No. 23-410

In the
Supreme Court of the United States

ESTATE OF GABRIEL STRICKLAND, ET AL.,
Petitioners,

v.

NEVADA COUNTY, CALIFORNIA, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

John A. Whitesides
Counsel of Record
Angelo, Kilday & Kilduff, LLP
601 University Avenue
Suite 150
Sacramento, CA 95825
Telephone: (916) 564-6100
jwhitesides@akk-law.com

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

THE PETITION PRESENTS A QUESTION DISCONNECTED FROM THE FACTS

Despite numerous instructions to disarm issued by uniformed police officers in daylight, Petitioners' decedent, Gabriel Strickland, refused to drop the gun he carried on a public street and twice pointed the weapon at an approaching officer. After the second brandishing, other officers shot and killed Strickland. Because Petitioners' complaints admitted his pointing of the gun at officers prior to the shooting, the district court dismissed the action under Rule 12(b)(6) and the circuit court affirmed.

The petition presents the supposedly novel question as whether the Fourth Amendment standard for evaluating the reasonableness of force properly focuses on "the circumstances of the final moment" or upon all the circumstances "that created the deadly threat?" But, putting aside the latter phrase's vagueness, the answer is neither. As this Court has repeatedly explained, the facts and circumstances to be weighed are those the officer confronts at the scene, which would involve a temporal spectrum beginning with any information the officer received prior to arrival and continuing, based upon observations made at the scene, up to the moment of the decision to deploy force. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *White v. Pauly*, 580 U.S. 73, 80 (2017). Equally well-established is the principle that the officer may use deadly force if the suspect threatens him or another with a weapon, especially after warnings have issued. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The petition invokes a doctrine that apparently reasonable deadly force may be deemed excessive if, prior to the time of force deployment, police wrongfully caused the suspect to defend himself. But, regardless of that theory's constitutional merits, the facts alleged fail to suggest such "precipitation" – repeatedly asking a suspect to disarm and, upon refusal, futilely attempting non-deadly force, cannot arguably be deemed constitutionally unreasonable. This Court previously rejected the argument that police should, to maximize safety, refrain from using force against suspects who refuse to cease dangerous conduct.

As no other ground for *certiorari* under Rule 10 exists, the petition should be denied as merely expressing dissatisfaction with lower court decisions for reasons neither federally-significant, nor reflecting the factual record.

PARTIES TO THE PROCEEDING

Petitioners and Plaintiffs-Appellants below are: Estate Of Gabriel Strickland, minor N.S., and Shawna Alexander.

Respondents and Defendants-Appellees below are: County of Nevada, Sheriff Shannon Moon, Deputy Taylor King, Deputy Brandon Tripp, The City of Grass Valley, California, Police Chief Alex Gammelgard, Officer Brian Hooper, Officer Dennis Grube, Officer Conrad Ball.

Remaining Defendants below but not parties to the appeal are Wellpath Management, Inc., Brent Weldemere, and Richard Donofrio.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND RULES

OTHER AUTHORITIES

DECISIONS BELOW

The district court's order granting Respondents' motions to dismiss without leave to amend is reprinted at App-52-66. The circuit court's opinion affirming the judgment is reprinted at App-4-21. The Ninth Circuit's order denying *en banc* rehearing is reprinted at App-3.

JURISDICTION

The Ninth Circuit denied rehearing *en banc* on July 18, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a) and Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

ADDITIONAL STATEMENT OF THE CASE

The district court's dismissal order included the Fourteenth Amendment and California law intimate relationship deprivation claims of N.S., as an individual, and Shawna Alexander. App-61-62, 64-65. Solely the Estate (i.e., N.S. as successor in interest) sued regarding the Fourth Amendment. The circuit court's opinion did not address Fourteenth Amendment liability but confined its analysis to the Estate's Fourth Amendment claim. See App-10, 19.

Oddly, the petition quotes solely the Fourteenth Amendment as the involved constitutional provision, doing so immediately after asserting Petitioners preserved that issue for review. Pet., p. 2. Yet, the ostensibly supporting citation to the opening brief on appeal contains exclusively Fourth Amendment arguments. App-29-40. See App-10-11. Likewise, the petition presents as its question reasonableness of force, and its argument centers on *Graham v. Connor*, 490 U.S. 386 (1989), which held that *solely* the Fourth Amendment governs claims for excessive force used in the course of an arrest. *Id*. at 394-395; Petition, at i, 13-25. Accordingly, Respondents treat the petition's Fourteenth Amendment reference as a clerical mistake.

WHY CERTIORARI SHOULD BE DENIED

THE RELATIVES LACK STANDING TO PETITION

The absence of Fourth Amendment force claims by N.S., individually (vs. as successor in interest) and by Ms. Alexander would seem fatal to their standing to so petition this Court. Yet, despite their bearing the burden to show standing to sue, nowhere does the petition discuss this threshold matter. See *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (standing requirements must be met throughout appeal); *Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (plaintiff bears the burden of showing the requisite personal interest in the suit).

The only conceivable showing attempt would have been that the district court dismissed the intimate relationship claims as logically negated by the lack of

a viable Fourth Amendment force violation, due to the higher culpability standard applicable to substantive due process liability (i.e., conduct that shocks the conscience versus being merely unreasonable). See *County of Sacramento v. Lewis*, 523 U.S. 833, 843-844 (1998).

Whether the indirect relationship between the Fourth Amendment question presented and the relatives' intimate relationship deprivation claims could suffice is moot because the record undeniably fails to support their standing to pursue even the underlying substantive due process allegations. No portion of the complaint contained in the petition's appendix alleges any historical facts about (a) the relationships between Gabriel Strickland and N.S. or Ms. Alexander, or (b) the officers' knowledge of, or intent to disrupt, those relationships.

Nor could the appendix be thus supplemented because paragraphs 6 and 7 of the first amended complaint aver solely that N.S. is the "biological son" and Ms. Alexander "the biological mother," while the familial association charging averments contain nothing factual. Standing alone, blood kinship does not suffice for constitutional protection; rather "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children [citation], as well as from the fact of blood relationship." *Smith v. Org. of Foster Families For Equality & Reform*, 431 U.S. 816, 844 (1977). See *Lehr*

v. Robertson, 463 U.S. 248, 261 (1983) (citing *Smith* for the proposition "the mere existence of a biological link does not merit equivalent constitutional protection").

Indeed, as nowhere does the petition suggest Gabriel Strickland was a minor at the time of his confrontation, it cannot be assumed he was then cohabitating (or otherwise closely and frequently interacting) with either N.S. or Ms. Alexander. Not once has this Court actually found intrinsic associational protection outside a common household. For this reason, most circuits do not typically recognize associational protection for non-cohabitating persons, even parents and adult offspring. See *Russ v. Watts*, 414 F.3d 783, 787 (7th Cir. 2005); (noting no circuit except the Ninth "has allowed a parent to recover for the loss of his relationship with his child in these circumstances [not living together]");[1] *Sinclair v. City of Seattle*, 61 F.4th 674, 679 and 685 (9th Cir. 2023) (acknowledging the Ninth Circuit's outlying view derived without analysis).

Likewise, in conformity with *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978), most circuits require the state actor target the association, deeming merely incidental interference/deprivation as insufficient. *Russ*, 414 F.3d at 789-790. See *Partridge v. City of Benton, Arkansas*, 929 F.3d 562, 568 (8th Cir. 2019); *Gorman v. Rensselaer County*, 910 F.3d 40, 47-48 (2d

[1] The Tenth Circuit allows recovery for interference with a parent's relationship with an adult child, seemingly regardless of cohabitation, provided the state targets the relationship. *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186, 1188-89 (10th Cir. 1985).

Cir. 2018). And even the aberrant Ninth Circuit requires for due process protection more than mere biological relation. See *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1058 (9th Cir. 2018); *Mullins v. State of Oregon*, 57 F.3d 789, 793-795 (9th Cir. 1995).

Simply put, neither N.S., nor Ms. Alexander, has demonstrated, or could show, standing to pursue this petition.

THE PETITION FAILS TO SATISFY RULE 10

Although the Estate possesses standing to petition, its effort underwhelms. Three major flaws immediately appear.

I. No Jurisprudential Divergence Supposedly Exists

The first defect lies in the absence of a purported split with (a) other circuits, or (b) this Court's own decisions, created by the Ninth Circuit's opinion herein. As to circuit courts, the petition wastes energy arguing how the subject opinion deviates from other Ninth Circuit decisions, which neither concerns this Court, nor swayed the Ninth Circuit enough to grant rehearing *en banc*. Turning to this Court's jurisprudence, the petition admits (at 13) the circuit court here expressly applied *Graham*'s force evaluation factors to the factual record – the Estate argues that the panel did so incorrectly. Thus no putative doctrinal disagreement exists; rather the petition describes a mundane situation of a circuit court using the right formula, yet reaching the wrong conclusion.

II. The Issue Presented Lacks Support In The Record

The second major flaw lies in the petition's emphasis on the notion "the officers precipitated the imminent threat" by physically approaching Strickland, "causing" his brandishing of the gun at them. The Estate asserts that the proper focus rests not on whether the suspect threatened to use deadly force before being shot, but rather on whether the officers should have pursued an alternative approach less likely to agitate the suspect. This view essentially transforms the inquiry from whether the officers' actions were reasonable to whether they were ideal, which constitutes the type of 20/20 hindsight *Graham* condemned. 490 U.S. at 396-397.

Here the Estate's precipitation argument veers dangerously close to a far more severe factual setting this Court found unconvincing regarding causation. *County of Los Angeles v. Mendez,* 581 U.S. 420 (2017) arose from a citizen report of an armed felony suspect at a residence. Officers responded to the residence and commenced a search without a search warrant. *Id.* 423-424. During the search, deputies found a shack in the backyard that exhibited signs of human occupancy, and indeed two men were living therein (neither being the suspect). *Id.* at 424. Without announcing themselves, the deputies entered the shack, which caused one of the napping occupants to arise and pick up an air rifle in a manner that just happened to have the barrel pointed toward the deputies, who opened fire and severely injured both victims. *Id.* at 425-426.

At trial, the district court found liability for unreasonable search, awarding only nominal damages, and for excessive force, finding the deputies thus provoked the victims, awarding $4 million. *Id*. at 425-426. The Ninth Circuit largely affirmed, also relying on the notions (a) the illegal search tainted the deputies' otherwise reasonable use of deadly force by provoking the victims, and (b) the deputies' warrantless entry proximately caused the occupant to arm himself. *Id*. at 426.

A unanimous Court reversed the judgment. After Justice Alito's opinion categorically rejected the Ninth Circuit's "provocation" doctrine as incorrectly "looking back in time" in search of a different wrong "somehow tied to the eventual use of force" and so inconsistent with *Graham* (*id*. at 428-429), the Court turned to the circuit's alternative causation holding, finding it similarly flawed as failing to explain how the warrantless entry, for which liability did remain, caused the shooting. *Id*. at 432.

The Estate's "precipitation" theory merely re-badges the Ninth Circuit's summary causation analysis in *Mendez* by speculating that, if the officers had continued to wait and talk, Strickland would have eventually surrendered – a possibility the petition fails to harmonize with its assertion Strickland was so "delusional" as to be incapable of obeying verbal commands.

The Estate will undoubtedly reply that the footnote in *Mendez* leaves open the question whether *Graham* allows consideration of unreasonable pre-force police conduct that foreseeably created the later need to

deploy force. That general question is not here contested – Respondents acknowledge such situations arise, e.g., a plain-clothed officer's brandishing a weapon, without announcing himself, at a suspect unengaged in violent activity, so as to cause the suspect to flee in his vehicle towards another officer. See *Grudt v. City of Los Angeles*, 468 P.2d 825, 831 (Cal. 1970); *Yates v. Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991) (unreasonable for officer to "enter the dark hallway at 2:45 a.m. without identifying himself as a police officer, without shining a flashlight, and without wearing his hat"). But, as the instant facts fall well short of those addressed in those cases or in *Mendez*, this case is a poor means by which to explore the parameters of that potential intersection between tort and constitutional law.

The Estate does not allege that police conduct prior to the shooting proximately caused Strickland to arm himself. To the contrary, he armed before the officers even arrived – his public carry of the rifle formed the reason police responded to the scene. And, his mental illness, not the police, supposedly made him both dangerous and incapable of voluntarily disarming. App-69-70. Furthermore, unlike the hapless victims in *Mendez*, Strickland refused repeated commands to drop the gun, then later deliberately pointed it twice at officers. App-56. And here officers unsuccessfully tried to use non-deadly force – a Taser – yet Strickland still refused to surrender. App-55-56.[2] Public policy forbids

[2] The petition conveniently ignores the Taser attempt by asserting that approaching Strickland ensured he would either "obey" or the officers would kill him. Pet. at 11.

the notion that uniformed police legally "cause" a suspect to brandish a gun at them by openly approaching the suspect on a public street during daylight after he refuses to disarm.

III. The Petition Depends On Hyperbole And Misstatement

A. "Assault"

To render certain factual averments more palatable, the petition repeatedly uses exaggerated or wholly incorrect descriptions. The first distortion is that, after Strickland's initial refusals to disarm, the officers "assaulted" him, thus escalating the situation. Pet. pp. 4 ("direct assault"), 6 ("frontal assault," "direct assault"), 7 ("tactical assault"), and 8 ("tactical march"). Yet, the complaint alleges only that three officers *walked* towards him, two with drawn weapons, one of which aimed at him. App-86. Nowhere does the Estate cite authority, at any level, that an officer's walking toward an armed suspect, or defensively drawing his weapon in that situation, can be deemed unreasonable. Nor has this Court ever countenanced the idea that police should refrain from confronting armed suspects because remaining passive is "safer" for them and/or the suspect, despite the remaining danger to the community. See *Scott v. Harris*, 550 U.S. 372, 385 (2007) (allowing fleeing suspect to escape would not have necessarily eliminated risk to the general public, plus such a holding would incentivize suspects to refuse to comply with police directives).

B. "Innocence"

Next, to make Strickland more sympathetic, the petition incorrectly whitewashes him as committing no crime and disturbing nobody. The latter defies both the fact multiple citizens were concerned enough to call police (App-68) and the complaint's admission Strickland was "a danger to himself and/or to others" (App-70) – a risk the officers allegedly knew of (pet. at 10). The former ignores that the citizen reports created probable cause to believe Strickland was violating Calif. Penal Code § 25850(a), carrying a loaded firearm in a prohibited area of an unincorporated part of the county. After police arrived at Strickland's location, his refusals to disarm violated Cal. Penal Code § 148(a)(1). And his pointing a gun at the officers constituted the violent crime of assault on a peace officer under Cal. Penal Code § 241(c)), as well as an apparent violation of § 417.8 (brandishing deadly weapon at officer to prevent detention). See App-9, 86 (Strickland began pointing the gun at officers even before the Taser deployment) and Pet. at 10 (surmising Strickland refused to disarm to "protect" himself from the officers).

C. "Toy Gun"

Another major stretching lies in calling Strickland's air rifle a "toy." Such a benign label fits a nerf or squirt gun, but not a weapon capable of discharging a metal projectile. Indeed, California criminal law expressly rejects this view. *In re Bartholomew D.*, 131 Cal. App. 4th 317, 326 (2005) (air rifles qualify as dangerous

weapons under the Cal. Penal Code).[3] Air rifles vary considerably in power/velocity, depending on the exact mechanism used to create the air pressure (e.g., CO2 cartridge vs. manual pump), or the presence of a spring. More importantly, the Estate concedes the officers lacked an immediate means to verify that the gun was in fact an air rifle, as opposed to a firearm, much less its muzzle velocity. Nor does it cite authority that, even with certainty about the gun's nature, the threat to the officers or the community from an air rifle was *de minimis*.[4]

CONCLUSION

The petition offers neither doctrinal divergence, nor a unique Fourth Amendment question, warranting *certiorari*. Moreover, it defeats its own precipitation theory by trying to paint Strickland as both delusional, and thus dangerous and incapable of obeying

---

[3] "Unlike a toy gun, which is designed for play and is incapable of shooting a projectile, or a starter pistol, which is not designed to release a projectile but to make a loud noise to signal the beginning of a race, a BB gun is not an imitation gun. It is an instrument designed to shoot by expelling a metal projectile at a target, is commonly recognized as such, and thus, as *Arturo H.* observes, is reasonably perceived as capable of inflicting serious injury." *Ibid.*

[4] The Center for Disease Control expressed the following view: "At close range, projectiles from many BB and pellet guns, especially those with velocities greater than 350 fps, can cause tissue damage similar to that inflicted by powder-charged bullets fired from low-velocity conventional firearms . . . Injuries associated with use of these guns can result in permanent disability or death." https://www.cdc.gov/mmwr/preview/mmwrhtml/00039773.htm

instructions to disarm, yet so manifestly harmless to the community the officers should have waited indefinitely for some other verbal solution to emerge and possibly succeed. As Justice Scalia aptly expressed in *Scott v. Harris*, "[w]e think the police need not have taken that chance and hoped for the best."[5]

The petition should be denied.

Respectfully submitted,

John A. Whitesides
Counsel of Record
Angelo, Kilday & Kilduff, LLP
601 University Avenue
Suite 150
Sacramento, CA 95825
Telephone: (916) 564-6100
jwhitesides@akk-law.com

Counsel for Respondents

[5] 550 U.S. at 385.