No. 11-55004

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS AVINA et al.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1346(b). 3ER 322.[1] The court granted summary judgment for the United States and entered judgment on November 4, 2010. 1ER 1. Plaintiffs filed a timely notice of appeal on January 3, 2011. 2ER 1; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

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[1] "ER" refers to the excerpts of record filed by plaintiffs-appellants. The number preceding the letters refers to the volume, and the number following the letters identifies the page or pages on which the cited material appears.

STATEMENT OF THE ISSUE

Whether plaintiffs established a genuine issue of material fact on their claims under the Federal Tort Claims Act with respect to the reasonableness of the conduct of the federal agents who handcuffed plaintiffs while executing a warrant to search plaintiffs' home for firearms and other evidence of illegal drug-trafficking.

STATEMENT OF THE CASE

Plaintiffs Thomas, Rosalie, B.F., and B.S. Avina filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, alleging that U.S. Drug Enforcement Administration agents committed assault and battery and intentional infliction of emotional distress by handcuffing plaintiffs and using strong language while executing a warrant to search plaintiffs' California residence. The agents also had a warrant for the arrest of Luis Eduardo Alvarez, a drug-trafficker thought to be living at the residence. The district court granted the government's motion for summary judgment, concluding that there was no evidence that the agents used unreasonable force or engaged in extreme or outrageous conduct as required to establish claims for battery or intentional infliction of emotional distress under California law. *See* 1ER 11-12. Plaintiffs appeal.

STATEMENT OF FACTS

A. Statutory Background

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, provides a limited waiver of sovereign immunity for certain tort actions against the United States "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The Act makes the United States liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. "In assessing the United States' liability under the FTCA, [courts] are required to apply the law of the state in which the alleged tort occurred." *Conrad v. United States*, 447 F.3d 760, 767 (9th Cir. 2006).

Several exceptions limit the Act's waiver of immunity and the scope of the government's liability. Among other exceptions, the FTCA does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). The Act expressly excludes from that exception, however, the "acts or omissions of investigative or law enforcement officers of the United States Government." *Id.* "[I]nvestigative or law enforcement officer" refers in that context to "any officer of the United States who is empowered

by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* There is no dispute in this case that the federal agents whose conduct plaintiffs challenge fall within that definition.

B. Factual and Procedural Background

1. After concluding that U.S. Drug Enforcement Administration (DEA) agents had probable cause to believe that Luis Eduardo Alvarez was engaged in illegal drug-trafficking and resided at 1601 Drew Road, Space 14, in Seeley, California, a federal magistrate judge issued an arrest warrant for Alvarez and a search warrant for the residence. *See* 1ER 3. The warrant authorized the agents to search for and seize evidence of illegal drug-trafficking, including weapons, firearms, firearm accessories, and ammunition. *Id.* Because Alvarez was a suspected drug-trafficker with a history of violence and resisting arrest, the DEA sent a team of seven armed agents to move rapidly through the residence and assert control over the occupants in order to minimize the possibility of violence and injury. *Id.*

DEA agents executed the search warrant on the morning of January 20, 2007. Plaintiffs, who occupied the residence, were home at the time of the search. *Id.* After knocking and announcing themselves as "police," the agents entered the residence. They first encountered plaintiff Rosalie Avina, who had been sleeping on a couch in a room near the door. The agents ordered Mrs. Avina to the floor and handcuffed her

for safety. *See id.* The agents then approached the bedroom to which plaintiff Thomas Avina had retreated as the agents entered the residence. When Mr. Avina opened the bedroom door, he found an agent pointing a gun at him. 1ER 3-4. Mr. Avina initially refused to comply with the agents' instructions, and the agents responded by assisting him to the ground and handcuffing him. 1ER 4. In giving instructions to Mr. and Mrs. Avina, the agents used strong language, including some profanity. 1ER 3-4.

Agents also entered the bedrooms of plaintiffs B.F. and B.S. Avina, who were then fourteen and eleven years old, respectively. Both girls were in bed at the time, and B.S. was sleeping. 1ER 4. B.F. complied with the agents' instruction to get on the ground, and the agents thereafter handcuffed her. *Id.* B.S. initially resisted the instruction, and agents responded by assisting her to the floor and handcuffing her. *Id.* The agents did not use profanity in speaking to the girls. 1ER 11.

Plaintiffs were detained in the living room while the agents proceeded to search and secure the premises. 1ER 4. When, during the course of the search, the agents realized the age of the Avina daughters, they promptly removed their handcuffs. 1ER 10. One of the daughters asked to use the bathroom around that time and was allowed to do so privately. *See* 2ER 117, 211. The search took no more than an hour, and it produced neither Mr. Alvarez nor any evidence of illegal drug-

trafficking. The agents removed the handcuffs of all plaintiffs sometime prior to the completion of the search, after satisfying themselves that plaintiffs posed no threat to their safety. 1ER 4.

No plaintiff requested medical attention during the search. *Id.* After agents completed the search, plaintiffs visited a nearby medical clinic. Their medical records document no physical injuries or complaints thereof, indicating only that plaintiffs were given nonprescription medication for anxiety. 1ER 4-5.

2. After filing the requisite administrative claims, *see* 28 U.S.C. § 2675(a), plaintiffs filed suit against the United States under the FTCA in July 2008, alleging that the DEA agents executing the search committed assault and battery and intentional infliction of emotional distress in violation of California law. *See* 1ER 5 & n.4; 3ER 322-25. Following briefing by both sides, the district court granted the government's motion for summary judgment. 1ER 2.

The court first noted that, under California law, "a plaintiff who brings an assault-and-battery action against a law-enforcement officer has the burden of proving unreasonable force as an element of the tort." 1ER 8 (citing *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272 (Cal. Ct. App. 1998)). The court found that the agents in this case reasonably anticipated a dangerous situation, and they took "appropriate measures to minimize the risk of harm with a plan that used a team of

seven agents to move rapidly through the home and assert control over the occupants." 1ER 10. "[T]he only force applied by the agents," the court observed, was that necessary to handcuff plaintiffs during entry to secure the home. *Id.*

In concluding that this use of force was reasonable, the district court looked to *Muehler v. Mena*, 544 U.S. 93, 99-100 (2005), where the Supreme Court approved the conduct of agents who handcuffed and detained for three hours the occupants of a residence while executing a search warrant for evidence of drug-trafficking activity. The district court also took note of the Supreme Court's more general observation that, in executing a search warrant, "the risk of harm to both the police and occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981).

In response to plaintiffs' contention that "the allegedly extensive use of profanity somehow contributes to a finding that the agents used unreasonable force," the court noted that there was "no evidence that suggests any use of profanity was extensive." 1ER 11. To the contrary, the court observed that "the evidence demonstrates that the agents sparsely used profanity," and "did so only in association with commands during entry directed solely at the adults." *Id.* "Though B.F. Avina testified that she heard profanity used in the background during the agents' entry,

neither B.F. nor [B.S.] Avina testified that any of the agents used any profanity directed at them." *Id.* (internal citation omitted).

In light of the "minimal amount of force used throughout the search relative to the inherently dangerous circumstances confronting the agents," the court ultimately concluded that "the DEA agents used objectively reasonable force in executing the search and arrest warrants at Plaintiffs' incorrectly identified home." *Id.* Accordingly, there was no issue of material fact with respect to whether the agents committed battery in violation of California law.

Having determined that the agents' conduct was objectively reasonable, the court also granted summary judgment for the government on plaintiffs' claim for intentional infliction of emotional distress. Under California law, a plaintiff claiming intentional infliction of emotional distress must show that the defendant engaged in extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, emotional distress. *See* 1ER 12 (citing *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (Cal. 1993)). The district court observed that to characterize the agents' conduct as "extreme and outrageous to the point that it exceeded all bounds of that usually tolerated by civilized society would clearly be antithetical to the Supreme Court's holding in *Muehler*," as "objectively reasonable conduct is neither extreme nor outrageous." *Id.* The district court thus

entered summary judgment for the United States on plaintiffs' claims for both assault and battery and intentional infliction of emotional distress.

SUMMARY OF ARGUMENT

This tort case involves the execution of search and arrest warrants by federal law enforcement agents. Having probable cause to believe that a drug-trafficker was living at plaintiffs' residence, DEA agents obtained warrants to arrest the suspect and to search the residence for firearms and other evidence of illegal drug-trafficking. Plaintiffs were home when agents executed the warrants, and the agents reasonably detained plaintiffs, in handcuffs, while securing the premises. Finding no evidence that the agents used force beyond that necessary to handcuff the plaintiffs, and concluding that the agents' use of strong language was not excessive, the district court granted summary judgment for the United States on plaintiffs' claims of assault and battery and intentional infliction of emotional distress. This Court should affirm the district court's judgment, as plaintiffs have adduced no evidence indicating that state law would impose liability in like circumstances.

In addressing claims raised under the Federal Tort Claims Act, courts must look to the state law governing the conduct of private individuals in analogous circumstances. 28 U.S.C. §§ 1346(b), 2674; *United States v. Olson*, 546 U.S. 43, 46 (2005). Under California law, the torts of assault and battery require a showing of

threatened or actual unlawful touching. *See* Cal. Penal Code §§ 240, 242. The question, then, is whether the agents in this case engaged in the requisite unlawful touching. California law allows a private individual to use reasonable force to effect an authorized citizen arrest. *See People v. Fosselman*, 659 P.2d 1144, 1148 (Cal. 1983) (en banc) (citing Cal. Penal Code § 835). This is consistent with provisions of the Restatement (Second) of Torts authorizing one privileged to execute a court order to enter another's property and use whatever force is reasonably necessary to achieve the purposes of the court order. *See* Restatement (Second) of Torts §§ 210, 212(1)(f) (1965). What is critical is that the predicate legal authorization entitles the individual to use reasonable force to achieve the authorized objective. The use of reasonable force in such circumstances therefore is not unlawful.

As the district court properly determined here, there is no evidence that the force used by the agents in handcuffing plaintiffs while they secured the residence was excessive or unreasonable in any respect. The agents expected to find a known drug-trafficker and weapons at plaintiffs' residence, and they reasonably concluded that it was necessary to handcuff the residents while asserting control over the situation. Agents completed the search quickly, and they removed plaintiffs' handcuffs as soon as the premises were secured. Plaintiffs suffered no physical injuries during the encounter. Because the agents' contact with plaintiffs was fully

lawful in these circumstances, plaintiffs have not established a triable issue of fact on their assault and battery claims.

Summary judgment was likewise appropriate with respect to plaintiffs' claim for intentional infliction of emotional distress. To state such a claim under California law, a plaintiff must show that the defendant engaged in extreme and outrageous conduct with the intention of causing, or with reckless disregard toward the probability of causing, emotional distress. *See Corales v. Bennett*, 567 F.3d 554, 571 (9th Cir. 2009). The agents' use of reasonable force in securing the residence while executing the warrants plainly does not meet that standard, as the district court again correctly explained. Thus, the district court properly entered summary judgment for the United States, and the judgment of the district court should be upheld.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Bamonte v. City of Mesa*, 598 F.3d 1217, 1220 (9th Cir. 2010). The moving party is entitled to judgment as a matter of law if the non-moving parties fail to make a sufficient showing on any essential element of their claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see Brinson v. Linda Rose Joint Ventures*, 53 F.3d 1044, 1049 (9th Cir. 1995) (holding that a plaintiff must set out specific facts showing a genuine issue for trial). Viewing the evidence in the light most favorable to

plaintiffs, the Court must determine whether there is any genuine issue of material fact and whether the district court correctly applied the relevant substantive law. *See Bamonte*, 598 F.3d at 1220.

ARGUMENT

The District Court Correctly Granted Summary Judgment for the United States Because the Evidence Shows that the Agents' Conduct Was Reasonable Under the Circumstances.

The United States may be held liable under the Federal Tort Claims Act only where a private person in like circumstances would be liable to the claimant under the law of the place where the alleged misconduct occurred. 28 U.S.C. §§ 1346(b), 2674. Thus, as the Supreme Court explained in *United States v. Olson*, 546 U.S. 43, 46 (2005), rather than looking to the law governing the conduct of state or local government entities, a court in adjudicating an FTCA claim must seek an analogy to the state law governing private persons. The *Olson* Court did not address the distinct issues implicated in the law enforcement context because the facts of that case did not require it to do so. This Court considered those issues in *Tekle v. United States*, 511 F.3d 839 (9th Cir. 2007) (amended), and two judges indicated in separate opinions that federal law enforcement privileges remain relevant in FTCA cases after *Olson*. *Id.* at 857-58 (Fisher, J.); *id.* at 862 (Kleinfeld, J.). Because it is clear in this case that, in analogous circumstances, a private person would not be liable under

California law, the Court need not consider the applicability of law enforcement privileges to affirm the district court's judgment.[2]

When seeking to identify an analogous situation for FTCA purposes, it is not necessary to find a perfect fit in the law governing private persons. As this Court has said, "[l]ike circumstances are not identical circumstances. Congress did not require a claimant to point to a private person performing a governmental function." *Xue Lu v. Powell*, 621 F.3d 944, 947-48 (9th Cir. 2010) (internal quotation marks omitted); *see Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955) (holding that a plaintiff suing the United States for negligent operation of a lighthouse need only find an analogous situation in which a private person undertakes to warn the public of

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[2] If this Court were to reach the question left open in *Olson*, it should hold that federal law enforcement privileges are pertinent to the issue of liability under the FTCA, consistent with two of the opinions in *Tekle*, 511 F.3d at 857-58, 862. In that event, this Court should further conclude that the authority of DEA agents to execute search warrants under 21 U.S.C. § 878(a)(2) resolves the issue in this case, as the agents' conduct was lawful pursuant to that privilege. *See Muehler v. Mena*, 544 U.S. 93, 98-99 (2005). Notably, there is also some support for the continued recognition of *state* law enforcement privileges after *Olson*. *See Villafranca v. United States*, 587 F.3d 257, 262 (5th Cir. 2009). Recognition of such privileges would further support the district court's decision in this case, as it is clear that California law privileges law enforcement officers to use reasonable force when executing warrants. *See Brown v. Ransweiler*, 171 Cal. App. 4th 516, 527 (Cal. Ct. App. 2009); *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272 (Cal. Ct. App. 1998). As elaborated in the text, the conduct of the agents here was, from any plausible vantage point, reasonable and lawful and therefore cannot give rise to the imposition of tort liability upon the United States.

danger, inducing reliance on his conduct). Thus, "[a]nalogy not identity of circumstance is key." *Xue Lu*, 621 F.3d at 948; *see Olson*, 546 U.S. at 46.

A. Summary judgment was appropriate with respect to plaintiffs' claim for assault and battery, as the agents' use of force was entirely reasonable under the circumstances.

1. For purposes of assessing plaintiffs' claim for assault and battery, the closest private-person analogue is found in provisions stating that one authorized to undertake a certain act may use reasonable force to achieve the authorized objective. Under California law, a private person is in certain circumstances authorized to make an arrest, and "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 527 (Cal. Ct. App. 2009) (internal quotation marks and citation omitted). As long as an arrest is authorized, a private person may use reasonable force to detain the subject and effect an arrest. *See People v. Fosselman*, 659 P.2d 1144, 1148 (Cal. 1983) (en banc) (citing Cal. Penal Code § 835); *see also People v. Adams*, 176 Cal. App. 4th 946, 952 (Cal. Ct. App. 2009) ("When a peace officer or a private citizen employs reasonable force to make an arrest, the arrestee is obliged not to resist, and has no right of self defense against such force.").

The principle that legal authority to perform an act is attended by the right to use reasonable force to accomplish the act is also found in the Restatement (Second) of Torts § 212(1), which identifies several circumstances in which "[o]ne who is privileged to enter land is further privileged to use such force against the person of the possessor or third persons as is necessary, or reasonably believed by the actor to be necessary, to accomplish the purpose of the privilege." Among these circumstances is an entry made "pursuant to a court order as stated in § 210." Restatement (Second) of Torts § 212(1)(f); *see id.* § 210 ("The privilege to execute an order of a court directing the actor to put a third person in possession of land of which another is in possession, or to do any other act on the land, carries with it the privilege to enter the land for the purpose of executing the order, provided that any writ issued for the execution of the order is valid or fair on its face."). California courts have often looked to the Restatement to determine the scope of tort liability under state law. *See, e.g.*, *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 376 (Cal. 1992); *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 1000 (Cal. 1991); *Lawson v. Safeway Inc.*, 191 Cal. App. 4th 400, 418 (Cal. Ct. App. 2010). As with the law of citizen arrests, the predicate authorization in Restatement § 212 confers the right to use reasonable force to achieve the authorized objective.

Guided by this analogy, the standard here for judging the lawfulness of the DEA agents' conduct under California law is one of reasonable force. *See* Restatement (Second) of Torts § 212; *Fosselman*, 659 P.2d at 1148; *Adams*, 176 Cal. App. 4th at 952. If the force used by the agents was reasonable in light of the circumstances surrounding the execution of the warrants, the agents did not undertake or threaten to undertake any unlawful touching that could satisfy the legal requirements for a claim of assault or battery under California law.[3]

As the district court properly concluded, plaintiffs have adduced no evidence that the force used by the federal agents in this case was unreasonable under the circumstances. The agents reasonably anticipated that in executing the warrants they would encounter a dangerous drug-trafficker and contraband commonly associated with the drug trade. The subject of the search, Luis Eduardo Alvarez, had a history of violence and resisting arrest, and the warrant authorized the agents to search for and seize weapons, firearms, firearm accessories, and ammunition, 1ER 3, indicating a fair probability that those items would be found in the residence, *see Illinois v. Gates*,

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[3] Assault is the "unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240. "A battery is any willful and unlawful use of force or violence upon the person of another." Cal. Penal Code § 242. Noting that plaintiffs alleged "assault and battery" as a single cause of action and that the term "assault and battery" is frequently used when a battery has been committed, the district court addressed plaintiffs' cause of action as one for battery. 1ER 5 n.4.

462 U.S. 213, 238 (1983). Under the circumstances, the agents cannot be said to have used undue force by handcuffing plaintiffs while they secured the premises or by using a limited amount of strong language when giving instructions. *See* 1ER 11.[4]

As the district court observed, the Supreme Court's opinion in *Muehler v. Mena*, 544 U.S. 93 (2005), confirms the reasonableness of the agents' conduct. The officers in that case also executed a warrant at a residence, expecting to find weapons and evidence of gang activity. The plaintiff and three other residents were handcuffed and detained for two to three hours in a converted garage while officers searched the premises. In assessing the reasonableness of the detention and the force used by the officers, the Supreme Court noted that the "safety risk inherent in executing a search warrant for weapons was sufficient to justify the use of handcuffs, [and] the need to detain multiple occupants made the use of handcuffs all the more reasonable." *Id.* at 100. *Muehler* compels a determination of reasonableness in this case, as the agents here anticipated similar risks, and the imposition on plaintiffs was

[4] As the district court indicated, *see* 1ER 11, it is unclear how the agents' use of strong language could amount to a battery, even if excessive. The allegation is more relevant if considered under the framework of an assault, but even then plaintiffs have failed to offer any evidence indicating that the agents' occasional expletives could be construed as a threat to use unlawful force. *See* Cal. Penal Code § 240 (defining assault).

far less substantial than in *Muehler* given that the detention lasted no more than one hour and took place in the relative comfort of plaintiffs' living room. *See* 1ER 4.

As the Supreme Court has observed, "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Michigan v. Summers*, 452 U.S. 692, 702 (1981). Such situations present a substantial risk of harm to both the law enforcement officers executing the search and any occupants of the residence. That risk can be "minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-03. As the Court stated in *Muehler*, "[t]he governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons" and a wanted drug-trafficker is believed to reside on the premises. 544 U.S. at 100. The agents in this case reasonably responded to these risks by detaining plaintiffs, in handcuffs, until the premises had been secured. That was the full extent of the force used.

2. Plaintiffs make much of the fact that the warrant in this case authorized agents to search a residence that was ultimately determined to be unconnected to any illegal drug-trafficking. Plaintiffs seize on this alleged error as a basis for distinguishing *Muehler*. According to plaintiffs, the agents in *Muehler* knew that a gang member resided at the residence subject to the search, and gang-related

implements in plain view at the outset of the search confirmed that fact. Pl. Br. 7-8. By contrast, plaintiffs contend, there was in hindsight no evidence connecting their residence to any illegal drug-trafficking activity. *Id.* at 8.

Plaintiffs' focus is misplaced. Generally, as long as a court order is valid on its face, an individual acts lawfully in executing the order in good faith. *See* Restatement (Second) of Torts § 210; *United States v. Leon*, 468 U.S. 897, 920-21 (1984) (holding that when "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope . . . . there is no police illegality"). Entry and search are authorized in those circumstances, and an individual executing a facially valid order is thus permitted to use the reasonable force that California law allows in the exercise of that authority. An exception to this rule has been found only when the affidavit supporting a warrant lacks a substantial basis for determining the existence of probable cause. *See Millender v. Cnty. of Los Angeles*, 620 F.3d 1016, 1025 (9th Cir. 2010). This standard is rarely met: "Even if a warrant lacks probable cause . . . the *Leon* good faith exception preserves the reasonableness of the subsequent search unless the warrant is so lacking in indicia of probable cause so as to render official belief in its existence entirely unreasonable." *Johnson v. Walton*, 558 F.3d 1106, 1111 (9th Cir. 2009).

Plaintiffs offer no argument or evidence suggesting that the agents did not in good faith act within the scope of the warrant in this case. As plaintiffs note, evidence exists that the affidavit supporting the warrant erroneously stated that Alvarez's car was registered to plaintiffs' address. *See* Pl. Br. 8; 2ER 217. But this deficiency was not apparent from the face of the warrant and therefore does not implicate the limited exception to *Leon*; there is no indication of any kind that the agents executing the warrant had reason to know of the error and acted other than in good faith. To the contrary, the statement in the affidavit regarding the registration would tend to confirm the existence of probable cause to search the residence.

Any argument that the existence of an error in the affidavit undermines the validity of the warrant would similarly be unavailing in this case. To challenge the validity of a warrant on that basis, a plaintiff "must make 1) a 'substantial showing' of deliberate falsehood or reckless disregard for the truth and 2) establish that, but for the dishonesty, the [search] would not have occurred." *Liston v. Cnty. of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997) (quoting *Hervey v. Estes*, 65 F.3d 784, 788-89 (9th Cir. 1995)); *see Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Plaintiffs have alleged no facts that could satisfy that standard. Indeed, there is no suggestion that the error with respect to the vehicle registration was the result of anything other than inadvertence. Plaintiffs have additionally failed to establish a triable issue of fact

with respect to whether the remaining evidence in the affidavit was nevertheless sufficient to establish probable cause.

In sum, the agents who searched plaintiffs' residence were authorized to do so. Under California law, one authorized to make an arrest or execute a court order is authorized to use reasonable force to achieve that end. The agents' limited use of force in handcuffing plaintiffs while securing the premises plainly was reasonable under the circumstances. The district court correctly applied the reasonableness standard and concluded that plaintiffs had offered no evidence to suggest that the agents' conduct was unlawful by that measure. *See* 1ER 11. Accordingly, the district court properly determined that summary judgment for the government was warranted with respect to plaintiffs' claims for assault and battery.

B. Summary judgment was appropriate with respect to plaintiffs' claim for intentional infliction of emotional distress, as the agents' use of reasonable force cannot be deemed extreme or outrageous.

All that remains is plaintiffs' claim for intentional infliction of emotional distress. Under California law, a plaintiff asserting such a claim must show that the defendant's conduct was extreme and outrageous and undertaken with the intention of causing, or with reckless disregard toward the probability of causing, emotional distress. *Corales v. Bennett*, 567 F.3d 554, 571 (9th Cir. 2009); *Davidson v. City of*

Westminster, 649 P.2d 894, 901 (Cal. 1982). To be deemed outrageous, the conduct "must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Davidson*, 649 P.2d at 901.

The district court properly determined that plaintiffs had adduced no evidence that could support such a finding. As discussed, the DEA agents' conduct was plainly reasonable under the circumstances. The agents reasonably anticipated that they would encounter at the residence a drug-trafficker and drug-trafficking paraphernalia, including firearms, and they proceeded with due caution. In their interactions with plaintiffs, the agents used only the force necessary to secure the premises while they executed the search warrant. And the agents' use of strong language was limited and was exclusively directed at the adults in the residence. Because their actions were reasonable, the agents cannot be said to have undertaken the sort of extreme and outrageous conduct necessary to establish the tort of intentional infliction of emotional distress. Thus, as with plaintiffs' assault-and-battery claim, the district court properly granted summary judgment for the United States with respect to plaintiffs' claim for intentional infliction of emotional distress. The judgment of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JUNE 2011

STATEMENT OF RELATED CASES

Counsel for the United States are aware of no related cases as defined in Circuit Rule 28-2.6.

/s/ Lindsey Powell
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief for Appellee contains 5,295 words (excluding the cover, tables, and certificates), according to the count of this office's word processing system.

/s/ Lindsey Powell
LINDSEY POWELL

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2011, I caused the foregoing Brief for Appellee to be served on appellants' counsel by filing it through the Court's CM/ECF system.

/s/ Lindsey Powell
LINDSEY POWELL