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14 **UNITED STATES DISTRICT COURT**  
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 K'AUN GREEN; an individual )

Case No.: 5:22-cv-02174-NC

17 Plaintiff, )

18 v. )

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

19 CITY OF SAN JOSE, a municipal )  
20 corporation; MARK MCNAMARA, in his )  
21 individual capacity as a law enforcement )  
22 officer for CITY OF SAN JOSE; )

JURY TRIAL DEMANDED

23 ANTHONY MATA, in his individual )  
24 capacity as a law enforcement officer for )  
25 CITY OF SAN JOSE; and DOES 1-50, )  
26 inclusive.

Defendants.

**INTRODUCTION**

1. Mr. K'aun Green is a 20-year-old, three-time high school state football championship quarterback and current student-athlete at Contra Costa College in Pinole, California. At the time of this incident, he was the recipient of multiple scholarship officers to continue playing football at Division 1 Universities. In addition to being a dutiful son and loyal friend he is now, by all reasonable accounts— a hero.

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1 2. During the early morning hours of March 27, 2022, K'aun was sitting in La Victoria  
2 restaurant in San Jose when he was approached by an unknown man who was showing signs of  
3 being highly intoxicated. The man became aggressive, verbally challenged K'aun to fight and  
4 punched K'aun in the face. The two men began to wrestle and fell to the floor.

5 3. A second man who was apparently friends with K'aun's initial attacker, pulled out a gun  
6 and pointed the gun at K'aun and the other customers in the restaurant. K'aun bravely sprung  
7 into action. He disarmed the gunman to protect not only his life but the lives of the other  
8 customers in the restaurant.

9 4. The two assailants and a third person rushed K'aun. They pulled on him and demanded  
10 that he give them the gun back. Mr. Green backed away from the group of attackers towards the  
11 front door of the restaurant all the while pleading for the attackers to stop. When K'aun reached  
12 the front door, one of the attackers reached out and grabbed K'aun's clothes and refused to let  
13 go. K'aun slipped out of the attacker's grasp, stepped back and propped open the front door  
14 with his left hand.

15 5. Unbeknownst to K'aun, 5-6 San Jose police officers rushed up to the restaurant's front  
16 steps while he was exiting the door with his back towards the approaching officers. As K'aun  
17 focused on keeping his attackers from taking the gun, he backed out of the door with the pistol  
18 pointed harmlessly in the air.



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 2 6. Seconds later, officers did provide orders to “drop the gun” but Defendant McNamara  
 3 never provided K’au the opportunity to comply and shot K’au four times simultaneous with  
 4 the commands. Defendant McNamara never warned K’au he would shoot or even provided  
 5 him any opportunity to comply with the orders to drop the gun before firing. In fact,  
 6 surveillance captured K’au Green in the **act of complying** with those orders – dropping the  
 7 gun and raising his hands in surrender – when Defendant McNamara inexplicably shot him four  
 8 times simultaneous to those orders while the five other SJPD officers standing beside him  
 9 **tellingly never opened fire** – because they saw him complying or were giving him the  
 10 opportunity to comply. Certainly those five officers did not perceive an immediate threat of  
 11 serious bodily harm from K’au that merited discharging their firearm despite standing right  
 12 next to Defendant McNamara.



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 24 7. Paramedics rushed K’au to a nearby hospital. There, he underwent emergency surgery  
 25 to treat the gunshot wounds he sustained to his abdomen, leg, and arm. Doctors were forced to  
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1 remove a portion of K'aun's intestines along with multiple bullet shrapnel that had ripped into  
2 his body. K'aun hopes of reaching his dream of playing Division 1 Football and drafted into the  
3 National Football League are in jeopardy. He faces a long and uncertain road to regain the life  
4 he once enjoyed. Nevertheless, he is as determined to fight for his future as he was to fight for  
5 the lives of everyone in the restaurant on that fateful night.



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- 16 8. Hours after shooting K'aun Green, Defendant McNamara proceed to text with fellow  
17 SJPD officers referring to K'aun Green n-word and using other racial slurs to describe  
18 him. Defendant McNamara also joked about shooting K'aun Green and wanting to shoot  
19 more. Defendant McNamara likened the City of San Jose to the "Wild West" and implied  
20 that he shot K'aun Green simply because K'aun is black and possessed a firearm.
- 21 9. Approximately a year after the shooting, Defendant McNamara continued to text with  
22 fellow SJPD officers referring to K'aun Green as the n-word, using other racial slurs and  
23 vile stereotypes to describe him. Defendant McNamara stated that "I hate black people"  
24 making it apparent that his motivation to shoot and kill K'aun Green was based on race.

25 **JURISDICTION**

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

7 11. Plaintiff K'AUN GREEN, (hereinafter "Plaintiff," or "Mr. Green") is a competent adult  
8 of majority age and a resident of California.

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

12 13. Defendant MARK MCNAMARA, in his individual capacity as a law enforcement  
13 officer, chief of police and final policy maker for CITY OF SAN JOSE, who was and at all  
14 times herein mentioned was employed by the CITY OF SAN JOSE POLICE DEPARTMENT.

15 14. Defendant ANTHONY MATA, in his individual capacity as a law enforcement officer  
16 for CITY OF SAN JOSE, who was and at all times herein mentioned was employed by the  
17 CITY OF SAN JOSE POLICE DEPARTMENT.

18 15. Plaintiff is ignorant of the true names and/or capacities of defendants sued herein as  
19 DOES 1 through 50, inclusive, and therefore sue said defendants by such fictitious names.  
20 Plaintiff will amend this complaint to allege the true names and capacities when ascertained.  
21 Plaintiff believes and alleges that each of the DOE defendants is legally responsible and liable  
22 for the incident, injuries and damages hereinafter set forth. Each defendant proximately caused  
23 injuries and damages because of their negligence, breach of duty, negligent supervision,  
24 management or control, violation of public policy, and false arrests. Each defendant is liable for  
25 his/her personal conduct, vicarious or imputed negligence, fault, or breach of duty, whether  
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1 severally or jointly, or whether based upon agency, employment, ownership, entrustment,  
2 custody, care or control or upon any other act or omission. Plaintiff will ask leave to amend this  
3 complaint subject to further discovery.

4 16. In doing the acts alleged herein, Defendants, Does and each of them, acted within the  
5 course and scope of their employment for the CITY OF SAN JOSE.

6 17. In doing the acts and/or omissions alleged herein, Defendants, and each of them, acted  
7 under color of authority and/or under color of law.

8 18. Due to the acts and/or omissions alleged herein, Defendants, and each of them, acted as  
9 the agent, servant, and employee and/or in concert with each of said other Defendants herein

10 19. On or about April 11, 2022, Plaintiff filed a timely government tort claim against City of  
11 San Jose. On or about May 24, 2022, City of San Jose rejected the government tort claim.

12 **FACTUAL ALLEGATIONS**

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14 20. On March 27, 2022, at around 3 am in the morning Plaintiff, 20-year-old, K'aun Green,  
15 and a few friends were sitting in La Victoria Taqueria in San Jose, California. The group was  
16 patiently waiting for their food when a stranger approached K'aun and began to verbally harass  
17 him. K'aun tried to ignore the man.

18 21. The stranger, who unbeknownst to K'aun was there with several other people, suddenly  
19 attacked K'aun, punching him in the face. As K'aun desperately tried to defend himself, one of  
20 the attacker's friends pulled out a gun and pointed it at K'aun and the other customers in the  
21 restaurant. As the fracas continued, K'aun miraculously managed to disarm the second man.  
22 Once K'aun wrestled control of the gun away from his attackers, he backed away to create  
23 distance between himself and his attackers. K'aun's efforts not only served to protect his life but  
24 the lives of the restaurant's other patrons as well.  
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1 22. K'aun continued to move away from his attackers as he backed towards the front door of  
 2 the restaurant. Nevertheless, the three attackers chased after and lunged at K'aun in efforts to  
 3 regain control of the gun. Mr. Green fended them off with one hand while simultaneously  
 4 holding the gun up and away from their grasp in his left hand.

5 23. Unbeknownst to K'aun, 5-6 San Jose police officers rushed to the front steps of the  
 6 restaurant as K'aun was exiting the door with his back towards the Officers. As K'aun focused  
 7 on keeping his attackers from taking the gun, he backed out of the door with the pistol pointed  
 8 in the air.



17 24. Seconds later, officers did provide orders to “drop the gun” but Defendant McNamara  
 18 never provided K'aun the opportunity to comply and shot K'aun four times simultaneous with  
 19 the commands. Defendant McNamara never warned K'aun he would shoot or even provided  
 20 him any opportunity to comply with the orders to drop the gun before firing. In fact,  
 21 surveillance captured K'aun Green in the **act of complying** with those orders – dropping the  
 22 gun and raising his hands in surrender – when Defendant McNamara inexplicably shot him four  
 23 times simultaneous to those orders while the five other SJPD officers standing beside him  
 24 **tellingly never opened fire** – because they saw him complying or were giving him the  
 25 opportunity to comply. Certainly, those five officers did not perceive an immediate threat of  
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1 serious bodily harm from K'aun that merited discharging their firearm despite standing right  
2 next to Defendant McNamara.

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4 25. The officers' bullets ripped through K'aun's body striking K'aun twice in the arm, once



14 in his knee and once in the abdomen. Immediately after he was shot, the stunned onlookers  
15 began to scream at the Officers, demanding to know why they shot K'aun since it was obvious  
16 he did not pose an imminent deadly threat at the time the lone Officer shot him. Furthermore the  
17 five officers standing right next Defendant McNamara saw that K'aun Green did not pose an  
18 imminent deadly threat at the time and declined to fire their weapon.

19  
20 26. Incredulously, the Officers handcuffed K'aun behind his back which further complicated  
21 his ability to breathe and aggravated his injuries. Although K'aun was scared he was going to  
22 lose consciousness and die, he somehow managed to maintain his composure and resisted going  
23 into shock. He repeatedly begged for the officers, EMTs or anyone to call his mother – all to no  
24 avail.

1 22. Mr. Green was rushed to a nearby hospital where he underwent emergency surgery.  
2 Doctors treated Mr. Green for his gunshots which necessitated they remove a piece of his  
3 intestines.  
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15 23. Even after officers learned K'aun had been the hero, they continued to treat him like a  
16 criminal. They handcuffed him to the hospital bed and prevented him from contacting anyone.  
17 K'aun's parents were worried sick since they only found out their son was shot after one of his  
18 friends informed them after police had detained and interrogated the friend. K'aun's family  
19



1 quickly called San Jose Police Department and local hospitals in a frantic effort to find out  
2 whether their son was dead or alive. After being given the run around for over a day, the police  
3 finally confirmed he was alive but being held in police custody in a hospital. K'aun's parent  
4 were finally able to visit him on Tuesday, May 29, 2022, nearly three days after the incident.

5 24. Only after reports from various media outlets that the officers shot the wrong person did  
6 the San Jose Police Department feel compelled to explain why they shot the hero, not the  
7 gunman.

8 25. Tellingly, K'aun was never charged with any crimes. As a result of the officers'  
9 excessive force K'aun suffered bullet and shrapnel wounds to his elbow, knee, and abdomen,  
10 requiring multiple surgeries. At the time of this tragic yet avoidable incident, K'aun was a  
11 junior college student athlete who was being courted to play college football by many Division  
12 1 Universities. In fact, he was projected to be drafted and become an NFL player given his  
13 athletic ability prowess and championship pedigree. K'aun is facing a long and uncertain road  
14 to recover the life he once lived, the sport he once enjoyed and dream he was moving ever  
15 closer to making his reality. Defendant McNamara's rash decision to shoot K'aun several times,  
16 who had done nothing wrong, has potentially jeopardized the young man's promising future.



1 26. Hours after shooting K’aun Green, Defendant McNamara proceed to text with fellow  
2 SJPD officers referring to K’aun Green n-word and using other racial slurs to describe him.  
3 Defendant McNamara also joked about shooting K’aun Green and wanting to shoot more.  
4 Defendant McNamara likened the City of San Jose to the “Wild West” and implied that he shot  
5 K’aun Green simply because K’aun is black and possessed a firearm.

6 27. Approximately a year after the shooting, Defendant McNamara continued to text with  
7 fellow SJPD officers referring to K’aun Green as the n-word, using other racial slurs and vile  
8 stereotypes to describe him. Defendant McNamara stated that “I hate black people” making it  
9 apparent that his motivation to shoot and kill K’aun Green was based on race.

10 **DAMAGES**

11 28. As a consequence of Defendant’s violations of Plaintiff’s federal civil rights under 42  
12 U.S.C. §1983 and the Fourth Amendment, Plaintiff was physically, mentally, emotionally, and  
13 financially injured and damaged as a proximate result of Defendants' wrongful conduct.

14 29. Plaintiff found it necessary to engage the services of private counsel to vindicate her  
15 rights under the law. Plaintiff is therefore entitled to an award of attorneys’ fees and/or costs  
16 pursuant to statute(s) in the event that he is the prevailing party in this action under 42 U.S.C.  
17 §§ 1983 and 1988. Plaintiff is also entitled to punitive damages under 42 U.S.C. §§ 1983 and  
18 1988.  
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21 **CAUSES OF ACTION**

22 **FIRST CAUSE OF ACTION**

23 **(Fourth Amendment – Excessive Force under 42 U.S.C. Section 1983)**  
24 *(Plaintiff against MCNAMARA and DOES 1-25)*

25 30. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of  
26 this Complaint.

1 31. When Defendant McNamara shot Plaintiff, Plaintiff was not a credible threat and was in  
2 the act of complying with officers. Defendant’s conduct deprived Plaintiff of his right to be  
3 secure in his person against unreasonable searches and seizures as guaranteed to Plaintiff under  
4 the Fourth Amendment to the United States Constitution.

5 32. As a result of this misconduct, Defendant is liable for Plaintiff’s injuries.

6 WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

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8 **SECOND CAUSE OF ACTION**  
9 **(Supervisory and Municipal Liability for Unconstitutional Custom or Policy (Monell)–**  
10 **42 U.S.C. section 1983)**  
11 *(Plaintiff against Defendant ANTHONY MATA, CITY OF SAN JOSE and DOES 26-50)*

12 33. Plaintiff hereby re-alleges and incorporates each and every paragraph in this Complaint  
13 as fully set forth here.

14 34. Plaintiff is informed and believes and therein alleges that the CITY OF SAN JOSE  
15 Police Department exhibits a pattern and practice of using excessive force and misconduct  
16 against citizens and despite these incidents, none of the Officers are ever found in violation of  
17 department policy or disciplined, even under the most questionable of circumstances. CITY OF  
18 SAN JOSE Police Department and Chief of Police Defendant ANTHONY MATA’s failure to  
19 discipline or retrain the Defendant Officer is evidence of an official policy, entrenched culture  
20 and posture of deliberate indifference toward protecting citizen’s rights and the resulting deaths  
21 and injuries is a proximate result of the CITY OF SAN JOSE Police Department and Chief of  
22 Police Defendant ANTHONY MATA’s failure to properly supervise its Officers and ratify their  
23 unconstitutional conduct. Plaintiff is informed, believes and therein alleges that the following  
24 instances are examples of the CITY OF SAN JOSE’S pattern and practice of condoning  
25 misconduct, excessive and deadly force by failure to discipline:

- 26 a. San Jose Police shot and killed Anthony Nunez on July 4, 2016 on his front porch during a mental health crisis in which he had tried to commit suicide. A

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1 jury found the two shooting officers, San Jose Officers Michael Santos and  
2 Anthony Vizzusi, used excessive in July of 2019. Neither officer was disciplined  
and one of them was promoted.<sup>1</sup>

- 3 b. San Jose Police shot unarmed 24-year-old Jennifer Vasquez on Christmas Day,  
4 December 25, 2018 fourteen times in her head, chest, arm and shoulder. Officers  
had mistaken Ms. Vasquez’s car for that of a wanted criminal suspect’s car,  
5 chased her down and shot her. None of the officers were disciplined.<sup>2</sup>
- 6 c. On May 2, 2018 San Jose Police Officer Vieira-Ribeiro responded to a call of a  
possible fight at the Eastridge Mall involving two suspects. Ofc. Vieira-Ribeiro  
7 spotted and followed two running suspects onto a dirt bicycle path then ran over  
suspect Andy Martin with his vehicle crushing his pelvis. Ofc. Veira-Ribeiro  
8 then backed over Andy Martin a second time, fracturing his leg. Ofc. Vieira-  
Ribeiro was not disciplined as a result of this incident resulting in a \$6 million  
9 jury verdict. Martin v. San Jose, 3:19-cv-01227-EMC.
- 10 d. On June 21, 2020, San Jose officers shot and killed a David Tovar, Jr. in the  
back while he ran away then sicced a police K9 on him while he bled to death.  
11 Tovar v. San Jose, 5:21-cv-02497-EJD
- 12 e. On August 31, 2022, a jury found a San Jose officer used excessive force when  
he shot and killed Jacob Dominguez in 2017 based on the disputed fact whether  
13 Dominguez was surrendering a weapon when the officer shot.<sup>3</sup>

14 35. Despite having such notice, Plaintiff is informed and believes and thereon alleges that  
15 Defendants MATA, CITY and Does 1-50, and/or each of them, approved, ratified, condoned,  
16 encouraged and/or tacitly authorized the continuing pattern and practice of misconduct and/or  
17 civil rights violations by said officers. A San Jose Police Officer shot Plaintiff K’AUN GREEN  
multiple times after he bravely disarmed a gunman and was not threatening anyone.

18 36. Plaintiff is further informed and believe and thereon allege that as a result of the  
19 deliberate indifference, reckless and/or conscious disregard of the misconduct by Defendant and  
20 Does 1-50, and/or each of them, encouraged these officers to continue their course of  
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23 <sup>1</sup> “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/>

24 <sup>2</sup> “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/>

25 <sup>3</sup> “San Jose: Federal jury finds police officer liable for excessive force in fatal 2017 shooting”  
26 <https://www.mercurynews.com/2022/08/31/san-jose-federal-jury-finds-police-officer-liable-for-excessive-force-in-fatal-2017-shooting/>

1 misconduct, resulting in the violation of Plaintiff’s rights as alleged herein.

2 37. As against Defendant CITY OF SAN JOSE, DOES 1-50 in his/their capacity as police  
3 officer(s) for the City of SAN JOSE, Plaintiff further alleges that the acts and/or omissions  
4 alleged in the Complaint herein are indicative and representative of a repeated course of conduct  
5 by members of the CITY OF SAN JOSE POLICE DEPARTMENT tantamount to a custom,  
6 policy or repeated practice of condoning and tacitly encouraging the abuse of police authority,  
7 and disregard for the constitutional rights of citizens. This is reinforced by the fact that the  
8 officers in the aforementioned excessive force incidents as well as the one underlying this  
9 complaint have not been disciplined and/or re-trained. Furthermore Defendant Chief of Police  
10 MATA has made statements in the media and public that appeared to endorse and support  
11 Defendant McNamara’s excessive force.  
12

13 38. The unconstitutional actions and/or omissions of Does 1-50, as well as other officers  
14 employed by or acting on behalf of Defendant CITY OF SAN JOSE on information and belief,  
15 were pursuant to the following customs, policies, practices, and/or procedures of the SAN JOSE  
16 Police Department stated in the alternative, which were directed, encouraged, allowed, and/or  
17 ratified by policy making officers for CITY OF SAN JOSE – particularly Defendant MATA:  
18

- 19 a. To cover-up violations of constitutional rights by any or all of the  
20 following:
- 21 i. by failing to properly investigate and/or evaluate complaints or  
22 incidents of excessive and unreasonable force;
  - 23 ii. by ignoring and/or failing to properly and adequately investigate and  
24 discipline unconstitutional or unlawful police activity; and
  - 25 iii. by allowing, tolerating, and/or encouraging police officers to: fail to  
26 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

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1 unlawful police conduct, by withholding and/or concealing material  
2 information;

- 3 b. To allow, tolerate, and/or encourage a “code of silence” among law  
4 enforcement officers and police department personnel, whereby an officer  
5 or member of the department does not provide adverse information  
6 against a fellow officer or member of the department; and,
- 7 c. To use or tolerate inadequate, deficient, and improper procedures for  
8 handling, investigating, and reviewing complaints of officer misconduct  
9 made under California Government Code § 910 et seq.;
- 10 d. To fail to have and enforce necessary, appropriate, and lawful policies,  
11 procedures, and training programs to prevent or correct the  
12 unconstitutional conduct, customs, and procedures described in this  
13 Complaint, with deliberate indifference to the rights and safety of  
14 Plaintiffs and the public, and in the face of an obvious need for such  
15 policies, procedures, and training programs to prevent recurring and  
16 foreseeable violations of rights of the type described herein.

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

21 40. The unconstitutional actions and/or omissions of Defendant McNAMRA, Does 1-25,  
22 and other SJPD personnel, as described above, were approved, tolerated and/or ratified by  
23 Defendant MATA and policy-making officers for the SJPD. Plaintiff is informed and believes  
24 and thereupon alleges, the details of this incident have been revealed to the authorized policy  
25 makers within the City of SAN JOSE and the SJPD, including Defendant MATA and that such  
26 policy makers have direct knowledge of the fact that the shooting K’AUN GREEN was not  
justified, but rather represented an unconstitutional use of unreasonable, excessive, and deadly  
force. Notwithstanding this knowledge, the authorized policy makers within the City of SAN  
JOSE and SJPD, including Defendant MATA, have approved the McNamara’s shooting of  
K’AUN GREEN, and have made a deliberate choice to endorse the shooting of K’AUN

1 GREEN and the basis for that shooting. By doing so, the authorized policy makers within the  
2 City of SAN JOSE, MATA and the SJPD have shown affirmative agreement with the actions of  
3 Does 1-25, and have ratified the unconstitutional acts of Does 1-25.

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

10 42. Defendants subjected Plaintiff to their wrongful conduct, depriving Plaintiff of rights  
11 described herein, knowingly, maliciously, and with conscious and reckless disregard for  
12 whether the rights and safety of Plaintiff and others would be violated by their acts and/or  
13 omissions.

14 43. As a direct and proximate result of the unconstitutional actions, omissions, customs,  
15 policies, practices and procedures of Defendants City of SAN JOSE and Does 26-50 as  
16 described above, plaintiff sustained serious and permanent injuries and are entitled to damages,  
17 penalties, costs and attorneys’ fees as set forth in paragraphs above.

18 WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

19  
20 **THIRD CAUSE OF ACTION**  
21 **(Violation of CALIFORNIA CIVIL CODE § 52.1 “The Bane Act”)**  
22 *(Plaintiff against Defendants MCNAMARA, CITY, and DOES 1-50)*

23 44. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of  
24 this Complaint.

25 45. Plaintiff brings this “Bane Act” claim individually for direct violation of his own rights.

26 46. By their conduct described herein, Defendant McNamara, acting in concert/conspiracy,

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1 as described above, violated Plaintiff’s rights under California Civil Code §52.1, and the  
2 following clearly-established right under the United States Constitution and the  
3 California Constitution:

- 4 a. Plaintiff’s right to be free from excessive and unreasonable force in the course of  
5 arrest or detention, as secured by the Fourth Amendment to the United States  
6 Constitution and by Article 1, § 13 of the California Constitution;

7  
8 47. Excessive force which violates the Fourth Amendment also violates the Bane Act.<sup>4</sup>

9 Defendant’s use of unlawful force against Plaintiff, in and of itself, satisfies the “by  
10 threat, intimidation, or coercion” requirement of the Bane Act.

11 48. Further, any volitional violation of rights done with reckless disregard for those rights  
12 also satisfies the “by threat, intimidation, or coercion” requirement of the Bane Act.<sup>5</sup> All  
13 of Defendant’s violation of duties and rights were volitional, intentional acts, done with  
14 reckless disregard for Plaintiff’s rights; none were accidental or merely negligent.

15 49. Alternatively, Defendant’s violated Plaintiff’s rights by the following conduct  
16 constituting threat, intimidation, or coercion that was above and beyond any lawful  
17 seizure or use of force:

- 18 b. Threatening Plaintiff in the absence of any threat presented by Plaintiff or any  
19 justification whatsoever;  
20  
21 c. Using deliberately reckless and provocative tactics to detain Plaintiff in violation  
22 of generally accepted law enforcement training and standards, and in violation of  
23 Plaintiff’s rights;

24  
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<sup>4</sup> See *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014) (citing *Cameron v. Craig*, 713 F.3d  
26 1012, 1022 (9th Cir. 2013)).

<sup>5</sup> *Cornell v. City and County of San Francisco*, 17 Cal.App.5th 766, 801-02 (2017) (*review denied*).

- d. Defendant using force against Plaintiff in the absence of any threat or need for such force;
- e. Threatening violence against Plaintiff, with the apparent ability to carry out such threats, in violation of Civ. Code § 52.1(j); and
- f. Violating multiple rights of Plaintiff;

50. Defendant CITY OF SAN JOSE is vicariously liable, pursuant to California Government Code § 815.2, for the violation of rights by its employees and agents.

51. As a direct and proximate result of Defendant Sievers' violation of California Civil Code §52.1 and of Plaintiff's rights under the United States and California Constitutions, Plaintiff sustained injuries and damages, and against all Defendants and is entitled to relief as set forth above, including punitive damages against Defendant McNamara, and including all damages allowed by California Civil Code §§ 52, 52.1, and California law, not limited to costs, attorneys fees, treble damages, and civil penalties.

WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

**FOURTH CAUSE OF ACTION**  
**(Battery — Violation of CALIFORNIA PENAL CODE § 242)**  
*(Plaintiff against Defendants McNamara, CITY, and DOES 1-50)*

52. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of this Complaint.

53. Defendant McNamara, while working as an officer of the San Jose Police Department and acting within the course and scope of his duties, intentionally injured Plaintiff without a lawful basis or consent.

54. As a result of the actions of the Defendant, Plaintiff suffered physical injuries. Defendant did not have legal justification for using force against Plaintiff, and Defendant's use of force while carrying out his law enforcement duties was an

1 unreasonable use of force.

2 55. Defendant CITY OF SAN JOSE is vicariously liable, pursuant to California  
3 Government Code § 815.2, for the violation of rights by its employees and agents.

4 56. As a direct and proximate result of Defendant’s battery of Plaintiff, Plaintiff sustained  
5 injuries and damages, and is entitled to relief as set forth above.

6 /

7  
8 **FIFTH CAUSE OF ACTION**  
9 **(Negligence)**

10 *(Plaintiff against Defendants McNamara, CITY, and DOES 1-25)*

11 57. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of  
12 this Complaint.

13 58. At all times, Defendant City and McNamara owed Plaintiff the duty to act with due care  
14 in the execution and enforcement of any right, law, or legal obligation.

15 59. At all times, Defendants owed Plaintiff the duty to act with reasonable care.

16 60. These general duties of reasonable care and due care owed to Plaintiff by Defendants  
17 include but are not limited to the following specific obligations:

- 18 g. to refrain from using excessive and/or unreasonable force against Plaintiff;
- 19 h. to refrain from unreasonably creating the situation where force, including but not  
20 limited to deadly force, is used;
- 21 i. to refrain from abusing their authority granted to them by law; and
- 22 j. to refrain from violating Plaintiff’s rights guaranteed by the United States and  
23 California Constitutions, as set forth above, and as otherwise protected by law.

24 61. Defendants, through their acts and omissions, breached each and every one of the  
25 aforementioned duties owed to Plaintiff.  
26

1 62. Defendant CITY OF SAN JOSE is vicariously liable for the wrongful acts and  
2 omissions of its employees and agents pursuant to Cal. Gov. Code §815.2.

3 63. As a direct and proximate result of Defendants’ negligence, Plaintiff sustained injuries  
4 and damages and, against each and every Defendant, is entitled to relief as set forth  
5 above.

6 WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

7  
8 **SIXTH CAUSE OF ACTION**  
9 **(The Ralph Act – Civil Code)**

10 *(Plaintiff against Defendants McNamara, CITY, and DOES 1-25)*

11 64. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of  
12 this Complaint.

13 65. Defendant whether or not acting under color of state law, interfered with Plaintiff’s right  
14 to be free from any violence, or intimidation by threat of violence, committed against  
15 him because of his race.

16 66. Plaintiff is readily-recognizable as an African-American, black male. Defendant  
17 McNamara expressed an insidious hate for black people. Defendant McNamara  
18 explained in text messages intentionally shot and attempted to kill K’aun Green because  
19 he was a black male possessing a firearm, not because he was a threat. As such  
20 Defendant McNamara’s violence against K’aun Green was motivated by his hate for  
21 black people. Telling none of the 5-6 officers standing next to Defendant McNamara  
22 even shot a single time while Defendant McNamara shot several times.

23 67. Plaintiff is entitled to recovery for damages of past physical pain, past and future  
24 suffering, and emotional distress and special or economic damages to Mr. JOHNSON  
25 including future medical expenses. Plaintiff is entitled to a statutory civil penalty of  
26 \$25,000 for each violation of California Civil Code §51.7 pursuant to California Civil

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Code §52. Plaintiff is also entitled to exemplary damages because Defendant McNamara’s violence was accompanied by ill will, spite and/or for the purpose of injuring Plaintiff.

**JURY DEMAND**

68. Plaintiff hereby demands a jury trial in this action.

**PRAYER**

WHEREFORE, Plaintiff prays 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 McNamara and DOES 1-50 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, Cal. Civil Code §§ 51.7, 52 et seq., 52.1, 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.

Dated: November 16, 2023

Respectfully submitted,

POINTER & BUELNA, LLP  
LAWYERS FOR THE PEOPLE

/s/Patrick Buelna

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