No. 17-1354

In the Supreme Court of the United States

ERICK GELHAUS,

Petitioner,

–v–

ESTATE OF ANDY LOPEZ,
BY AND THROUGH SUCCESSORS IN INTEREST,
RODRIGO LOPEZ AND SUJAY CRUZ, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* PEACE OFFICERS' RESEARCH ASSOCIATION OF CALIFORNIA, PORAC LEGAL DEFENSE FUND, LOS ANGELES POLICE PROTECTIVE LEAGUE AND ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PEACE OFFICERS' RESEARCH ASSOCIATION OF CALIFORNIA, PORAC LEGAL DEFENSE FUND, LOS ANGELES POLICE PROTECTIVE LEAGUE AND ASSOCIATION OF LOS ANGELES DEPUTY SHERIFFS

This matter presents the Supreme Court with the opportunity to correct the Ninth Circuit Court of Appeals' erroneous application of the law on two separate issues of substantial importance to all sworn law enforcement professionals: the legal standard governing officers' use of force under the Fourth Amendment, and the value of an officer's testimony in furtherance of adjudicating the lawfulness of a use of force.

The Peace Officers' Research Association of California ("PORAC") is a professional association of local, state, and federal sworn law enforcement associations representing over 65,000 members in California, Oregon, Washington, Arizona, Nevada, Idaho and Montana. The PORAC Legal Defense Fund ("PORAC LDF") is a legal defense fund for law enforcement officers with over 120,000 members nationwide. PORAC LDF provides legal representation for its members in civil, criminal, and administrative matters arising out of the course and scope of its members' employment. Specifically, PORAC LDF provides its law enforcement members with legal representation immediately following their involvement in officer-involved shootings, or where other forms of force are used to make arrests, prevent escapes or overcome

resistance. PORAC LDF also provides its law enforcement members legal representation in defense of civil rights actions filed pursuant to 42 U.S.C. section 1983, including allegations of unlawful use of force in violation of the Fourth Amendment.

The Los Angeles Police Protective League ("LAPPL") is a labor organization that represents over 9,900 sworn law enforcement officers of the Los Angeles Police Department. The Association of Los Angeles Deputy Sheriffs ("ALADS") is a labor organization that represents over 7,900 sworn law enforcement officers of the Los Angeles County Sheriff's Department. In addition to protecting, promoting and improving the working conditions and rights of their members, both LAPPL and ALADS represent and defend their members accused of workplace misconduct, including allegations of excessive or unreasonable force in the performance of their official duties.

PORAC, PORAC LDF, LAPPL and ALADS (collectively referred to herein as "*Amici*") have a significant interest in the law governing the lawfulness of officers' use of force generally, and more specifically, officers' protection from Section 1983 civil suits under the doctrine of qualified immunity–the primary issues presented in this matter.

Amici timely notified the parties of their intent to file an amici curiae brief more than 10 days prior to filing. (Supreme Court Rule 37.2(a).) Petitioner provided his consent to the filing of this brief, but Respondents did not. Therefore, pursuant to Supreme Court Rule 37.2(b), *Amici* respectfully moves this Court for leave to file the attached *amici* brief in support of Petitioner.

As set forth in the attached brief, the decision of the Ninth Circuit erroneously applies the law, thereby imposing adverse consequences on law enforcement officers and agencies in two ways. First, the decision, through its discussion on the application of qualified immunity, establishes a new standard governing an officer's use of force under the Fourth Amendment that is contrary to existing precedent and will cause significant uncertainty and tentativeness on the part of officers facing dangers threatening the public and themselves. This results from the decision's implication that an officer must wait until a high-powered rifle is lethally aimed directly at the officer before deploying protective force, such that the deployment of force any time prior to that fraction of a second may violate the Fourth Amendment. This standard is utterly unrealistic and unworkable, and therefore incredibly dangerous for members of the public and officers charged with their protection.

Second, the decision improperly discounts the testimony of the involved officer in adjudicating whether or not the use of force at issue was reasonable. In so doing, the decision unnecessarily departs from existing circuit precedent concerning the consideration of an officer's testimony in furtherance of analyzing the lawfulness of deployed force. All *Amici* peace officer members, and all peace officers, have a significant interest in their testimony being afforded the proper weight and consideration when determining whether their actions taken under tense, uncertain, and rapidly evolving circumstances were lawful.

Amici's members are directly impacted by the erroneous legal conclusions of the Ninth Circuit and

its resulting practical impact. *Amici* are uniquely suited to provide this Court an experienced and considered viewpoint on both the legal issues and practical consequences presented by the Ninth Circuit's decision. *Amici* therefore respectfully request leave to file the attached brief urging this Court to grant the petition.

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BRIEF OF *AMICI CURIAE*

Amici respectfully submit this brief as *Amici Curiae* in support of Petitioner Erick Gelhaus, urging the Court to grant review in Case No. 17-1354.[1]

INTERESTS OF *AMICI CURIAE*

As identified in *Amici's* Motion for Leave to File Brief of *Amici Curiae*, *Amici* and their members have a significant interest in the law governing the lawfulness of peace officers' use of force generally, and more specifically, officers' protection from Section 1983 civil suits under the doctrine of qualified immunity —the primary issues presented in this matter.

SUMMARY OF ARGUMENT

At issue in the petition is whether the Ninth Circuit improperly denied Deputy Erick Gelhaus ("Gelhaus") qualified immunity. A central purpose of qualified immunity is to ensure that public officials charged with discretionary functions are not discour-

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties were timely notified of *Amici's* intention to file this brief in accordance with Supreme Court Rule 37.2(a). Petitioner gave his consent, but Respondents did not.

aged from exercising their official authority in the public interest. *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982). This purpose is especially relevant in the context of a police officer's use of force, and for the benefit of both the public's and officers' safety, should be secured by clear and practical legal standards governing law enforcement's use of force.

This Court has long acknowledged that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-397 (1989). Because of this fact, and the reality that officers are thrust into such circumstances by duty and not by choice, qualified immunity is afforded to "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). As long as an officer does not engage in conduct that violates "clearly established statutory or constitutional rights of which a reasonable [police officer] would have known," as set forth by existing case law, qualified immunity attaches. *White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548, 551 (2017) (per curiam).

This Court very recently reiterated the "long-standing principle that 'clearly established law' should not be defined 'at a high level of generality.' As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case." *White*, 137 S.Ct. at 552. Accordingly, the precedent established by the Ninth Circuit's decision in this matter will necessarily shape the decision-making process of all officers in the Ninth Circuit, and likely

throughout the country, when confronted by significant dangers while on duty.

The holding of the Ninth Circuit in *Estate of Lopez By & Through Lopez v. Gelhaus*, 871 F.3d 998, 1012 (9th Cir. 2017) hereinafter "*Gelhaus*")—that an officer is not entitled to qualified immunity when the officer uses force against an individual armed with an AK47 who turns to face the officer and begins to raise his rifle—creates an unworkable and dangerous standard which will cause hesitancy and tentativeness on the part of officers who witness an imminent threat to a member of the public, or face such a threat themselves.

Law enforcement officers should not be forced to wait until a rifle is pointed at them or has been raised to the level where the single depression of a trigger—in an instant—can kill officers and innocent bystanders. This is so because officers in the heat of the moment cannot practically be required to analyze the upward movement of an automatic weapon—inch-by-inch, often at distance—to determine the precise moment in time the weapon is at the particular angle presenting a lethal threat upon depression of the trigger.

Additionally, the Ninth Circuit improperly discounted Gelhaus' testimony, stating that certain inconsistencies result in "abundant grounds for a jury to reasonably question Gelhaus' credibility and accuracy." *Id.* at 1009. This determination then led the Ninth Circuit to discount Gelhaus' testimony about the position of the gun when he fired and whether it was "partially raised." *Id.* at 1008. However, none of the alleged inconsistencies were material and they

were not contradicted by existing facts. As such, Gelhaus' statements about the incident should not have been discounted by the Ninth Circuit. By doing so, the Ninth Circuit improperly denied qualified immunity to Gelhaus based upon a manufactured "metaphysical doubt" as to the material facts.

For the above reasons, this Court should grant the petition to address these important questions that impact all peace officers throughout the Ninth Circuit.

ARGUMENT

I. THE STANDARD ESTABLISHED BY THE NINTH CIRCUIT IS UNREALISTIC AND WILL CAUSE HESITATION ON THE PART OF OFFICERS FACING LIFE-THREATENING DANGERS

Only unreasonable force violates the Fourth Amendment. Reasonableness is an objective standard, "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham, supra*, 490 U.S. at 396. "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them…" *Id.* at 397.

Assessing whether a particular use of force is reasonable "requires a careful balancing of the 'nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396. The government's interest in the use of force is analyzed

by examining three core factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* This calculus "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-397.

The Ninth Circuit's decision in *Gelhaus* should be reviewed and overturned because it violates this Court's and the Ninth Circuit's existing and well-reasoned precedent cautioning against interpreting the "reasonableness" requirement in such a way that would cause tentativeness in officers, thereby endangering their and the public's safety.

For example, in *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1992), officers were confronted with a man firing a rifle from an apartment building. *Id.* at 914. The officers approached the door and banged on it; when the door opened, the suspect pointed the gun at the officers who responded with deadly force. *Id.* The Ninth Circuit rejected the plaintiff's contention that "the officer should have used alternative measures before approaching and knocking on the door," because requiring officers to "find and choose the least intrusive alternative" would impose a requirement that "would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves." *Id.* at 915.

Similarly, in *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009), the Ninth Circuit again acknow-

ledged the necessity of refraining from imposing additional requirements on officers facing critical situations when analyzing the reasonableness of force. In that case, the Ninth Circuit weighed the police response to an armed standoff. *Id.* at 1075-76. The plaintiff contended that police were required to obtain a warrant before entering the residence because the exigency that previously existed had dissipated by the time entry was made. *Ibid.* In rejecting the plaintiff's argument, the Ninth Circuit reasoned:

> . . . . [Plaintiff's] dissipation theory would have serious consequences beyond simply forcing police to engage in the empty gesture of obtaining a warrant in the midst of a dangerous and volatile standoff. It would introduce yet another element of uncertainty into the already complex and dangerous calculus confronting law enforcement in armed standoff situations. At minimum, the officers on the scene would be unable to devote their full attention to the actual threat and to ensuring public safety. *Id.* at 1079. (Emphasis added).

These concerns expressed by the Ninth Circuit in *Scott* and *Fisher* represent reasoned and thoughtful policy, taking into account the unique circumstances faced by officers in the field when exercising their authority to deploy force, and furthering the purpose of qualified immunity to not discourage the exercise of that authority for the benefit of the public. *Graham, supra,* 490 U.S. at 396-397; *Harlow, supra*, 457 U.S. at 807. Simply stated, the Ninth Circuit's decision in *Gelhaus* must be reviewed by this Court

and overturned because it ignores these recognized concerns by "introduce[ing] yet another element of uncertainty into the already complex and dangerous calculus confronting law enforcement," (*Fisher*, 558 F.3d at 1079), and therefore "inevitably [will] induce tentativeness by officers, and thus deter police from protecting the public and themselves." *Scott*, 39 F.3d at 915.

The decision itself demonstrates how this tentativeness will be created, and the potentially dangerous consequences that could result. In the decision affirmed by the Ninth Circuit here, the District Court ruled as follows:

> While defendants cite testimony that the barrel of Andy's gun "began" to come up, or was "in the process" of being pointed at the deputies, the court is obligated to view that evidence in a light most favorable to the non-moving parties. And in that light, the court can conclude only that the rifle barrel was beginning to rise; and given that it started in a position where it was pointed down at the ground, it could have been raised to a slightly higher level without posing any threat to the officers. *Gelhaus*, 149 F.Supp. 3d at 1162.

As the Ninth Circuit recognized, it is "bound by the district court's finding on this critical issue." *Gelhaus*, 871 F.3d at 1007. The Ninth Circuit then repeated this factual finding, noting again and again that the barrel of the rifle could have risen or was beginning to rise as Andy Lopez (hereinafter "Lopez") turned to face Gelhaus, but that the rifle was

apparently not raised to such a level that would present a threat to the officers:

> Because we are obligated to view the evidence in the light most favorable to Andy, we must assume for purposes of this interlocutory appeal that, as the district court found, the barrel of the weapon could incidentally have risen, as part of the natural turning motion, only "to a slightly-higher level [that did not] pos[e] any threat to the officers. *Id.* at 1008.
>
> Viewing the evidence in the light most favorable to plaintiffs, a reasonable jury could come to the following factual conclusions: . . . (10) as Andy turned, the weapon turned with him; (11) the gun barrel might have raised slightly as Andy turned, but given that it started in a position where Andy's arm was fully extended and the gun was pointed straight down at the ground, the barrel never rose at any point to a position that posed any threat to either of the officers. . . . *Id.* at 1010-1011.
>
> [T]he district court[] . . . found that even if the gun "began" to rise at the start of Andy's turn (when it was pointed straight down at the ground), as one's arm naturally swings in the course of a turn, it did not necessarily rise throughout the whole interaction, and could have been raised only to a "slightly-higher level" that was non-threatening to Gelhaus. *Id.* at 1015.
>
> It bears repeating: even though we must

> assume for purposes of this interlocutory appeal that the barrel "began" to rise as Andy turned, we must also assume—as the district court expressly found—that it potentially rose, as an incident of Andy's turning motion, only "to a slightly-higher level [that did not] pos[e] any threat to the officers." *Id.* at 1016-1017.
>
> Here, Gelhaus could not have reasonably misconstrued the threat allegedly posed by the position of Andy's gun because, on the facts as we must regard them, it never rose to a position that posed any threat to the officers. *Id.* at 1020.

It is clear, therefore, that the Ninth Circuit concluded that although the assault rifle was rising as Lopez turned to face Gelhaus, the gun had not yet risen to a level that the Ninth Circuit believed would constitute a threat to the officers. This standard is simply unworkable and therefore dangerous.

This decision instructs officers that when they are confronted with an armed individual facing away from them, who then, in response to commands, begins to turn toward the officer while simultaneously raising his weapon, they cannot defend themselves or others and still be entitled to qualified immunity. Rather, the officers must wait until a precise (but undefined) moment and angle have been completed by the barrel of the weapon's movement to deploy protective force.

This holding stands in stark contrast to existing Ninth Circuit and other circuit precedent. In both *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007) and *Scott*, 39 F.3d at 914, the Ninth

Circuit determined that when an individual points his gun "in the officers' direction" or holds "a 'long gun' and point[s] it at them," officers are undoubtedly entitled to respond with deadly force. Indeed, the Ninth Circuit has previously held that a gun need not be pointed at the officer, or moved at all in the officer's direction, in order of the use of force to be objectively reasonable: "This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013.)

This reasoning—grounded in an acknowledgment of the tense, uncertain, and rapidly evolving circumstances confronted by officers—is consistent with other circuits. E.g., *County of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1545 (2017) [Ninth Circuit found deadly force reasonable where suspect pointed BB gun "somewhat" towards officer]; *Rogers v. King*, 885 F.3d 1118, 1122 (8th Cir. 2018) [deadly force reasonable where suspect began "raising the gun up towards" a fellow officer]; *Long v. Slaton*, 508 F.3d 576, 581 (11th Cir. 2007) ["the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect."]; *Slattery v. Rizzo*, 939 F.2d 213, 215 (4th Cir. 1991) [deadly force reasonable where suspect turned body towards officer with hand appearing to grasp object out of officer's view]; *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991) [deadly force reasonable where unarmed

suspect reached for unknown object after commands to show hands].

The undisputed evidence here establishes that Lopez made a "harrowing gesture" as contemplated by the Ninth Circuit in *George*, 736 F.3d at 838: he was raising his weapon as he turned toward the officers. The Ninth Circuit's decision attempts to differentiate *George* by insisting that Lopez's actions were not harrowing because the weapon "never rose to a position that posed any threat to the officers." *Gelhaus*, 871 F.3d at 1020. Despite acknowledging this Court's direction to "avoid the 20/20 vision of hindsight," (*Graham*, 490 U.S. at 396), the Ninth Circuit nevertheless concluded that Lopez's turning towards Gelhaus while raising the weapon was not harrowing.

To justify this apparent contradiction, the Ninth Circuit cited a series of facts that the majority insists remove the "harrowing" nature from Lopez's actions, including: (1) that Lopez was "walking normally," (2) that Gelhaus thought Lopez looked "like a teen," (3) that Gelhaus did not describe Lopez's turn toward him as abrupt, and (4) that Gelhaus had not received any report suggesting that Lopez was dangerous or intended to use the weapon. *Gelhaus*, 871 F.3d 998 at 1010. The court then stated that, "In short, prior to and during Andy's turn, Gelhaus simply did not witness <u>any</u> threatening behavior." *Id.* at 1021, original emphasis.

However, this analysis ignores two material facts recognized by the Ninth Circuit in its decision: (1) Lopez turned towards the officers while carrying a replica AK47, and (2) as he turned to face the officers, he was raising the weapon. These facts, which the

majority did not address in the above analysis, clearly establish that the actions of Lopez, as witnessed by Gelhaus without the benefit of hindsight, were harrowing.

Moreover, the discussion above only illuminates the untenable and unworkable standard the decision establishes, and the tentativeness and uncertainty it will create for officers facing apparent threats to their safety or the safety of others. As established in *Long* and *Scott*, if a weapon is pointed at the officers, the use of force would be objectively reasonable. As set forth in *George*, if the weapon is not directly pointed at the officers, but is instead pointed at the ground, the use of force may be objectively reasonable where the suspect makes a furtive movement, a harrowing gesture, or a serious verbal threat.

However, the Ninth Circuit's decision in this case holds that the act of turning toward an officer and raising a weapon is not harrowing so long as the weapon is not yet raised to the exact level that would immediately threaten the officer. According to the Ninth Circuit, an officer must wait to use force as the gun is rising, inch by inch, until the gun's barrel reaches the precise angle at which it poses a direct threat. Therefore, an officer facing a suspect who is turning towards the officer and raising a weapon at the officer would be forced to be tentative, thus "deter[ring] police from protecting the public and themselves." *Scott*, 39 F.3d at 915.

This Court in *Graham* cautioned that the reasonableness of a use of force must allow "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense,

uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-397. The decision in this case ignores the split-second judgments faced by officers who encounter armed individuals raising a weapon to point it at the officers. Instead, it imposes a standard that will only add uncertainty and cause tentativeness in officers who are forced to make the split-second decision as to whether the weapon has been risen to a level that now poses a threat. The Ninth Circuit's decision must therefore be reviewed by this Court to clarify the applicable standard.

II. THE NINTH CIRCUIT IMPROPERLY DISCOUNTED GELHAUS' TESTIMONY

As the Ninth Circuit has long recognized, motions for summary judgment when deadly force is used raise unique issues about the treatment of uncontradicted evidence presented by an officer. In *Scott*, 39 F.3d 912, the Ninth Circuit stated:

> Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is

> internally consistent and consistent with other known facts. *Hopkins*, 958 F.2d at 885-8; *Ting v. United States*, 927 F.2d 1504, 1510-11 (9th Cir.1991). In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably. *Id.* at 915.

In this case, however, the Ninth Circuit misapplied this test and discounted Gelhaus' testimony when there was no conflict with the material facts.

The central issue in which the Ninth Circuit discounted Gelhaus' testimony related to the position of the weapon when Gelhaus fired and whether it was rising. As the Ninth Circuit's decision states, "the evidence that the gun began to rise comes almost exclusively from Gelhaus and Schemmel. The jury might not believe their testimony given that Gelhaus does not know where Andy was pointing the rifle and does not know if the gun was ever actually pointed in his direction." *Gelhaus, supra*, 871 F.3d at 1012. However, as noted above, the District Court expressly found that the weapon was rising as Lopez turned to face Gelhaus, and the Ninth Circuit was bound by this finding. Nevertheless, the Ninth Circuit concluded that "taking the facts as we must regard them, a reasonable jury could find that Gelhaus deployed deadly force while Andy was merely standing on the sidewalk holding a gun that was pointed down at the ground." *Id.* at 1017.

Moreover, Gelhaus' statements regarding the position of the gun should not have been discounted. The Ninth Circuit cited numerous disputed facts or inconsistencies, which permitted it to question Gelhaus' credibility. *Id.* at 1009. However, the apparent contradictions cited by the decision are simply insufficient to permit the Ninth Circuit to wholly discount an officer's sworn testimony.

The only clear contradiction noted by the majority pertains to which hand Lopez was holding the weapon with when he turned to face the officers. The majority insists that this fact is material because the gun would have risen differently had the gun been held in the outer hand versus the inner hand. *Id.* at 1007. However, this apparent contradiction is immaterial because the Ninth Circuit was bound by the finding that, regardless of which hand the weapon was held, the weapon began to rise as Lopez turned to face Gelhaus.

The "contradictions" cited by the Ninth Circuit in its decision should be contrasted with the other cases in which the Ninth Circuit discounted the testimony of police officers who used deadly force. For example, in *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794 (9th Cir. 2014), the court stated that the testimony of an officer could be discounted because the "combination of facts" set forth in the officer's testimony "appears to be physically impossible." Moreover, the court in *Gonzalez* concluded that the facts were material, and "[a] reasonable jury" could conclude that the officer "did not reasonably perceive an immediate threat of death or serious bodily injury." *Id.* at 795. Here, there was no such impossibility in Gelhaus' testimony about the

raising of the weapon, only that the two officers differed as to which hand held the weapon.

In *Cruz v. City of Anaheim*, 765 F.3d 1076, 1079-80 (9th Cir. 2014), the Ninth Circuit identified numerous inconsistencies regarding testimony about where the suspect was located when he was shot and whether he reached for his waistband. For example, the suspect did not have a gun, which calls into question whether he would have reached for his waistband at all. *Id.* at 1079. The court also noted that the suspect was left-handed, "yet two officers attested that they saw Cruz reach for his waistband with his right hand," and concluded that "[a] reasonable jury could doubt that Cruz would reach for a non-existent weapon with his off hand." *Id.* Furthermore, there was the officers' testimony that the suspect had exited the vehicle, "but after he was killed they had to cut him free from his seat belt because he was 'suspended' by it." *Id.* Again, these facts are substantially different from the alleged inconsistencies cited by the Ninth Circuit in this case. None of Gelhaus' statements were contradicted by plain and undisputed facts, and indeed his statement that the weapon was rising as Lopez turned was not even disputed by the Ninth Circuit.

Other cases not cited by the Ninth Circuit decision support the conclusion that Gelhaus' testimony should not have been discounted. For example, in *Longoria v. Pinal Cty.*, 873 F.3d 699, 708 (9th Cir. 2017), an officer's testimony that a suspect assumed a "shooter's stance" was contradicted by real-time videos, other officers' accounts, an expert witness, and by the officer's partner. In *Newmaker v. City of Fortuna,* 842 F.3d

1108, 1116-17 (9th Cir. 2017), the officers' testimony was discounted where their version of events changed over time and conflicted with an autopsy report and video evidence.

No such inconsistencies or contradictions were present here, and together the above cases show that Gelhaus' testimony should not have been discounted. There were no significant and substantial inconsistencies regarding material facts that would warrant a reasonable jury doubting Gelhaus' credibility in this case. Accordingly, the Ninth Circuit should have credited Gelhaus' account that the weapon was rising as Lopez turned to face him, and that the use of force was therefore objectively reasonable.

CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that the petition for review be granted.

Respectfully submitted,

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