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

Reply to Opposition to Petition for Writ of Certiorari

Patrick H. Dwyer
Counsel of Record
P.O. Box 1705
17318 Piper Lane
Penn Valley, CA 95946
530-432-5407

Attorney for Petitioners
November 30, 2023

Table of Contents

Table of Authorities

I. PETITIONERS HAVE STANDING

Before discussing the Respondents' arguments on the merits of the case, Petitioners address the Respondents' assertion that the only Petitioner with standing is the Estate of Gabriel Strickland.

A. All Three Petitioners Have Standing on The Fourth Amendment Question

Respondents mistakenly assert that Petitioners N.S and Shawna Alexander do not have standing to prosecute this Petition.

Respondents fail to grasp that the familial association claims under the Fourteenth Amendment in the First Amended Complaint ("FAC") have, as a *prerequisite*, the same allegation of excessive force under the Fourth Amendment that is the premise for the claims of the Estate of Gabriel Strickland. Accordingly, N.S. and Shawna Alexander have a clear stake in this Court's decision on the question presented. They must prevail on the Fourth Amendment issue before they can continue to prosecute their claims for loss of familial association under the Fourteenth Amendment. That gives N.S. and Shawna Alexander standing.[1]

[1] While preparing the Petition for printing, Petitioners inadvertently inserted an older, incorrect page [Pet. 2] that omitted mention of the Fourth Amendment under the headings "Federal Issues Raised in the Appellate Court" and the applicable "Constitutional Provisions." However, that the Petition concerns a single Fourth Amendment issue regarding the reasonableness of the use of deadly force is clear from the "Question Presented" at the beginning of the Petition.

B. Respondents Never Challenged the Familial Association Claims

Respondents' motion to dismiss in the trial court never challenged the standing of Petitioners N.S., who is Gabriel Strickland's minor child, and Shawna Alexander, who was Gabriel Strickland's biological mother, to bring an action against Respondents. Instead, Respondents' Motion to Dismiss was focused on the contention that the use of force by the Officers was objectively reasonable under the Fourth Amendment. This is confirmed by the District Court Decision [A52-66] which premised its *entire ruling on this Fourth Amendment question*. There was only a brief mention of FAC Claims Nine through Thirteen based upon familiar association under the Fourteenth Amendment, all of which the District Court dismissed because it found that there was no underlying Fourth Amendment violation upon which a Fourteenth Amendment claim for loss of familiar association could be based.

Petitioners raised four issues in their appeal to the Ninth Circuit. Two issues focused on the Fourth Amendment question of reasonableness of the use of force, another issue was whether a jury should decide whether the Officers acted reasonably, and the last issue was whether Petitioners should have been granted leave to amend. [A23] Respondents did not file any cross appeal questioning Petitioners N.S. or Shawna Alexander's standing to assert familial association claims under the Fourteenth Amendment.

For obvious reasons, the decision of the Ninth Circuit never considered the standing of Petitioners N.S. or Shawna Alexander to bring claims for loss of familial association under the Fourteenth Amendment. It correctly focused on the same issue

that is before this Court: was the use of deadly force by the Officers objectively reasonable under the Fourth Amendment. Petitioners N.S. and Shawna Alexander's standing to prosecute the Fourth Amendment issue as a prerequisite for their loss of familial relations claims was never questioned. Moreover, since the District Court never considered any additional issues about the familial association claims, it would have been improper for the Ninth Circuit to do so *sua sponte*.

If Petitioners are successful and this case is returned to the District Court, Respondents could then challenge the standing of N.S and Shawna Alexander to prosecute familial association claims. Until that happens, there is no justiciable issue to be decided. And if that eventuality occurs, Respondents would first have to take the matter to the Ninth Circuit for review before coming back to this Court.

II. REPLY ARGUMENT

A. Divergence From Decisions of The Supreme Court is the Basis for the Petition

Respondents incorrectly assert that the Petitioners failed to argue that the Ninth Circuit's decision conflicted with this Court's prior decisions. Indeed, both the "Question Presented" in the Petition and opening paragraph of the summary of the "Decision of the Ninth Circuit Court of Appeal" clearly explain Petitioners' contention that the Ninth Circuit's decision seriously deviated from "totality of the circumstances" test adopted in *Graham v. Conner*, 490 U.S. 386 (1989), 109 S.Ct. 1865, 104 L.Ed.2d 443 ("*Graham*"). [Pet., 2 & 8] The Petition presented a thorough explanation of the Ninth Circuit's deviation from this Court's precedent and

the *sub silentio* adoption of a *per se* rule which has no place under the "totality of the circumstances" test laid down by this Court over three decades ago.

B. The Issues Presented Are Fully Supported in the Record

Petitioners presented detailed analysis of five categories of *Graham* factors where the Ninth Circuit deviated from established law. These are set forth in the Petition at Sections II - VII, and include the following:

> The Failure to Consider the Absence of Urgency; [Pet., 13-14]
>
> The Opinion Did Not Look at the "Totality of the Circumstances"; [Pet. 15-16]
>
> False Comparison to Split-Second Cases and Creation of a *Per Se* Rule; [Pet. 16-17]
>
> When There Is No Urgency, Officers Must Deliberate and Not Unnecessarily Precipitate the Use of Deadly Force. [Pet. 17-25]

Respondents did not address any of these areas of argument in their Opposition, thereby tacitly conceding Petitioners' argument on these issues.

Respondents did, however, attempt to counter one of Petitioners' arguments: that the Officers precipitated the imminent threat. [Pet. 14-15, 23-25] Ironically, in challenging Petitioners' on this point, Respondents fail to even mention, let alone discuss, the three cases relied upon by the Ninth Circuit for its holding that the officers' use of deadly force in the

final moment was objectively reasonable.[2] The failure to mention these cases, let alone discuss them, is another tacit concession by Respondents that Petitioners successfully distinguished these cases. [Pet., Sec. VII.A, 18-20]

Respondents attempt to misdirect the Court's attention to a similar sounding, but entirely different and irrelevant legal issue: i.e., the "provocation rule" that was the focus of this Court's ruling in *County of Los Angeles v. Mendez,* 581 U.S. 420, 137 S.Ct. 1539, 198 L.Ed.2d 52 (2017) ("*Mendez*"). In *Mendez*, officers made a warrantless entry into a cabin which was a clear Fourth Amendment violation.[3] However, that warrantless search could not provide the basis for liability for a subsequent use of force by the officers when they were later on surprised by the plaintiff, Mendez, who was in a bedroom in the cabin holding a BB gun pointed towards one of the deputies. Simply put, the reasonableness of the officer's use of force to counter the gun pointed at another officer had to be evaluated upon the *Graham* Factors pertaining to the new use of force and not the prior, unrelated warrantless search.

[2] The cornerstone cases in the Ninth Circuit's decision are *George v. Morris,* 736 F.3d 829, 838 (9th Cir. 2013), *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007), and *Scott v. Henrich,* 39 F.3d 912, 914 (9th Cir. 1994.

[3] Evaluation of the lawfulness of the search of the cabin is done under the rules for obtaining warrants for search and seizure, not under the *Graham* totality of the circumstances test which is used for determining the reasonableness of the use of force.

This Court correctly found that the provocation rule, which "instructs courts to look back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force" as the basis for liability for the "forceful seizure itself" *may not be used* to "serve as the foundation of the plaintiff's excessive force claim." *Mendez* at 581 U.S. 428, 137 S.Ct. 1546-47.

This case is about whether the Officers use of deadly force to resolve a mental health crisis was objectively reasonable. It has nothing to do with the provocation rule struck down in *Mendez*.

III. The Petition Relies Upon the Pleadings, Not On Hyperbole and Misstatement

The final area of opposition by Respondents is that Petitioners used exaggerated or wholly incorrect descriptions in three regards: the use of the terms "assault", "innocence", and "toy gun". Petitioners' use of these words was factually correct and proper.

A. Petitioners' Description of the Officers' Conduct As a Tactical Assault Was Correct

The FAC laid out detailed factual allegations describing how the Officers failed to consider various *Graham* factors such as the absence of any urgency, Strickland's known mental health problems, and whether non-force means could have been deployed to resolve the situation without using force.

As further alleged in the FAC, it was the Officers that unnecessarily precipitated the use of deadly force by deciding to make a direct line-of-sight march upon Strickland with their assault weapons at the ready. Indeed, the FAC specifically

alleges that "Defendant Brandon Tripp initiated an assault and told the other officers: 'Cover me.'" [Appendix 86, FAC ¶¶ 78–100]

Respondents premise their argument upon the red-herring argument that "the Estate [does not] 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." [Opp., 9]

This is not the basis of Petitioner's claims. Petitioner has alleged that the Officers acted impulsively and ignored all of the non-force means that could have been employed to resolve the standoff without the use of force. This is a straightforward tort-based argument: i.e., there was no urgency, and thus, a *reasonable* officer would have been patient and waited for more experienced officers to arrive and/or employ a variety of non-force means to resolve the situation. The decision to deploy lethal force and march upon Strickland went against both good police tactics and standard police policies and procedures for dealing with a mental health crisis. [A75-78; A 89; FAC ¶ 40, FAC Ex. 4; FAC ¶100]

Respondents cite to *Scott v. Harris*, 550 U.S. 372, 385 (2007) ("*Scott*") for the proposition that police are not obligated to "refrain from confronting armed suspects because remaining passive is safer for them and/or the suspect, despite the remaining danger to the community." The problem with citation to *Scott* is that this case is wholly distinguishable. In *Scott*, the suspect fled the scene by car and was endangering the public with high speed, reckless driving. Of course the officers in *Scott* did not have to let the suspect escape. In the sharpest contrast, the FAC alleges that Strickland

had not committed any crime, did not try to flee the scene, there was no danger to the public, and there was no urgency. [A88; FAC ¶93]

B. Petitioners Alleged That Strickland Had Not Committed Any Crime

Respondents improperly assert that Petitioners are alleging that Strickland was "innocent" and then try to paint Strickland as a violent criminal with a loaded firearm. The factual allegations are to the contrary.

As alleged in the FAC, the Officers were dispatched to the scene to investigate a report that a man was walking on Squirrel Creek Road with what looked like a long gun. The Officers immediately recognized Strickland. Further, they were aware that he had mental health issues and it was obvious that he was experiencing a mental health episode at the incident scene. [A84, A87; FAC ¶¶ 65, 89.]

The task for the Officers was to verify whether the gun was a replica without having to use force, especially deadly force. There were several non-force options because Strickland was communicating and not trying to flee. Strickland told the Officers that the gun was a toy and pointed to the orange tip. Strickland had, in fact, not violated any laws by carrying the replica gun.

Despite the lack of urgency, and contrary to established policies and procedures for handling such mental health crises, the Officers promptly escalated the situation with the direct march upon Strickland. This was a wholly unreasonable and unnecessary escalation to maximum lethal force. The Officers should have been properly trained to

handle such situations, but as alleged in the FAC, they were not. [[A78-78; FAC ¶¶ 41-43, Ex. 5; A80-81; FAC ¶¶ 51-54, FAC Exs. 6 & 7] And, there should have been an adequate inter-agency operating procedures that resulted in the most experienced, not the least experienced, Officer taking charge of the incident. [A82-83; FAC ¶¶ 61-63]

True, Strickland was non-compliant with the Officer's commands to drop the gun and this was a violation. But he was in a diminished state of mind and to him, putting down the gun meant giving up his only means of self-defense.

In terms of causation, the primary cause was the Officers' rash and unprofessional escalation to maximum force deployment. Once this decision was made, the psychology of the incident shifted and the Officers became mentally locked into making Strickland obey their command instead of using their heads to resolve the matter without deadly force. Once the operational situation descended to this level, there was little possibility to avoid bloodshed.

C. The Replica Gun

For the first time on appeal, Respondents argue that the toy replica gun that Strickland carried was, in fact, a "dangerous" weapon. Respondents also improperly cite to multiple third party sources. Petitioners object to the argument and to the citations because the argument has never been previously raised and the sources never entered into the record.

Moreover, the FAC specifically alleges that the replica gun was an Airsoft rifle. [A68; FAC ¶6] Airsoft rifles do not use metal shot, only smaller

plastic shot and are not considered dangerous. See https://en.wikipedia.org/wiki/BB_gun.

Respondent's approach here is really just a ruse to avoid a serious problem with their case. The Officers were told by Strickland that it was a toy gun and he pointed to the orange tip. The Officers acknowledged that they could see the orange tip.[4]

This raises several important questions:

(1) Would the Officers have marched directly upon Strickland if they truly believed that he had a real long gun?

Not a chance – they would have stayed behind protective cover.

(2) Was it reasonable for the Officers to use their military style assault rifles against a plastic pellet gun?

The Officers fired multiple rounds from close range (approx. 10-15 ft.) into Stricklands' chest. The orange tip would have been obvious at this distance. A small plastic pellet would not have penetrated the Officers' body armor or caused any significant injury.

[4] As Petitioners pointed out in their Opening Brief in the Ninth Circuit, video that was produced by Respondents, but had not been fully analyzed by Petitioners' experts in time for inclusion in the FAC, shows that at the final moment Strickland was in the open and on his knees facing the oncoming Officers. Officer Ball, dropped his gun, took out his baton, and swatted the Airsoft replica from Strickland's hands. However, Officers Tripp and Hooper opened fired. Further discovery is obviously needed to prepare this case. [A48; Opening Brief, 48n7] This case was prematurely dismissed under FRCP 12(b)(6). Additional leave should have been granted by the Trial Court to amend.

CONCLUSION

The single Fourth Amendment issue before the Court is central to all excessive force cases brought under 42 U.S.C. §1983 across the nation. The importance of the question presented invites this Court to review the decision of the Ninth Circuit to bring consistency among all courts deciding similar Fourth Amendment questions.

The Respondents' Opposition failed to raise any meritorious arguments against the Petition. Indeed, the absence of any counter-argument concerning most of the issues raised in the Petition is a tacit concession that Petitioners' arguments are correct.

Petitioners hope the Court will understand the necessity for deciding not only this Fourth Amendment question, but also the need to reinforce the role of the Seventh Amendment in our system of justice. The Constitution specifies that juries are to decide questions of fact. Cases such as this, in which the determination of the reasonableness of the use of deadly force will require evaluation of many *Graham* factors and large amounts of evidence of all kinds, are properly the domain of a jury. Further, dismissal of a case as factually complex as this on a motion to dismiss without leave to amend is not in accord with the liberal pleading standards under FRCP 15.

Respectfully Submitted,

s/ Patrick H. Dwyer
Patrick H. Dwyer
Counsel of Record for
Petitioners

CERTIFICATE OF COMPLIANCE

Estate of Strickland, N.S., and Shawna Alexander,

Petitioners

v.

Nevada County, California,
Sheriff Shannon Moon,
Deputy Brandon Tripp,
Deputy Taylor King,
The City of Grass Valley, California,
Chief Alex Gammelgard,
Officer Brian Hooper,
Officer Dennis Grube, and
Officer Conrad Ball,

Respondent(s)

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains not more than 2,700 words, excluding the parts of the Reply brief that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 2023

s/ Patrick H. Dwyer
Patrick H. Dwyer, counsel
for Petitioners

PROOF OF SERVICE

I hereby certify under penalty of perjury that I caused three copies of the Petition For Writ Of Certiorari in the matter of *Estate of Strickland v. Nevada County, et al*, to be served upon each of the following according to Supreme Court Rule 29.3:

1. Steven J. Renick
   Manning & Kass, LLP
   801 S. Figueroa St, 15th Floor
   Los Angeles, California 90017-3012
   *Attorneys for Nevada County, Sheriff Shannon Moon, and Deputies Tripp and King

2. John A. Whitesides
   Angelo, Kilday & Kilduff, LLP
   601 University Avenue, Suite 150
   Sacramento, CA 95825
   *Attorneys for The City of Grass Valley, Chief Alex Gammelgard, and Officers Hooper, Ball, and Grube

3. Jerome M. Varanini
   Law Offices of Jerome M. Varanini
   641 Fulton Avenue, Suite 200
   Sacramento, CA 95812-0590
   *Attorney for Wellpath Management, Inc, Brent Weldemere, Richard Donofrio

I declare under penalty of perjury under the laws of the State of California that the foregoing certification is true and correct.

Date: November 30, 2023

s/ Patrick H. Dwyer
Patrick H. Dwyer, Counsel for Petitioners