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.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORCE LITIGATION CONSULTING, LLC AND GREGORY CONNOR CONSULTING INC. IN SUPPORT OF PETITIONER

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ERICK GELHAUS,

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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 a Brief as *Amici Curiae*

Pursuant to Rule 21, the undersigned counsel and *Amici* petition this Honorable Court for leave to file an *Amicus Curiae* brief in support of the Petitioner in this matter. Our interest, personally and professionally, are as retired Judge Advocates with multiple combat tours and as retired law enforcement officers who have spent over two decades teaching and extensively writing about the Use of Deadly Force in Self-defense. We have taught these subject matters, all relevant to this case at the Army War College; the United States Military Academy; the United States Naval Academy; United

States Special Operations Command; and, to divers other student bodies of commanders, law enforcement officers and their legal advisors and judge advocates.

We are also writing on behalf of the peace officers that believe that the Federal Appellate Court's decision in this case is not only morally and legally wrong, but that it also has a chilling, dangerous impact on our Nation's officers' ability to defend themselves in the line-of-duty. As authors and trainers in the field of law enforcement, specifically search and seizure and the related sub-category of use of force, we have perceived a trend in cases from the lower courts, especially the Court of Appeals for the Ninth Circuit, that appear to be inconsistent with the teachings of the Supreme Court in these topic areas: the safety of law enforcement officers and innocent citizens; the impact on society of decreased law enforcement effectiveness; and, the concern that the trend will continue if not addressed and corrected by this Court.

The Petitioner has consented to the filing of the brief. The Respondent has neither consented nor objected to date.

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I. INTEREST OF *AMICI CURIAE*[1]

The named *Amici,* Force Litigation Consulting, LLC and Gregory Connor Consulting Inc., are practitioners, authors and trainers in the field of law enforcement, specifically search and seizure and the related sub-category of use of force. They have perceived a trend in cases from the lower courts that appears to be inconsistent with the teachings of the Supreme Court in these topic areas; the safety of law enforcement officers and innocent citizens, and the impact on society of decreased law enforcement effectiveness, and are concerned that the trend will continue if not addressed and corrected by the Court.

As so wisely observed by Sir Winston Churchill in a speech in 1927, "I decline utterly to be impartial between the fire brigade and the fire."[2] So, too, should any court when weighing the actions of a peace officer acting in defense of self or innocent others.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief.

[2] Patrick, Urey and Hall, John, *In Defense of Self and Others: Issues, Facts & Fallacies – The Realities of Law Enforcement's Use of Deadly Force*, Third Edition, Carolina Academic Press (2017).

II. SUMMARY OF ARGUMENT

The *amici* named above respectfully request that this Court accept the petition for certiorari filed by Petitioner Gelhaus, and set the matter for briefing and argument. This Court should do so in order to correct the errors of law made by the District Court and Court of Appeals that hamper the otherwise lawful acts of law enforcement officers, introduce and apply standards not consistent with the guidance of this Court, and to provide further guidance to other subordinate courts.

III. STATEMENT OF FACTS

> Andy Lopez was shot by Sonoma County Deputy Sheriff Erick Gelhaus while carrying a replica AK-47 assault rifle that had been altered to look like the real thing. Gelhaus had been on patrol in the afternoon of October 22, 2013, and had spotted Lopez, who appeared to be in his mid to late teens, walking on the sidewalk carrying what appeared to be an AK-47. Gelhaus approached Lopez from behind, called for him to drop his weapon, but instead, Lopez turned to face the officer, raising the barrel of the rifle, prompting Gelhaus to fatally shoot him.[3]

[3] As set forth in Petitioner's brief.

IV. THE LEGAL ANALYSIS TO BE APPLIED

A. The trial court improperly assessed the circumstances and introduced an erroneous standard that impedes the lawful obligations of law enforcement officers.

The trial court, for no discernable reason, referred to the lack of any reports of a person carrying a weapon. *Order Granting in Part and Denying in Part Summary Judgment* at 1-2, January 20, 2016. This is not merely irrelevant, but unsound. Proactive policing, the active search for malefactors who present a risk to the community, is a core function of law enforcement.

> One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.

Terry v. Ohio, 392 U.S. 1, 22 (1968). As in *Terry*, "(i)t would have been poor police work indeed ..." to have not given further attention to the circumstances described. *Terry*, at 23. Here, decedent was carrying what appeared to be a rifle he could not lawfully possess under California law, certainly a circumstance that would justify inquiry by any law

enforcement officer who saw the events. *Plakas v. Drinski*, 19 F. 3d 1143, 1150 (1994). Under the curious view expressed by the trial court, proactive policing is treated as problematic, not a benefit to society.

B. The trial court applied legal standards for Petitioner's use of force that were neither relevant nor correct.

The trial court also confused the standards of *Tennessee v. Garner*, 471 U.S. 1 (1985) with those of *Graham v. Connor*, 490 U.S. 386 (1989). While this confusion appears to be common, it is inexplicable. *Garner* is about the reasonableness of using deadly force to prevent the escape of an apparently unarmed felon. While it did teach that the use of deadly force to make a seizure is subject to the reasonableness requirement of the Fourth Amendment, *Garner*, at 7, the primary focus of the case was the use of force to control (seize) a person who is trying to escape. "This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon." *Garner*, at 3. Similarly,

> (w)here the suspect poses *no immediate threat to the officer and no threat to others*, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. ... (a) police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee

> statute is unconstitutional insofar as it authorizes the use of deadly force against such *fleeing* suspects.
>
> * * *
>
> Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary *to prevent escape*, and if, where feasible, some warning has been given.

Garner, at 11-12 (emphasis added). From reading the above, it is clear that it is a condition precedent to the restrictive applicability of *Garner* that the person who is to be seized by deadly force must be both fleeing *and* not a danger to the officer or others.

C. The correct legal standard should have resulted in a different outcome at Summary Judgment.

Under no stretch of the imagination were the facts in this case consistent with *Garner*. Decedent was not fleeing. Instead, he did not follow the commands given and turned toward the deputies in a manner consistent with and indicative of assaultive conduct likely to result in death or grievous bodily harm, to wit: shooting an officer with an AK-47. As such, the analysis of the law enforcement conduct is subject to the "objective

reasonableness" test of *Graham v. Connor*, 490 U.S. 386 (1989). There is no question that decedent was "seized" by the act of shooting him. The question to be determined is whether the seizure was "reasonable".

> Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

Graham, at 395 (emphasis in original).

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem

> unnecessary in the peace of a judge's chambers violates the Fourth Amendment. The 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.

Graham, at 396-397 (internal quotation marks and citations omitted). Here, even assuming the facts in the light most favorable to the respondents (plaintiffs below), the trial court concluded that the "... 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." *Order Granting in Part and Denying in Part Summary Judgment* at 11, January 20, 2016. This is parsing the facts in too fine a manner, and ignores the long established and well-known reality of violent human conflict. A rifle such as decedent appeared to be wielding can be raised from a position pointed at the ground and fired in less time than it would take for most to respond with appropriate defensive fire.

> From the research on assailant behavior in a shooting situation, which has been referred to previously, the average time for an assailant to point and fire a long barreled weapon at this

> distance, where a gun doesn't necessarily need to be aimed is approximately a second. However, an average officer who has already decided to shoot, can't react and complete the defensive act of shooting (aligning a gun on target, aiming and then shooting), in response to an evolving threat, for seven tenths of a second or longer. If the officer has to bring their weapon on target and aim it as Deputy Gelhaus said he did, then it would take the average officer well over a second to respond to the threat of a long barreled weapon being pointed at them.
>
> Therefore, from a behavioral science perspective, if Mr. Lopez had the weapon he was perceived to have and the intent to fire on the officers as was perceived and Deputy Gelhaus had not responded, but waited until Mr. Lopez had actually started to point or point and fire his perceived AK47 -by the time Deputy Gelhaus could respond with gunfire, if Deputy Gelhaus was still able to - he could be shot at multiple time (sic) before he could respond back and fire one shot.

Lewinski, Appendix "D" to the *Sonoma County District Attorney's Report to the Public*, at 13-14. As such, once the barrel began to move upward to any perceptible amount, the lethal threat to Gelhaus and

any other person "down range" was at least imminent. "The best use of justified deadly force is preemptive. That means that it is timely enough, and effective enough, to prevent an *imminent* risk of serious injury (about to happen) from becoming a *definite* attempt to cause serious bodily injury (in fact happening)." Urey W. Patrick and John C. Hall, "*In Defense of Self and Others -- issues, facts & fallacies: The realities of law enforcement's use of deadly force*", p. 100 (3rd edition, 2017) (emphasis in original).

In reality, then, not only was Petitioner's use of force objectively reasonable - to have failed to shoot would have been unreasonable from an objective viewpoint, regardless of decedent's apparent or actual age. Pierce R. Brooks, *"... officer down, code three."* p. 133 (1975). This is not a surprising analysis, and should be readily apparent to anyone who has read and considered the *District Attorney's Report*, which has been available since July 2014. http://www.pressdemocrat.com/news/2371645-181/sonoma-county-da-no-criminal, last accessed April 22, 2018.

Moreover, ideally police use of force should be preemptive not reactive. In other words, police need not wait to be shot at before using force to prevent being this from happening. And, the age of an armed suspect is rarely relevant to such threat assessments. One need only look to the FBI's Uniform Crime Statistics[4] or local headlines to see

[4] Annually, in the United States, there are over 3,200 murders committed by suspects under the age of 18, See E.g., FBI

the large percentages of shootings perpetuated by teenagers. An apparently armed teenager who is noncompliant is as dangerous as an adult similarly situated.

D. This was a matter of reasonable use of force in self-defense under well-established law many years older than *Graham*.

While there is no doubt that from a Fourth Amendment viewpoint, this was a "seizure", it was first and foremost a matter of self-defense under long established legal standards. The standard of "reasonableness" applied to the use of force under the Fourth Amendment is indistinguishable from that applicable to self-defense. A private citizen faced with the same threat would likewise have been justified in shooting the decedent. Certainly a law enforcement officer, one whom society directs to actively seek out and control criminal actors, should be given the benefit of the same analysis.

Most simply "do not know what they do not know" when it comes to the tactical and legal dynamics of close-in killing environments. As such, they superimpose ill-founded notions of reasonableness when judging others' tactical actions in situations fraught with immediate dangers. In doing so, they judge this dangerous world as they believe it *ought* to be rather than how it truly is. And, too often, opinion derived from television, the media or even political agitators instead of law,

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Uniform Crime Report – Expanded Homicide Data Table 3 (2010).

science and proper tactics drive the litigation train.[5] The Supreme Court of the United States, both in old Common Law cases such as *New Orleans & Northeastern R. Co. v. Jopes,* 42 U.S. 18 (1891) and *Brown v. United States,* 256 U.S. 335 (1921) and modern day cases assessing reasonableness under the Fourth Amendment soundly refute such novice opinion.

In *Jopes*, the plaintiff approached the conductor with an open knife in his hand, and in a threatening manner, and that the conductor for the railroad, fearing danger, shot and wounded the plaintiff in order to protect himself. The *Jopes* Court said:

> It will be scarcely doubted that if the conductor was prosecuted criminally, it would be a sufficient defense that he honestly believed he was in imminent

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[5] Bohrer, Shannon and Chaney, Robert, "Police Investigations of the Use of Deadly Force Can Influence Perceptions and Outcomes," *FBI Law Enforcement Bulletin* (January 2010). "For example, when interviewed, one chief of police advised, "it is sometimes easier to go through an officer being killed in the line of duty than a questionable police shooting." In 1993, Edward F. Davis was an instructor in the FBI Academy's Behavioral Science Unit when he interviewed the chief about police and the use of force. The chief's comment could be misconstrued because it was part of a larger dialogue about police use of force and community relations, although it demonstrates perceived and sometimes real concerns. Specifically, the chief was referring to the fact that the department seemed to pull together when an officer is killed and the opposite often occurs when the shooting is questioned in the media."

> danger and had reasonable ground for such belief. In other words, the law of self-defense justifies an act done in honest and reasonable belief of immediate danger. The familiar illustration is that if one approaches another pointing a pistol and indicating an intention to shoot, the latter is justified by the rule of self-defense in shooting, even to death, and that such justification is not avoided by proof that the party killed was only intending a joke, and that the pistol in his hand was unloaded. Such a defense does not rest on the actual, but on the apparent, facts and the honesty of belief in danger.

Jopes, *Id.*, at 23. " ... (i)t is enough if the danger which the defendant seeks to avert is *apparently* imminent, irremediable and actual." *Jopes*, at 24 (emphasis added). One should also note that the *Jopes* Court was not plowing new ground; the various authorities cited after the preceding sentence range as far as 42 years old (*Shorter v. People*, 2 N.Y. 193 (1849)) at the time of the *Jopes* opinion.

In *Brown*, the Supreme Court made it very clear that the right of a man to stand his ground and defend himself when attacked with a deadly weapon, even to the extent of taking his assailant's life, depends upon whether he reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, and not upon the detached

test whether a man of reasonable prudence, so situated, might not think it possible to fly with safety or to disable his assailant, rather than kill him.

> Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this Court at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant, rather than to kill him.

Brown, Id., at 343. These same standards apply to law enforcement personnel faced with what appears to be a lethal threat.

To properly analyze deadly force events, one must understand: (1) the authorities extant to use deadly force; (2) the proper standard of legal review; and, (3) the tactical dynamics of deadly force encounters underpinning those legal standards.[6] It

[6] In every other area of the law – E.g., contract law, environmental law, search & seizure law, and tort law – the law drives the facts. This is because decisions based on these laws can be made in calm, rational decision-making environments. But, when considering deadly force in self-defense matters, the Supreme Court of the United States recognizes that facts drive the law. This is because persons being attacked are in a risk-critical, time sensitive environment during which they will resort to recognition-primed decision making. It is why Justice Oliver Wendell Holmes so presciently stated in *Brown v. United States* (1921) that, "Detached

is this reasonableness that the Supreme Court of the United States repeatedly says a reviewer must not do:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight … the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation – in circumstances that are tense, uncertain, and rapidly evolving.[7]

In April 2018, the Supreme Court soundly reiterated this principle in *Kisela v. Hughes*, 584 U. S. ____ (2018)[8] (per curiam):

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reflection cannot be demanded in the presence of an uplifted knife."

[7] *Graham v. Connor,* 490. U.S. 396 at 397.

[8] Where Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question addressed is whether at the time of the shooting Kisela's actions violated clearly established law. In reality, the threat to the other woman was not merely theoretical - at that distance, Hughes could have easily delivered a lethal wound

> An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U. S. ___, ___ (2014) (slip op., at 12). That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

The "reasonableness" inquiry in a use of force case 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.[9,10] Even if extant "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force Constitutional."[11]

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before the officers could react.

[9] *Graham v. Connor*, 490 U.S. 386, 397 (1989).

[10] While a case such as this is addresses the use of force as a "seizure" under the 4th Amendment, it is at its core a case of self-defense, and the analysis must start from the legal and tactical understandings of such cases. The legal analysis is far older than the *Graham* case, going back to *Jopes* and the cases and commentaries cited therein.

[11] *Graham*, at 397.

There is a reason why the Federal Courts are so seemingly forgiving to agents of the government when it comes to making hasty threat assessments. It is because the facts of how humans react under stress are what drive the law in this regard. These facts are known by knowing tactical instructors as "tactical dynamics of a deadly force encounter."[12]

V. THE TACTICAL DYNAMICS OF A DEADLY FORCE ENCOUNTER MUST IMPACT THE LEGAL ANALYSIS.

Many counsel remain jejune to the dynamics of deadly force encounters and how such dynamics impact judgment and targeting decisions under stress. The lower courts in this case chose to do what a trial court in the United Kingdom was chastised for doing in the case of *Regina v. Corporal R. Lee Clegg*, in which a British Paratrooper was convicted from a case arising out of a patrol in Northern Ireland during the co-called "troubles" between

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[12] The proceeding pages – concerning the dynamics of deadly force encounters – are drawn from *In Defense of Self and Others* and the authors' professional experience and knowledge base as set forth in numerous books, law review articles and treatises they have collectively authored. See E.g., Bolgiano, David G., *Combat Self-Defense: Saving America's Warriors from Risk-Averse Commanders and their Lawyers*, Little White Wolf (2007); Bolgiano, David G. and Patterson, James M., *Fighting Today's Wars: How America's Leaders Have Failed Our Warriors*; and, Bolgiano, David G. Taylor, G. John, et al., "Defining the Right of Self-Defense: Working toward the Use of a Deadly Force Appendix to the Standing Rules of Engagement for the Department of Defense," *University of Baltimore Law Review,* Volume 31, Issue 2, Spring 2002.

Great Britain and Irish Nationalist. In overturning the lower courts, the higher court in *Clegg* noted:

> The period of time which separated the firing of the first three shots from the fourth (if it was fired into the side of the car) was minimal. The circumstances in which the final shot was fired could not be divorced from the other shots. This is true, in my opinion, whether the last shot was fired at the side or at the rear of the car. The motivation of the accused in firing the fourth shot cannot realistically be segregated from what happened immediately before it.

- In the Crown Court of Northern Ireland, *The Queen v. Lee William Clegg*, Neutral Citation no. 1908 (1999)

There are many ways to break down the tactical dynamics of a deadly force encounter, but the opinions and concepts of most importance in this case can be set forth into the following categories: Action versus Reaction; and Wound Ballistics. Decades of Federal and State case law recognize these factors when assessing the efficacy or lawfulness of a shooting.

A. Action versus Reaction

Bad guys – or any threat to a person – only have one decision: when to initiate an attack. This is

true whether it is time to fire the first shot in an ambush, pull and slash with a knife, or when to fire on a police officer on patrol. The "bad guys" have an enormous time advantage to good guys trying to catch up to them. They have the initiative by being able to act first, a distinct and usually deadly advantage in close quarters fighting. "He who shoots first wins."

Assessing threats takes time and real world decision-making is further negatively impacted because shooting incidents are most often characterized by:

- Sudden, unexpected occurrences.
- Rapid and unpredictable movement by target(s).
- Limited target opportunities because of either "bad guy" speed or use of cover.
- Frequently under low light or from partially obstructed vantage points.
- Life and death stress of sudden, close, personal violence, which leads us to the second dynamic of a tactical encounter, the ill effects of Emotional Intensity.

B. Wound Ballistics

Unless a person receives a devastating head shot or the cervical spine is severed – causing immediate disruption of the brain and brain nerve function – the body, physically, can keep on fighting until volumic blood loss (around 40% of a person's blood supply) deprives the brain-nerve function of enough oxygen to function. That is why proper

tactical guidance should never be to "use minimum force" or "shoot and assess," but rather "you should apply force rapidly and accurately until the threat is over".

Many have preconditioned their minds into believing how bullets work. There are many cases where police and combat troops, in the middle of a firefight, actually stop and look at their own weapons because they weren't "working like they were supposed to work." In other words, these warriors had preconditioned their expectations as to how a suspect who they had just shot was supposed to react. And when the suspects did not immediately fall to the ground, it caused a moment of hesitation on the officer's part, sometimes with fatal consequences.

Despite all the fantasy out of Hollywood and misinformation in some gun magazines, small arms rounds[13] do not possess "knock down" or "stopping" power. Small arms projectiles physically incapacitate an individual by crushing, tearing, or destroying flesh and bone with enough depth of penetration and permanence to either directly disrupt the body's

[13]The authors are referring to handgun rounds and rifle/carbine rounds. It is certainly true that .50 caliber Browning Machine Gun (BMG) rounds do possess superior "stopping" power than the aforementioned rounds, but the reality is that even these larger rounds are still governed by the general principles of wound ballistics. Once the principles of wound ballistics are grasped, it can be readily understood that projectiles that create larger and deeper holes increase the probability of timely results. However, in each case, we are still only talking about increasing probabilities.

brain-nerve function or cause enough blood volume loss to keep oxygen from adequately feeding that brain-nerve function. The goal is stopping the assailant from performing his ill deeds.

The preeminent scholar in the field of wounds ballistics, retired Army surgeon Colonel Marty Fackler, had this to say about the "shock" or "knock down power" of a small arms projectile: "The shock from being hit by a bullet is actually much like the shock from being called an idiot; it is an expression of surprise and has nothing to do with physical effects or psychological trauma."[14]

Comprehensive knowledge of all aspects of using force, not just the written law, is essential to properly applying the law to the facts. Without understanding these tactical dynamics of an encounter, the law will be applied in a factual vacuum or, worse, from an availability heuristic of one's experience. It is akin to trying a medical malpractice case against a cardiothoracic surgeon without intimately understanding the science of cardiothoracic surgery.

These realities mean that there is no reliable and timely way to insure immediate incapacitation of a determined attacker. [15] Incapacitation takes

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[14] Fackler, MI, MD, "Questions and Comments," Wound Ballistics Review, Journal of the International Wounds Ballistics Association, vol. 4(1) 1999, page 5.

[15] "Immediate incapacitation" is the goal of any use of deadly force by a police officer, defined as the sudden physical inability to pose any further risk of injury or death to others.

time. [16] Action and reaction times are real and unavoidable factors.

The Petitioner's perception was utterly reasonable. Neither tactics nor the law requires the *least* amount of force or lesser means when confronting an imminent threat. "That multiple shots were fired does not suggest that the officers shot mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat."[17]

Even if it were true (and we are in no means so alleging) allegations of poor tactical or pre-incident conduct would not negate the reasonableness of the force used at the time the shooting commenced:

> [T]he fact that an officer negligently gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself … Thus, even if an officer negligently provokes a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation.[18]

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[16] Patrick, UW. "*Handgun Wounding Factors and Effectiveness*", FBI Academy Firearms Training Unit, U. S. Department of Justice, Federal Bureau of Investigation, 1989.
[17] *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir.1996)
[18] *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) and *Hennessey v. Smith*, 292 F.3d 1177 (9th Cir. 2002). See also, *Carroll v. Carman*, 574 U.S. ___ (2014) (per curiam).

VI. CONCLUSION

Anyone acting in a self-defense capacity cannot see the future or read minds. One can only react to what the threat chooses to do, *and what one reasonably believes the threat may do*. Such was the case here. Respondents, the parents of Andy Lopez, are understandably traumatized by the events of October 22, 2013. The events are tragic. That said, the actions of Petitioner at the time, under the circumstances as they reasonably appeared to a law enforcement officer with appropriate training and experience were reasonable, and that it what brings Petitioner and *amici* to this Court to correct the flawed decisions of the courts below.

Neither the law nor reason requires one to use the *least* intrusive means available to stop a threat, only objectively reasonable means. Viewed this way, the correct way, the Petitioner's conduct was reasonable and therefore as a matter of law should be covered by qualified immunity case law that says summary judgment is the appropriate resolution.

Respectfully Submitted,

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