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 *AMICUS CURIAE* BRIEF ON BEHALF OF THE CALIFORNIA STATE SHERIFFS' ASSOCIATION, THE CALIFORNIA POLICE CHIEFS ASSOCIATION AND THE CALIFORNIA PEACE OFFICERS' ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amici Curiae, the California State Sheriffs' Association, the California Police Chiefs Association and the California Police Officers' Association, move this Court, pursuant to Rule 37.2(b) of the Rules of this Court, for leave to file the attached proposed *amicus curiae* brief in support of the Petition for Writ of Certiorari.

All parties were timely notified of the intent of these *Amici* to file the attached brief as required by Rule 37.2(a). Although Petitioner has given consent to the filing of the attached brief, counsel for Respondent Estate of Andy Lopez have indicated that they are not authorized to provide such consent as requested by these *Amici*, even though Respondent had provided consent for the same *Amici* to file an *amicus* brief with the Ninth Circuit Court of Appeals in connection with the Petition for Rehearing En Banc.

The Ninth Circuit Court of Appeals has incorrectly determined that excessive force claims are permitted to go to the jury and has improperly denied qualified immunity for Petitioner Erick Gelhaus, who is a peace officer with the Sonoma County Sheriffs' Department. These rulings and the underlying legal issues are of critical importance to *Amici*, as they manage or are made up of thousands of peace officers throughout the State of California who would be subject to the Court's opinion in this matter. Once again, the Ninth Circuit's ruling does not follow this Court's precedent in

evaluating the reasonableness of peace officer use of force or in applying qualified immunity. Officers in the Ninth Circuit will not be assured fair application of Fourth Amendment Doctrine and Qualified Immunity principles if this ruling is permitted to stand.

In point of fact, officers are subject to facing suspects who are armed with assault-style weapons with great lethality and are required to act in what they reasonably perceive to be life-and-death circumstances frequently. Yet, the Ninth Circuit's opinion in this matter, if permitted to stand by this Court, will hamper officers' abilities to react appropriately and safely to perceived deadly threats in providing law enforcement services in the field and will require officers to second-guess themselves, thus placing their lives and the lives of the public at increased risk.

The heartbreaking tragedy that occurred here – the unnecessary death of a teenager – is not remedied by the Ninth Circuit's departure from this Court's established legal principles, which applied to the underlying incident, and which should have required the Ninth Circuit to recognize the reasonableness of Petitioner's actions in the face of the danger he perceived to be facing. Moreover, the case law governing the use of deadly force was not sufficiently clearly established to have constitutionally prohibited his conduct at that time. Accordingly, Gelhaus is entitled to qualified immunity.

Amici have a specific and substantial interest in protecting this Court's broad application of Fourth

Amendment reasonableness standards and in making qualified immunity available to law enforcement officers making critical decisions in the field. As stated in the proposed brief, *Amici* provide a law enforcement perspective that is of broader application than Petitioner, and can aid this Court in its consideration of the vital issues in this matter.

Therefore, in line with *Amici's* participation in the Ninth Circuit Court of Appeals briefing process, *Amici* respectfully request that this Court grant leave to file the attached *amicus curiae* brief in support of the Petition for Writ of Certiorari.

Dated: April 26, 2018

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Amici Curiae are the California State Sheriffs' Association, the California Police Chiefs Association and the California Peace Officers' Association (collectively "*Amici Curiae*").[1] *Amici Curiae* respectfully submit this brief in support of the Petition for Writ of Certiorari in this matter.

I. IDENTITY AND INTEREST OF *AMICI CURIAE*.

Amici are the above Associations, whose members make up a vast array of law enforcement officers throughout the State. *Amici* Members represent policy making officials, management, and rank and file officers, providing a broad spectrum of law enforcement viewpoints.

A. California State Sheriffs' Association ("CSSA")

CSSA is a nonprofit professional organization that represents each of the fifty-eight (58) California

[1] No party or counsel for a party authored this brief, in whole or in part. No person or entity other than *Amici Curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. All parties have been given timely notice of *Amici*'s intent to file this brief; Petitioner has consented, and Respondent has not. This representation is made in compliance with Rule 37.6 of the United States Supreme Court Rules.

Sheriffs, and shares information and resources between sheriffs throughout the State.

B. California Police Chiefs Association ("CPCA")

CPCA represents virtually all municipal chiefs of police in California. CPCA promotes police administration, crime prevention, and the exchange of police information and experience throughout California.

C. California Peace Officers' Association ("CPOA")

CPOA represents more than 15,000 peace officers, of all ranks, throughout the State. CPOA provides professional development and training, and reviews matters impacting law enforcement.

D. *Amici Curiae* Interests In This Matter

This case raises important issues for *Amici Curiae*, in that it will have a profound impact on the members of each Association, as well as on the majority of peace officers in the State. The Ninth Circuit's Opinion (the "Opinion" or "Op.") in this matter has distinct and critical implications to law enforcement use of force and the liability of officers, particularly the applicability of qualified immunity. Local law enforcement officers are continuously engaged in the primary activity of combating crimes and encountering dangerous situations and individuals. Their conduct is guided by this

Court's pronouncements, and their day-to-day lives in the field are directly impacted by such decisions.

Since *Amici* represent the interests of a wide variety of law enforcement, *Amici* provide this Court with a valuable perspective into the implications of the Ninth Circuit's Opinion. The underlying use of force principles at issue impact important public safety concerns that are critical at all levels of law enforcement. Given the significant ramifications of the Ninth Circuit's Opinion, *Amici* respectfully submit this brief in support of Petitioner's Petition for Writ of Certiorari.

Amici's concern begins with the Ninth Circuit's Opinion in this case, *Estate of Lopez v. Gelhaus City of Anaheim*, 871 F.3d 998 (9th Cir. 2017), where the court made a sweeping and exceedingly dangerous pronouncement that a gun barrel "beginning to rise" at an officer does not threaten an officer such that he can reasonably use deadly force in response. Indeed, the Ninth Circuit gave little recognition for the type of weapon and its destructiveness faced by officers in this action.

Second, the Ninth Circuit failed to do exactly as this Court has made clear must be done – to identify specific case authority which clearly dictates what force may reasonably be utilized under similar circumstances.

The Ninth Circuit's Opinion, if permitted to stand, will undermine effective law enforcement in California and, worse, exponentially increase the danger posed to both officers and the public. This Court's review is required in order to provide clear direction as to the

reasonableness of officers' actions, particularly as to deadly force, when confronted with assault-style weapons, and the applicability of qualified immunity in such circumstances. *Amici* support this Court granting the Writ of Certiorari, so these pivotal issues governing the use of force and qualified immunity can be clarified.

II. SUMMARY OF THE ARGUMENT.

This Court is respectfully urged to grant review to determine whether the Ninth Circuit erred in determining 1) the reasonableness of the officer's use of deadly force, given the suspect's raising of a realistic replica assault weapon toward officers, and 2) whether there was any clearly established law prohibiting such deadly force under these facts.

III. STATEMENT OF THE CASE.

This action comes to this Court after the Ninth Circuit affirmed denial of summary judgment as to the reasonableness of Sheriff's Deputy Erick Gelhaus' ("Gelhaus") use of deadly force, and as to qualified immunity.

As the Ninth Circuit's Opinion admits, the following facts were known to Gelhaus at the time of the use of force:

- The area patrolled was "known for gang activity and violent crime." (Op., at 5.)

- "Gelhaus . . . had previously confiscated an AK-47 within one mile of Andy's location," although he "had also confiscated toy guns." (Op., at 6.)

- Based on Andy Lopez walking down the street with what appeared to be a real AK-47, Gelhaus "called in a 'Code 20,'" for "all available units . . . on an emergency basis." (Op., at 6.)

- Gelhaus' partner "'chirped the patrol car's siren'" at Andy Lopez; although Gelhaus "does not recall" this, it is actually audible in the dispatch call recording, and so could have been heard by Andy Lopez in announcing the officers' presence. (Op., at 7, 16 n.7.)

- Once the patrol car was stopped behind Andy Lopez, Gelhaus "knelt on the ground" behind the car door, "aimed his pistol at Andy and yelled loudly at least one time, 'Drop the gun!'" (*Id.*)

- Andy Lopez "did not drop the gun." (*Id.*)

- Although it turned out that the weapon being carried by Andy Lopez was a toy gun, it was an exact replica of a real AK-47 and "did not have an orange tip at the end of the barrel," as required for toy guns. (Op., at 9.)

- The location of the incident was "next to an open field in a residential neighborhood," and Andy Lopez was "walking in

the general direction of several houses." (*Id.*)

- Gelhaus "was aware at the time of the shooting that rounds from an assault rifle can penetrate car doors." (*Id.*)
- Most importantly, the district court explicitly found that "'the rifle barrel was beginning to rise'" at the time that Gelhaus fired at Andy Lopez. (Op., at 17.)

IV. ARGUMENT.

This case presents the intersection of "the most awesome and dangerous" power of government and its use of force with one of the most lethal and dangerous weapons faced by peace officers in the field as they engage daily in their efforts to protect and serve the public safety, as well as maintaining officer personal safety. *See Policeman's Benev. Ass'n of N. J. v. Washington Tp.*, 850 F.2d 133, 141 (3d Cir. 1988). The Fourth Amendment reasonableness standard as to excessive force claims recognizes this balancing of officers' use of force, including *lethal* force, against the severity of the crimes presented to officers and, often, the need for instantaneous analysis of potentially life-threatening circumstances. Indeed, an analysis of whether an individual's constitutional rights have been violated focuses on "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion." *Scott v. Harris*, 550 U.S. 372, 383, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

At the outset, the facts of this matter present differing issues than "standard" uses of force, in that this action involves a particularly deadly assault weapon. These weapons are often far superior in fire power to the weapons of ordinary line officers, and these weapons are deadlier, since they can penetrate car doors and bullet-resistant protective clothing worn by officers. These high powered weapons present a unique character of danger to officers, which impacts the balancing courts must utilize in order to properly evaluate officers' actions.

The dissenting opinion gives proper recognition to the potential danger posed by these weapons. (Op., at 60, Wallace, J., dissenting.) Indeed, not all weapons are the same or present the same danger or threat to officers or the public. As this Court has recognized, however, there is ample room within the Court's Fourth Amendment and qualified immunity analysis to account for such varying circumstances, including the type of weapon involved. However, the Ninth Circuit's Opinion does not afford due regard to the totality of the circumstances or the requirement for clearly established law as to a denial of qualified immunity here. Therefore, the Opinion warrants this Court's review.

A. This Court's Review Is Required In Order To Protect Reasonableness Analysis Under The Fourth Amendment And Qualified Immunity.

Based on the undisputed facts in this matter, Sheriff's Deputy Erick Gelhaus ("Gelhaus") was entitled to a finding that his actions were constitutional and reasonable, or at least, that the law was not clearly established such that he should be denied qualified immunity in the action he took to protect his, his partner's, and the public's safety. An individual appearing to illegally carry an AK-47 assault rifle on the sidewalk and who is raising the barrel of the gun toward officers is reasonably perceived by officers as posing an imminent threat of serious bodily injury or death such that an officer may constitutionally use deadly force in self-defense. In addition, even assuming *arguendo* that Gelhaus' actions could be construed as unreasonable, he is still entitled to qualified immunity because there was no clearly established law prohibiting his reaction under these circumstances.

1. Deputy Gelhaus' Actions Were Reasonable, Given The Rising Of The Barrel Of An Assault Weapon Toward Him.

In Fourth Amendment excessive force cases, the inquiry "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Officers' conduct must be "objectively reasonable based on the *totality* of the circumstances." *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (emphasis added). *See also*, *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872 (1989) ("reasonableness at the moment applies"); *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 821 (11th Cir. 2010) ("[t]he only perspective that counts is that of a reasonable officer on the scene at the time the events unfolded") (quotations omitted).

As this Court has long held, "proper application [of the Fourth Amendment reasonableness test] requires careful attention to the facts and circumstances of each particular case, including 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." *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. Critically, "[t]he calculus of reasonableness 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, 109 S. Ct. 1872. Indeed, the immediate threat posed by a suspect is the " 'most important' " factor in this analysis. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). *See also*, *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (same). Further, as to deadly force, an immediate threat of "serious physical harm" must be shown.

Tennessee v. Garner, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

These standards set a high bar for officers to meet, yet provide law enforcement officers appropriate maneuvering room in which to make such judgments, and permit an officer to defend himself when faced with an immediate threat. The standards do so, in part, by accounting for the practicalities of the real world and for the fact that these decisions are very seldom made at leisure.

In light of the undisputed facts, particularly two key facts – namely, the assault weapon being carried down the street in a residential neighborhood and the rifle barrel beginning to rise at officers, Gelhaus' reaction to the perceived and very real threat to officers was reasonable.

In the heat of the circumstances, with such a deadly weapon being "raised" at officers, little else mattered or was critically relevant to their immediate determination of what force was reasonable. What was most critical was the fact that the weapon being carried by Lopez reasonably appeared *real*. It was a type of weapon that was of extremely lethal force, and it was *being raised* at officers.

There is room within the Fourth Amendment reasonableness standard for an officer to use judgment and discretion, even if it is mistaken. Both the district court and the Ninth Circuit all too easily concluded that the barrel could have risen to a "'level [that did not] pos[e] any threat to the officers.'" (Op., at 18

(citing *Lopez*, 149 F. Supp. 3d at 1158, 1162).) However, the critical fact to officers in the field is their perception of the act of the barrel rising, not necessarily the exact angle of the rising barrel. The decision-making process employed by the Ninth Circuit demonstrates a lack of understanding of the practical realities and dangers faced by law enforcement officers in performing their duties. Moreover, it represents a quintessential example of the application of 20/20 hindsight vision, which explicitly is forbidden by this Court in judging a law enforcement officer's use of force.

The Ninth Circuit's decision alters the long-established standard employed by this Court in determining whether the force used by an officer violates the Fourth Amendment. "The Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments.'" *City & County of San Fran. v. Sheehan*, 135 S. Ct. 1765, 1775, 191 L. Ed. 2d 856, 867 (2015). Nothing in the Fourth Amendment bars an officer from protecting himself. *Id*. "The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay 'would gravely endanger their lives or the lives of others.'" *Id.*

The Ninth Circuit's decision – essentially telling officers that there is an unknown degree at which a rising weapon becomes a threat, encourages delay in the decision-making process these officers are placed in while facing life-threatening situations and fails to offer officers the protection that the law has always provided to them. In short, application of the Ninth Circuit's decision to real world, split-second, police

encounters would require a practice by officers of waiting for definitive proof of a circumstance that will only come when it is too late for them to adequately respond to defend themselves. The Ninth Circuit's Opinion impermissibly puts law enforcement officers' lives at risk and does not sufficiently protect the public safety.

Empirical evidence suggests that officers cannot respond quickly enough to threatening situations if they are required to wait for further confirmation of the continued rising of the barrel of the gun, as the Ninth Circuit's Opinion would dictate. In addition, it is illogical to assume that the rising barrel of a gun is not life threatening throughout its rising, and at lower levels. Even a gun not raised to a level perpendicular to a suspect's body could still prove to be a dangerous threat. A gunshot wound to a lower extremity of an officer's body could expose an officer to incapacitation, which can open a window of opportunity for suspects to control an officer's duty weapon, to flee and/or to inflict further injury on officers or members of the public.

Indeed, as *soon* as a gun is raised from being pointed at the ground, it can pose a serious threat of physical harm. The dissent recognizes the wholesale difference between a gun pointed at the ground – which was not where Lopez's gun was pointed, based on the undisputed facts, and one which is beginning to rise – to whatever level. (Op., at 47, dissent ("A gun pointed at the ground and one that is rising are qualitatively different.").)

This is the critical undisputed fact from the district court's findings – that "the fake gun's barrel 'was beginning to rise.'" (Op., at 48.) And, it was this rising of the gun's barrel, coupled with the fact that it was an AK-47 with no legal basis for being present on the sidewalk, that rendered Gelhaus' swift response reasonably necessary to protect his life.

Society asks officers to put themselves in harm's way in order that the public may be made safer. However, the Ninth Circuit's Opinion imposes an impractical standard that departs from established law and which jeopardizes the public's and law enforcement safety. The Opinion's holdings offer essentially no protection for those officers who heed this call.

In reality, any upward movement of a weapon toward an officer presents a manifest and unequivocal threat to officers, particularly with respect to an assault-style weapon. Gelhaus was thus reasonably reacting to a perceived real threat to his safety. Once a weapon begins to rise, an officer should not be asked to risk his life and is not required to "assume the best." *See Scott*, 550 U.S. at 385.

Indeed, the Ninth Circuit seems to have wholly discounted the nature of the weapon at issue in this matter. Contrary to what is required by the analysis in *Graham* as to the totality of the circumstances, the Ninth Circuit seems to have ignored the unique threat that the perceived AK-47 posed to Gelhaus.

The National Institute of Justice ("NIJ") is the only nationally accepted standard for the body armor

worn by law enforcement officers. The NIJ ballistic resistance standard, 0101.06, establishes minimum performance requirements and classifications for ballistic resistance of personal body armor protecting the torso. *See* NATIONAL INSTITUTE OF JUSTICE, *Guide Body Armor: Selection & Application Guide 0101.06 to Ballistic-Resistant Body Armor*, December 2014.[2]

Everyday wear armor is classified as Level IIA, II or IIIA with particular agencies choosing one of these levels, none of which offers any protection against rifle ammunition. *Id.* at 3, 21; *see also* NATIONAL INSTITUTE OF JUSTICE, *Understanding NIJ 0101.06 Armor Protection Levels*.[3] In other words, an officer facing an AK-47 faces a far more serious threat than an officer facing a handgun – a circumstance that cannot be disregarded by courts in analyzing use of force incidents.

The dissenting opinion recognizes the life-threatening risk posed by an assault-style weapon, such as an AK-47. Notably, there was apparently no disputed evidence that Gelhaus reasonably perceived Lopez's fake gun to be a real one; indeed, it was a replica AK-47, not merely a "toy" gun, and did not have the signature orange markings to indicate it was not real. (Op., at 55, dissent.) As the dissent notes, mere "possession of such a weapon is a crime in California." (Op., at 60, dissent (citing Cal. Penal Code § 30605(a)).)

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[2] Available at https://www.ncjrs.gov/pdffiles1/nij/247281.pdf

[3] Available at https://justnet.org/pdf/Understanding-Armor-Protection.pdf

More importantly, the "destructive capabilities" of this weapon are undisputed, as was the fact that there had been a "prevalence of weapons-related violent crimes in the area," and gang activity relating to such weapons. (Op., at 60, dissent.) These facts and circumstances render the risks of someone walking down the street with such a weapon, and the rising of the barrel of such a gun toward officers who had ordered Lopez to put down the gun, qualitatively the same as other factual circumstances presenting more direct threats to officers or outward aggressive behavior.

In contrast to this action, the Ninth Circuit in *Solis-Diaz v. Tompkins*, 656 F. App'x 294, 296 (9th Cir. 2016) (emphasis added), denied qualified immunity as to an individual with an assault weapon, but this was due to an actual material dispute of fact. There was disputed evidence whether the suspect "pointed his weapon at [the officer]," and even the officer stated that the "gun [was] pointing 'straight down.' "

The Fourth Amendment reasonableness standard gives "ample room for mistaken judgments." *Hunter v. Bryant*, 502 U.S. 224, 229, 116 L. Ed. 2d 589 (1991). This should be true for the assessment of the position of a gun, and thus the level of threat that it presented, i.e., where the barrel of an assault-style rifle is raised slightly but perhaps not rising enough to "pose[ ] any threat to either of the officers." (Op., at 23.) Even mistaken judgment on this fact, particularly given the nature of the weapon, is entitled to this Court's protection.

The Ninth Circuit found in *Curnow By and Through Curnow v. Ridgecrest Police*, 952 F.2d 321, 324-325 (9th Cir. 1991), that summary judgment was not proper because the suspect was not pointing a gun toward officers. Eyewitness statements established that the suspect did not reach for an assault weapon near him in his home, and he was apparently shot in the back by the officer's first shot. *Id*. at 323. In *Harris v. Roderick*, 126 F.3d 1189, 1202 (1997), the Ninth Circuit found lethal force unreasonable when a sniper killed an armed male without warning and not based on any threatening behavior of the individual. The Court characterized the "shoot-on-sight edict" as "so extreme an order [that it] is patently unjustified." *Id.*

In contrast to facts here, the individual shot in *Harris* "had committed no crime, posed no threat to the safety of officers or others, . . . and had not been warned of the presence of law enforcement." *Id.* As noted above, Lopez was walking down the sidewalk with what reasonably appeared to be an extremely lethal and illegal weapon; he was alerted to the presence of officers and ordered to put the gun down. Although a warning about the use of deadly force would have been ideal, the rapidly evolving circumstances did not permit that. Lopez's movements tragically led Gelhaus to the reasonable conclusion that Lopez was intentionally raising the gun to officers, presumably to fire upon them. As such, Gelhaus justifiably reacted to this sequence of events using deadly force in his own and his partner's defense.

Although it is clear that a suspect merely near a gun does not necessarily present a threat of harm, it is also true that "'an armed suspect need not engage in some specific action such as pointing, aiming, or firing his weapon to pose a threat.'" *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013) (cited in *Mason-Funk v. City of Neenah*, 2017 U.S. Dist. LEXIS 180735, at 34-35 (E.D. Wis. 2017)).

Indeed, the threat posed based on a suspect's behavior is often on a sliding scale in comparison to the type of weapon involved. In *Blanford v. Sacramento County*, 406 F.3d 1110 (2005), a sword presented sufficient immediate danger and justified deadly force, where there were other supporting facts, such as the man walking through a neighborhood brandishing the sword, warnings given to the individual that police would shoot, and the man exhibiting aggressive intentions by loud growling. *Id.* at 1112-1113, 1119.

Here, the facts and circumstances surrounding Lopez's behavior were equally threatening, based upon the barrel of an assault-style weapon being raised in the direction of Gelhaus, and the fact that the weapon was both *illegal* and far more deadly. As soon as the barrel of that weapon was rising toward the deputies, the threat of harm was reasonably perceived to be imminent and outweighed other potentially benign facts up to that point in time.

This Court has just recently reversed the Ninth Circuit's finding that an officer was not entitled to summary judgment in *Kisela v. Hughes*, ___ U.S. ___,

138 S. Ct. 1148, 200 L. Ed. 2d 449, 2018 U.S. LEXIS 2066, 86 U.S.L.W. 4173, 2018 WL 1568126 (2018). Although this Court's determination was based on qualified immunity, the Court also accepted officers' conclusions that lethal force could be used even in response to a knife, where officers reasonably believed that a victim within "a few feet" of the suspect could be in danger and the officers "had mere seconds to assess the potential danger." *Id.* at 1153, 20 L. Ed. 2d at 455. Again, the danger of the weapon (a knife) was coupled with "erratic" behavior by the suspect, and "at least two commands [from officers] to drop the knife." *Id.* In contrast here, a more inherently dangerous weapon (the apparently real, and illegal, AK-47) required much less in terms of threatening behavior to justify a similar use of force.

The Ninth Circuit's Opinion creates an absurdity not grounded in reality and which asks officers to do the impossible within the time frame when the barrel of an AK-47 rifle is rising up in their direction. Numerous studies have been conducted regarding officer response times, which demonstrate that officers cannot react to a threat faster than a gun that is being pulled on them. *See* Thomas A. Hontz, *Justifying the Deadly Force Response*, 2 POLICE Q. 462 (1999); William Lewinski et al., *Ambushes Leading Cause of Officer Fatalities – When Every Second Counts: Analysis of Officer Movement from Trained Ready Tactical Positions*, 15 LAW ENFORCEMENT EXECUTIVE FORUM 1 (2015); J. Pete Blair et al., *Reasonableness and Reaction Time*, 14 POLICE Q. 4: 323-42 (2011); William Lewinski et al.,

Reaction Time to Start and Stop Shooting: The Influence of Decision Making and Pattern Recognition, 14 LAW ENFORCEMENT EXECUTIVE FORUM 1 (2014).

A suspect can raise a gun held by the side of the leg and fire in .59 seconds. *Hontz*, at 468 and 470. On the other hand, an officer in such a situation, who is "faced with a complex decision-making process . . . will take an average of anywhere from .46 to .70 s[econds] to ***begin***" his or her response. *Lewinski* (2014), at 2 (emphasis added). It is during this time that the officer perceives the threat, evaluates it and makes a decision. *Hontz*, at 470-471. The officer must have "movement time to bring the weapon on target then time to return fire. . . ." *Id.* It takes an officer 1.82 seconds to remove his weapon from a snapped holster and fire, and 1.68 seconds to remove his weapon from an unsnapped holster. *Id.* at 10.

Even if an officer has his weapon out and aimed at a suspect, he is still at a serious disadvantage, purely because of the time it takes to complete the decision-making process. A study of a simple stimulus and response, in which officers were standing with guns drawn and were to fire when they saw a green light, were able to fire at an average of .25 seconds after the green light was turned on. *Lewinski* (2014), at 6.

In a study of more complex circumstances designed to more closely resemble an actual use of force situation, officers encountered armed suspects with their guns down, while officers had their guns aimed at the suspects. Suspects either surrendered or

attempted to shoot, and the study examined the "speed with which the officer fired if the suspect chose to shoot." *Blair*, at 323. The results of the study were not encouraging for officers; "officers were generally not able to fire before the suspect." *Id.* As the researchers concluded, the "process of perceiving the suspect's movement, interpreting the action, deciding on a response, and executing the response for the officer generally took longer than it took the suspect to execute the action of shooting, even though the officer already had his gun aimed at the suspect." *Id.* at 336.

Here, Lopez had his weapon by his side initially. As discussed above, had it been a real weapon as perceived, he could have fired it 0.59 seconds after the barrel first began to rise. *See Hontz*, at 468 and 470. Gelhaus, however, would not have been able to timely make a decision and respond. The Ninth Circuit's Opinion essentially finds that a suspect's gun is not a threat during the 0.59 seconds that the barrel is rising, but this defies logic and any practical usefulness in the field.

While it is clear from the Ninth Circuit's Opinion that the court believes there is some point at which a rising weapon goes from non-threatening to threatening, it is unclear at what point that occurs, or when it is reasonable for an officer to perceive movement upward as continuing upward. *See Lopez*, 871 F.3d at 1016-1017. Thus, a gun trained at the ground (0°) is not an objective threat, whereas a gun extended, or at a right angle to a suspect (90°) is an objective threat. *See George*, 736 F.3d at 838-839. What is wholly

unclear from the Ninth Circuit's Opinion here is the degree to which an officer must allow a suspect to raise a weapon at him before the officer can be said to be facing an objective threat of serious bodily injury or death. In "the theoretical, sanitized world of our imagination" this may be a mere ambiguity, but in reality is a question of life or death. *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992). The restrictions placed on officers do, and must, allow for the protection of their own safety even when they misperceive the need for force. "What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Id.*

The Ninth Circuit's Opinion would unnecessarily and dangerously require officers to delay using force, even in the face of a rising assault weapon. This exponentially increases the danger to officers, who are already at an extremely significant time disadvantage. *Amici* do not expect the law to condone unreasonable or reckless behavior of officers, but it should allow officers to do their jobs and to protect their own lives.

2. The Ninth Circuit's Opinion Ignores This Court's Requirement For Specific, Clearly Established Law In Order To Deny Qualified Immunity.

Police officers are presumed to be protected by qualified immunity. *See Gasho v. United States*, 39 F.3d 1420, 1438 (9th Cir. 1994). Indeed, the standards are flexible and account even for "reasonable error . . .

because officials should not err always on the side of caution." *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 537 (1991).

This Court has recently reiterated that "qualified immunity attaches when an official's conduct 'does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known.'" *White v. Pauly*, 580 U.S. ___, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017) (per curiam) (emphasis added). This Court stated that, while "case law 'does not require a case directly on point' . . . [the] constitutional question [must be] ***beyond debate***.'" *Id.* (emphasis added). This Court issued numerous reversals in recent years on qualified immunity, three of which were from the Ninth Circuit: *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), *Stanton v. Sims*, 134 S. Ct. 3 (2013), and *Wood v. Moss*, 134 S. Ct. 2056 (2014). *White*, 137 S. Ct. at 551.

Although long-established, this Court had to "reiterate" that "'clearly established law'" cannot be based on "generality." *Id.* This Court has "repeatedly told courts – and the Ninth Circuit in particular" this same principle. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (citations omitted).

This Court recently found the Ninth Circuit committed error in denying qualified immunity to an officer who shot an erratic suspect wielding a knife when a victim was within reach and could be in immediate danger. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018).

This Court also questioned the use of Circuit precedent for clearly established law. *See Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088 (2012).

As to the opinions analyzed in *Kisela*, there is similarly no clearly established law undermining qualified immunity. In *Blanford*, a lesser weapon utilized by a suspect, a sword, justified deadly force. *Kisela*, at 1153 (citing *Blanford v. County of Sacramento*, 406 F.3d 1110, 1112-1113 (2005). The facts in *Deorle v. Rutherford*, 272 F.3d 1272, 1276, 1281-1282 (2001), "involved a police officer who shot an unarmed man in the face, without warning." *Kisela*, at 1154. In *Harris*, a sniper shooting an armed suspect from a hilltop was deemed unreasonable. *Kisela*, at 1154 (citing *Harris v. Roderick*, 126 F.3d 1189, 1202-1203 (9th Cir. 1997)).

The standard for clearly established law to overcome qualified immunity is demanding. The right must be "sufficiently clear that every reasonable official" would perceive the violation. *al-Kidd*, at 742.

Here, the Ninth Circuit relies on several of its own decisions to demonstrate purportedly clearly established law. It does not rely on precedent of this *Court*. Even so, none of these cases establish clear law that Gelhaus' actions were unconstitutional. (Op., at 38-43 (citing *George v. Morris*, 736 F.3d 829 (9th Cir. 2013), *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), and *Curnow By and Through Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991)). They do not provide clear guidance for reasonable force against a suspect armed

with an assault weapon that is beginning to rise in an officer's direction.

To the contrary, in *George*, the suspect's weapon was "trained to the ground" when the officer fired. *George*, 736 F.3d at 839. Also, in *Harris*, the suspect was armed, but was shot by a sniper from the safety of a nearby hill without warning and not based on any threatening behavior. *Harris*, 126 F.3d at 1203. In *Curnow*, the suspect did not point the gun at officers, and was merely standing next to the weapon in his home when officers entered, and was actually shot in the back while running away holding the muzzle. *Curnow*, 952 F.3d at 324.

The Opinion ignores the change in the situation once Gelhaus perceived the assault-style weapon's barrel was rising towards him. Further, although the Ninth Circuit concluded that officers had an opportunity to warn Lopez, there was insufficient time to do so as soon as Lopez turned toward officers and the barrel of the assault weapon began rising toward them. Simply put, warnings were possible in *George*, because the gun of the suspect was pointed at the ground, not toward officers, and the barrel was not rising. That was not the situation faced by Gelhaus.

Despite the recognition of the vastly differing facts in *Harris* and *Curnow*, these cases were found to "g[i]ve Gelhaus 'fair notice'" not to use deadly force. (Op., at 42.) Not so. Instead, *Harris* says a sniper cannot shoot an armed man without warning from a distant location. *Kisela*, at 1154. *Curnow* says deadly force

cannot be used when a suspect is near a weapon, and then flees, holding it by the muzzle. 952 F.3d at 324. These authorities are insufficient to clearly establish that an officer, faced with the barrel of an illegal AK-47 rising up toward him, may not use deadly force to protect himself, his partner, and potentially nearby residents. *Amici* wish to emphasize that a case must be identified as to "'***similar circumstances***' violating the Fourth Amendment." *White*, 137 S. Ct. at 552.

The movement of Lopez's weapon – the rising barrel – is not just a distinguishing fact, but one changing the entire dynamic of the interaction between Lopez and Gelhaus. None of the precedents relied upon by the Ninth Circuit's Opinion speak to these very dangerous circumstances.

V. CONCLUSION.

For all of the foregoing reasons, *Amici* urge this Court to grant the Petition for Writ of Certiorari in this matter, in order to protect this Court's jurisprudence as to the reasonableness of peace officers' use of force

in the face of an assault-style weapon rising in the direction of officers, and concerning the applicability of the qualified immunity doctrine.

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Respectfully submitted,

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