No. 17-1354

In The Supreme Court of the United States

ERICK GELHAUS,

Petitioner,

vs.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The brief in opposition ("BIO") ignores the controlling decisions of this Court, including the Court's recent decision in *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam), as well as the facts established by the undisputed evidence in the record.

In *Kisela*, the court again reversed the Ninth Circuit for failing to apply this Court's decisions concerning qualified immunity. The Court emphasized that due to the highly factual specific nature underlying the use of force, "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." 138 S. Ct. at 1153 (citing *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 309 (2015) (per curiam)).

No existing precedent that "squarely governs" the "specific facts" at issue here supports liability against Deputy Gelhaus. None of the cases cited by the Ninth Circuit addresses this specific situation – an individual apparently armed with an assault rifle refusing to drop a weapon in compliance with at least one, or more commands, but instead starts to turn, hand on the pistol grip, with the barrel beginning to rise. Indeed, existing precedent in the Ninth Circuit and other circuits establish that an officer need not wait to be put in harm's way before responding in defense of himself and the surrounding community – a principle all the more important when confronting an assault weapon capable of spraying 30 bullets in seconds through car doors, ballistic vests, or walls.

Although full plenary review is warranted, *Kisela* supports a per curiam reversal directing entry of judgment for Gelhaus. At the very least, the petition should be granted, with remand to the Ninth Circuit to apply *Kisela*.

Unable to address *Kisela*, respondents invent two new excessive force theories – that Gelhaus fired too many shots, and that a special standard must govern use of force against juveniles. As we discuss, neither argument was raised below, which forecloses their consideration here, and in any event, each fails on the merits as well.

The undisputed evidence established that Lopez appeared to be in his mid to late teens, and the rifle was not a "toy" but an airsoft pellet replica rifle designed to look exactly like an AK-47 save for the existence of a bright orange tip, which had apparently been removed from the weapon, thus spawning what all would agree is a tragedy, albeit one for which Gelhaus is not responsible. The Ninth Circuit's decision ignores the real world dangers confronted by police officers facing individuals who appear to be armed with assault weapons of overwhelming lethality. Officers do not have the luxury of waiting to see how far the barrel of an assault rifle rises before responding with appropriate force. The Ninth Circuit decision severely impairs day-to-day training and operations of law enforcement, and directly impacts officer safety. The petition should be granted.

ARGUMENT

I. *KISELA V. HUGHES* UNDERSCORES THAT GELHAUS IS ENTITLED TO QUALIFIED IMMUNITY.

As noted in the petition, the Ninth Circuit panel majority cited its previous decision *Hughes v. Kisela*, 841 F.3d 1081 (9th Cir. 2016) (*amended by* 862 F.3d 775 (9th Cir. 2017)). (Pet. 10, 13, 23.) Shortly after the petition was filed, this Court issued its decision in *Kisela* reversing the Ninth Circuit. *Kisela* squarely governs this case, and underscores why the Court should grant the petition.

In *Kisela*, Officer Kisela and his partner received a radio report of a 911 call reporting that a woman was hacking a tree with a kitchen knife. 138 S. Ct. at 1151. The officers were flagged down by the person who had called 911, were given a description of the woman with the knife, and were told that the woman had been acting erratically. *Id*. Shortly thereafter, another officer arrived on the scene. *Id*.

Kisela's partner spotted a woman, later identified as Sharon Chadwick, standing next to a car in a driveway of a nearby house. *Id*. A chain-link fence with a locked gate separated Chadwick from the officers. *Id*. The officers saw another woman, Hughes, emerge from the house carrying a large knife at her side, and matched the description of the woman who had been seen hacking at a tree. *Id*. Hughes walked toward Chadwick and stopped no more than six feet from her. *Id*.

The officers drew their weapons and at least twice told Hughes to drop the knife. *Id*. Although Hughes appeared calm, she did not acknowledge the officers' presence or drop the knife. *Id*. Fearing that Hughes was going to attack Chadwick with the knife, Kisela dropped to the ground to avoid hitting the fence and fired several rounds at Hughes, wounding her. *Id*.

Hughes sued Kisela, alleging excessive force. *Id*. The district court granted summary judgment to Kisela, but the Ninth Circuit reversed. *Id*. The Ninth Circuit concluded that there was a genuine issue of fact whether the force employed was reasonable, and that the officers were not entitled to qualified immunity. *Id*.

This Court reversed in a per curiam opinion, holding that Kisela was entitled to qualified immunity. The Court observed that due to the fact-specific nature of excessive force cases, it was especially important that a plaintiff identify clearly established law to put an officer on notice of conduct that would violate the Fourth Amendment:

> Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "*squarely governs*" *the specific facts at issue*.

Id. at 1153 (emphasis added).

Officer Kisela was entitled to qualified immunity because the Ninth Circuit had "failed to implement" the standards articulated by this Court for determining

clearly established law. *Id*. The Ninth Circuit cited no case directly analogous to the facts confronted by Kisela. As the Court noted, "Kisela had mere seconds to assess the potential danger to Chadwick." *Id.* Moreover, Hughes had moved within a few feet of Chadwick and had failed to acknowledge at least two commands to drop the knife, which were loud enough that Chadwick, who was standing next to Hughes, had heard them. *Id.* As the Court emphasized, this "is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment." *Id*.

Here, too, Gelhaus had mere seconds to react to what could be viewed as a far more dangerous threat to public safety than a person wielding a knife – an individual with an assault weapon. Here as well, although Gelhaus gave at least one, and even plaintiff acknowledges likely two commands to drop the weapon, Lopez did not respond, just as Hughes failed to respond to Kisela's command to drop the knife. Indeed, this Court's acknowledgement in *Kisela* that an officer may rely on audible verbal commands to serve as warning, repudiates respondents' assertion that Gelhaus's failure to use his car's loudspeaker (BIO 7) or to command Lopez to do something more than drop the weapon (BIO 8), somehow creates an issue of fact as to reasonable use of force or entitlement to qualified immunity.[1]

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[1] Just as in *Kisela*, where Chadwick, standing next to Hughes, heard the commands (138 S. Ct. at 1153), here a witness further from Gelhaus than Lopez, heard the siren chirp and commands (3 ER 475-85, 490). The assertion by the panel majority and respondents

Respondents cite no case law that "'squarely governs' the specific facts at issue" here. *Kisela*, 138 S. Ct. at 1153. Respondents invoke the same cases cited by the Ninth Circuit which, as noted in the petition (and recognized by the dissent), are factually dissimilar to this case.

George v. Morris, 736 F.3d 829 (9th Cir. 2013) involved a factual dispute whether a suspect, moving with a walker, manipulated a pistol and/or pointed it directly at deputies or whether *he was even physically capable* of wielding the pistol. *Id*. at 833, 837. Respondents ignore this factual distinction. Here, it is undisputed that Lopez was manipulating the assault weapon by turning it, along with his body, and raising the barrel at the time Gelhaus fired.

Curnow By and Through Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991) is also factually dissimilar to this case. The Ninth Circuit denied qualified immunity because there was evidence that Curnow was not only unarmed at the time he was shot, but was not even reaching for a nearby gun. *Id*. at 323, 325. Here, it is undisputed that Lopez had what appeared to be an assault weapon, with his hand on the pistol

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that Gelhaus could not reasonably assume that Lopez heard the siren or commands, is sheer speculation, without evidentiary support. As the dissent noted, the panel opinion is emblematic of the Circuit's approach in such cases, denying summary judgment based "on the bare absence of evidence definitively disproving the existence of alternative facts for which there is no record." (App. 55.)

grip, and was turning toward the officer with the barrel beginning to rise. (App. 70-71.)

Respondents invoke *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997) as being correctly cited by the panel majority in denying qualified immunity. (BIO 18.) Yet, as petitioner noted, and as this Court observed in *Kisela*, *Harris* involved a unique situation – an F.B.I. sniper, consistent with the rules of engagement, shot an individual in the back from a substantial distance while the individual was not making any "threatening movement of any kind," but instead trying to return to a cabin. (Pet. 21 (citing *Harris*, 126 F.3d at 1203); *Kisela*, 138 S. Ct. at 1154.) Here, as in *Kisela*, "[t]he panel's reliance on *Harris* 'does not pass the straight-face test.'" 138 S. Ct. at 1154.

Respondents discount the conflict between the Ninth Circuit's decision and the cases cited by Gelhaus finding qualified immunity under circumstances almost identical to those present here. Respondents attempt to distinguish *Dooley v. Tharp*, 856 F.3d 1177 (8th Cir. 2017) on the ground that the suspect confronting the officers was acting oddly. (BIO 29-30.) Yet, as noted in the petition, even though the deputies had minutes to plan their approach, Dooley had done nothing illegal and had not threatened physical harm, and the video evidence from the patrol car's dashboard contradicted the deputies' description of the rifle's movements, the court found that the deputy's mistaken perception that Dooley posed a threat of serious harm was nonetheless objectively reasonable. (Pet. 25 (citing *Dooley*, 856 F.3d at 1183).) Indeed, in *Dooley*, the

suspect's movement with the rifle was even less threatening than what occurred here – Dooley was attempting to unsling the pellet gun in compliance with the officer's command, and grabbed it by the barrel. 856 F.3d at 1178-80. Here, the evidence established that Lopez was turning while holding what appeared to be an assault weapon by a pistol grip with the barrel beginning to rise.

The other cases cited by Gelhaus, *Reese v. Anderson*, 926 F.2d 494, 500-01 (5th Cir. 1991) and *Kenning v. Carli*, 648 F. App'x 763, 764-70 (8th Cir. 2016), stand for the well-accepted proposition that an officer need not wait until a suspect actually points a weapon at them before responding with deadly force. That is precisely the situation here, and that is why Gelhaus is entitled to qualified immunity.

II. RESPONDENTS' "EXCESSIVE NUMBER OF SHOTS" CLAIM IS LEGALLY AND FACTUALLY UNTENABLE.

Respondents contend that qualified immunity should be denied because a jury could find excessive force based on the number of times Gelhaus fired at Lopez. The argument is untenable.

First, respondents never argued this theory below (*see* Appellee's Brief, Ninth Circuit Dkt. No. 20) and hence cannot belatedly assert it now. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999) ("Respondent advanced this argument for the first time in his Brief in Opposition to Certiorari in this Court, having failed to

raise it before either the BIA or the Court of Appeals. We decline to address the argument at this late stage.") (citation omitted).

Moreover, the undisputed evidence here was that in response to the perceived threat posed by Lopez the shots were fired in rapid succession. (2 ER 123; 3 ER 487.) Respondents cite no case suggesting that an officer confronted with what appears to be an assault rifle must fire a single shot, and then assess the situation before firing additional rounds. Certainly none of the cases respondents cite even remotely supports such an untenable rule.

In *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992) (BIO 25), the officer fired at the suspect at two different points, *several minutes apart*. *Id*. at 883, 886-87. The question was whether the first volley was sufficient to alleviate any threat. That is not remotely close to the circumstances present here where the shots were fired in rapid succession.

In *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996) (BIO 25-26), the court noted that the number of shots fired would only be relevant if the instant could be broken into a "sequence of events." *Id*. at 1162 n.9. There is no "sequence of events" here. Only a single volley, in mere seconds.

Respondents assert that "*Mitchell v. Schlabach*, 864 F.3d 416, 430-431 (6th Cir. 2017) held it was unreasonable to continue to shoot the suspect, who may have been killed by the first shot. . . . " (BIO 26.) That is false. In *Mitchell*, the panel majority actually

affirmed summary judgment for the defendant police officers. 864 F.3d at 418, 424. The passage cited by respondents is from the dissenting opinion.

In *Lamont v. New Jersey*, 637 F.3d 177 (3d Cir. 2011), the court found that the number of shots fired was relevant to the excessive force inquiry because they were discharged by several officers over the course of *10 seconds*. *Id*. at 184. Given the lengthy time period, a jury could conclude that defendants could have seen after the first shots that the suspect's hand was empty, and he posed no threat. *Id*.

Ellis v. Wynalda, 999 F.2d 243 (7th Cir. 1993) is inapposite. There, the officer confronted a suspect who threw a lightweight bag at the officer and then started to flee. *Id*. at 247. The court observed that while the officer might have properly used deadly force as the bag was in the air and posing a potential threat, once it fell to the ground after inflicting no injury on him, and the suspect lacking any other indicia of a weapon, use of force could be found to be inappropriate. *Id.*

In *Lytle v. Bexar County, Tex.*, 560 F.3d 404 (5th Cir. 2009), there was an issue of fact whether the officer had fired as a vehicle was backing toward him, or after the vehicle had started to flee and posed no hazard. *Id*. at 413. In the passage cited by respondents, the court noted that the dispute was whether the use of force and threat were "'in near contemporaneity.'" *Id*. at 414. Here the threat posed by the rising barrel of an assault weapon was contemporaneous with Gelhaus's use of force.

Nor does *Horton v. Pobjecky*, 883 F.3d 941 (7th Cir. 2018) (BIO 28) support respondents. There the court affirmed summary judgment for an officer in an excessive force case, noting the tense, rapidly evolving circumstances confronting the officer. *Id.* at 950-52.

Neither the facts nor the governing law, support respondents' newly minted theory nor erode Gelhaus's entitlement to qualified immunity.

III. RESPONDENTS' CLAIM THAT THE FORCE WAS EXCESSIVE IN LIGHT OF LOPEZ'S AGE IS LEGALLY AND FACTUALLY UNTENABLE.

Respondents assert that the force was excessive in light of Lopez's age, and call for a special use of force standard for juveniles. (BIO 19-23.) First, as noted, respondents never argued this "special standard" below, thus barring its consideration here.

Second, the evidence is undisputed that Lopez appeared to be in his mid to late teens. Although respondents describe him as being 5 feet tall, witnesses note that he appeared to be at least 5'5". (2 ER 256.) As noted in the petition (and by the dissent) and ignored by respondents, witness Licea, who respondents assert readily discerned that Lopez was a youth with a toy rifle, in fact, based his assessment on information unknown to Gelhaus – that children in the area had been shooting windows with BB guns. (2 ER 131-37.) The other witness that respondents refer to as suggesting that Lopez appeared to be 11 or 12 years old, Ismael

Mondragon, related this to the officers based on the fact that he had driven past Lopez so closely that he called to him to throw the rifle away, because Mondragon had seen the sheriff's patrol vehicle approaching and believed something "bad" was going to happen. (2 ER 261-62.) Mondragon told the officer that the rifle Lopez was carrying was *possibly* fake, however, *he could not be sure.* (2 ER 262.)

Gelhaus was not privy to the information upon which Licea relied – that children had been shooting at windows with BB guns in the area, nor had he driven directly past Lopez. He was confronted with an individual in his mid to late teens, apparently carrying an assault rifle. No case authority would have suggested to Gelhaus that his use of force under the circumstances would be unreasonable.

Finally, none of the cases respondents cite suggest that there is a special rule with respect to use of force against a juvenile who appears to possess an assault rifle, and recent events at Parkland and Sandy Hook underscore that an officer could reasonably perceive a threat of deadly harm even at the hands of someone under the age of 18. Indeed, to the extent respondents are asserting some new rule should apply, this underscores Gelhaus's entitlement to summary judgment based on qualified immunity, in light of the absence of clearly established law focusing on the age of a suspect in the context of use of force.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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