9 c. Coroner’s fees, funeral and burial expenses;
- 10 d. Loss of familial relationships, including loss of love, companionship, comfort,
11 affection, society, services, solace, and moral support;
- 12 e. Pain and Suffering, including emotional distress (by all Plaintiffs, based on
13 individual §1983 claim for loss of familial association);
- 14 f. David Tovar Jr.’s conscious pain and suffering, pursuant to federal civil rights law
15 (Survival claims);
- 16 g. DAVID TOVAR JR’s loss of life, pursuant to federal civil rights law; and
- 17 h. Violation of constitutional rights;
- 18 i. All damages, penalties, and attorneys’ fees and costs recoverable under 42 U.S.C.
19 §§ 1983, 1988; California Civil Code §§ 52, 52.1, California Code of Civil
20 Procedure § 1021.5, and as otherwise allowed under California and United States
21 statutes, codes, and common law.
22

23 23. The conduct of Defendants CITY OF SAN JOSE and DOES 1-50 was malicious,
24 wanton, oppressive, and in reckless disregard of the rights and safety of DAVID TOVAR JR.,
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1 Plaintiffs, and the public. Plaintiffs are therefore entitled to an award of punitive damages
2 against Defendant DOES 1-50.

3 **CAUSES OF ACTION**

4 **FIRST CAUSE OF ACTION**

5 **(Fourth Amendment – Excessive Force under 42 U.S.C. Section 1983)**
6 *(Plaintiffs J.M. and D.T.M. as successors-in-interest to Decedent's survival claim against*
7 *DOES 1-25)*

8 24. Plaintiffs hereby re-allege and incorporate by reference each and every paragraph of
9 this Complaint.

10 25. When Defendant Does Police Officers shot Decedent, Decedent was not a credible threat,
11 unarmed and outnumbered. Defendants' conduct deprived Decedent of his right to be secure in
12 his person against unreasonable searches and seizures as guaranteed to Decedent under the
13 Fourth Amendment to the United States Constitution.

14 26. As a result of this misconduct, Defendant Does are liable for Decedent's injuries.

15 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

16 **SECOND CAUSE OF ACTION**

17 **Violation of Plaintiff's 14th Amendment Rights**
18 *(Plaintiffs individually and as co-successors-in-interest against DOES 1-25)*

19 27. Plaintiffs hereby re-allege and incorporate each and every paragraph in this Complaint
20 as fully set forth here.

21 28. Doe Defendants use of deadly force when they shot Mr. Tovar in the back as he ran for
22 his life was done without providing a verbal warning. The Defendant Doe Officers use of deadly
23 force was in reckless disregard for Decedent's right to be free from excessive force.

24 Furthermore, the Officers' decision to shoot Mr. Tovar several times as he ran away shocks the
25 conscience. Once Mr. Tovar fell to the ground and was bleeding to death, the officers failed to

1 Police Department exhibits a pattern and practice of using excessive force and misconduct
2 against citizens and despite these incidents, none of the Officers are ever found in violation of
3 department policy or disciplined, even under the most questionable of circumstances. CITY OF
4 SAN JOSE Police Department's failure to discipline or retrain the Defendant Officers is
5 evidence of an official policy, entrenched culture and posture of deliberate indifference toward
6 protecting citizen's rights and the resulting deaths and injuries is a proximate result of the CITY
7 OF SAN JOSE Police Department's failure to properly supervise its Officers and ratify their
8 unconstitutional conduct. Plaintiffs is informed, believe and therein allege that the following
9 instances are examples of the CITY OF SAN JOSE'S pattern and practice of condoning
10 misconduct, excessive and deadly force by failure to discipline:

- 11 a. San Jose Police shot and killed Anthony Nunez on July 4, 2016 on his front
12 porch during a mental health crisis in which he had tried to commit suicide. A
13 jury found the two shooting officers, San Jose Officers Michael Santos and
14 Anthony Vizzusi, used excessive in July of 2019. Neither officer was
15 disciplined and one of them was promoted.¹
- 16 b. San Jose Police shot unarmed 24-year-old Jennifer Vasquez on Christmas Day,
17 December 25, 2018 fourteen times in her head, chest, arm and shoulder.
18 Officers had mistaken Ms. Vasquez car for that of a wanted criminal suspect's
19 car, chased her down and shot her. None of the officers were disciplined.²
- 20 c. On May 2, 2018 San Jose Police Officer Vieira-Ribeiro responded to a call of a
21 possible fight at the Eastridge Mall involving two suspects. Ofc. Vieira-Ribeiro
22 spotted and followed two running suspects onto a dirt bicycle path then ran over
23 suspect Andy Martin with his vehicle crushing his pelvis. Ofc. Veira-Ribeiro
24 then backed over Andy Martin a second time, fracturing his leg. Ofc. Vieira-
25 Ribeiro was not disciplined as a result. Martin v. San Jose, 3:19-cv-01227-
EMC.

32. Despite having such notice, Plaintiffs are informed and believe and thereon allege that
Defendants, and Does 1-50, and/or each of them, approved, ratified, condoned, encouraged

¹ "2 Officers Used Excessive Force in Fatal Shooting of 18-Year-Old"
<https://www.nbcbayarea.com/news/local/2-officers-used-excessive-force-in-fatal-shooting-of-18-year-old/151849/>

² "San Jose Police Cleared of Wrongdoing in Fatal Shooting of Mistaken Suspect on Christmas Day"
<https://www.nbcbayarea.com/news/local/san-jose-police-cleared-of-wrongdoing-in-fatal-shooting-of-mistaken-suspect-on-christmas-day/104980/>

1 and/or tacitly authorized the continuing pattern and practice of misconduct and/or civil rights
2 violations by said officers. SAN JOSE Police Officers shot unarmed Decedent DAVID TOVAR
3 JR unlawfully then set a police dog on him while he bled to death.

4 33. Plaintiffs are further informed and believe and thereon allege that as a result of the
5 deliberate indifference, reckless and/or conscious disregard of the misconduct by Defendants
6 and Does 1-50, and/or each of them, encouraged these officers to continue their course of
7 misconduct, resulting in the violation of Decedent's and Plaintiff's rights as alleged herein.

8 34. As against Defendant CITY OF SAN JOSE, DOES 1-50 in his/their capacity as police
9 officer(s) for the City of SAN JOSE, Plaintiffs further alleges that the acts and/or omissions
10 alleged in the Complaint herein are indicative and representative of a repeated course of conduct
11 by members of the CITY OF SAN JOSE POLICE DEPARTMENT tantamount to a custom,
12 policy or repeated practice of condoning and tacitly encouraging the abuse of police authority,
13 and disregard for the constitutional rights of citizens. This is reinforced by the fact that the
14 officers in the aforementioned excessive force incidents as well as the one underlying this
15 complaint have not been disciplined and/or re-trained.

16 35. The unconstitutional actions and/or omissions of Does 1-50, as well as other officers
17 employed by or acting on behalf of Defendant CITY OF SAN JOSE on information and belief,
18 were pursuant to the following customs, policies, practices, and/or procedures of the SAN JOSE
19 Police Department stated in the alternative, which were directed, encouraged, allowed, and/or
20 ratified by policy making officers for CITY OF SAN JOSE:
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- 23 a. To cover-up violations of constitutional rights by any or all of the
24 following:
 - 25 i. by failing to properly investigate and/or evaluate complaints or
incidents of excessive and unreasonable force;

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- ii. by ignoring and/or failing to properly and adequately investigate and discipline unconstitutional or unlawful police activity; and
- iii. by allowing, tolerating, and/or encouraging police officers to: fail to file complete and accurate police reports; file false police reports; make false statements; intimidate, bias and/or “coach” witnesses to give false information and/or to attempt to bolster officers’ stories; and/or obstruct or interfere with investigations of unconstitutional or unlawful police conduct, by withholding and/or concealing material information;
- b. To allow, tolerate, and/or encourage a “code of silence” among law enforcement officers and police department personnel, whereby an officer or member of the department does not provide adverse information against a fellow officer or member of the department; and,
- c. To use or tolerate inadequate, deficient, and improper procedures for handling, investigating, and reviewing complaints of officer misconduct made under California Government Code § 910 et seq.;
- d. To fail to have and enforce necessary, appropriate, and lawful policies, procedures, and training programs to prevent or correct the unconstitutional conduct, customs, and procedures described in this Complaint, with deliberate indifference to the rights and safety of Plaintiffs and the public, and in the face of an obvious need for such policies, procedures, and training programs to prevent recurring and foreseeable violations of rights of the type described herein.

36. Defendants CITY OF SAN JOSE and DOES 26-50 failed to properly train, instruct, monitor, supervise, evaluate, investigate, and discipline Does 1-25, and other SJPD personnel, with deliberate indifference to Plaintiffs and Decedent’s constitutional rights. Plaintiffs and Decedent’s rights were thereby violated as a result of the deliberate indifference as described above.

37. The unconstitutional actions and/or omissions of Defendant Does 1-25, and other SJPD personnel, as described above, were approved, tolerated and/or ratified by policy-making officers for the SJPD. Plaintiffs are informed and believe and thereupon allege, the details of this incident have been revealed to the authorized policy makers within the City of SAN JOSE

1 and the SJP, and that such policy makers have direct knowledge of the fact that the killing of
2 DAVID TOVAR JR. was not justified, but rather represented an unconstitutional use of
3 unreasonable, excessive, and deadly force. Notwithstanding this knowledge, the authorized
4 policy makers within the City of SAN JOSE and SJP have approved the yet-to-be-identified
5 Officers' shooting of DAVID TOVAR JR., and have made a deliberate choice to endorse the
6 shooting of DAVID TOVAR JR and the basis for that shooting. By doing so, the authorized
7 policy makers within the City of SAN JOSE and the SJP have shown affirmative agreement
8 with the actions of Does 1-25, and have ratified the unconstitutional acts of Does 1-25.

9 38. The aforementioned customs, policies, practices, and procedures, the failures to properly
10 and adequately train, instruct, monitor, supervise, evaluate, investigate, and discipline, as well as
11 the unconstitutional orders, approvals, ratification and toleration of wrongful conduct of
12 Defendant City of SAN JOSE and Does 26-50, were a moving force and/or a proximate cause of
13 the deprivations of Plaintiff's clearly-established and well-settled constitutional rights in
14 violation of 42 U.S.C. §1983, as more fully set forth in Cause of Action 1-3, above.

15 39. Defendants subjected Plaintiffs and Decedent to their wrongful conduct, depriving
16 Plaintiffs and Decedent of rights described herein, knowingly, maliciously, and with conscious
17 and reckless disregard for whether the rights and safety of Plaintiffs and Decedent and others
18 would be violated by their acts and/or omissions.

19 40. As a direct and proximate result of the unconstitutional actions, omissions, customs,
20 policies, practices and procedures of Defendants City of SAN JOSE and Does 26-50 as
21 described above, plaintiffs sustained serious and permanent injuries and are entitled to damages,
22 penalties, costs and attorneys' fees as set forth in paragraphs 21-23 above.

23 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.
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JURY DEMAND

41. Plaintiffs hereby demand a jury trial in this action.

PRAYER

WHEREFORE, Plaintiffs pray for relief, against each and every Defendant, jointly and severally, as follows:

1. For general damages in a sum to be proven at trial;
2. For special damages, including but not limited to, past, present and/or future wage loss, income and support, medical expenses and other special damages in a sum to be determined according to proof;
3. For punitive damages against DOES 1-25 in a sum according to proof;
4. All other damages, penalties, costs, interest, and attorney fees as allowed by 42 U.S.C. §§ 1983 and 1988, and as otherwise may be allowed by California and/or federal law;
5. For cost of suit herein incurred; and
6. For such other and further relief as the Court deems just and proper.

Date: April 7, 2021

Respectfully submitted,

**POINTER & BUELNA, LLP
LAWYERS FOR THE PEOPLE**


ADANTÉ D. POINTER
COUNSEL FOR PLAINTIFFS