No. _____

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

PETITION FOR WRIT OF CERTIORARI

TIMOTHY T. COATES
Counsel of Record
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-mail: tcoates@gmsr.com

NOAH G. BLECHMAN
MCNAMARA, NEY, BEATTY, SLATTERY, BORGES & AMBACHER LLP
3480 Buskirk Avenue, Suite 250
Pleasant Hill, California 94523
Telephone: (925) 939-5330
Facsimile: (925) 939-0203
E-mail: noah.blechman@mcnamaralaw.com

Counsel for Petitioner Erick Gelhaus

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

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.

The questions presented by this petition are:

1. Did the Ninth Circuit improperly depart from this Court's decision in *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548 (2017) (per curiam) and numerous other cases by denying qualified immunity notwithstanding the absence of clearly established law imposing liability under circumstances closely analogous to those confronting Deputy Gelhaus?

2. Did the Ninth Circuit improperly depart from this Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989) and *Plumhoff v. Rickard*, ___ U.S. ___, 134 S. Ct. 2012 (2014) in denying qualified immunity based upon the absence of a constitutional violation given that the undisputed facts established that Deputy Gelhaus acted reasonably in responding to the threat of a suspect turning towards him while raising the barrel of what appeared to be an assault rifle?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

- The County of Sonoma, California, and Erick Gelhaus, an individual, defendants and appellants below, jointly represented by the same counsel, with Gelhaus as petitioner here.
- Estate of Andy Lopez, by and through successors in interest, Rodrigo Lopez and Sujay Cruz, plaintiffs and appellees below and respondents here.

There are no publicly held corporations involved in this proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	3
A. The Underlying Incident	3
B. The District Court Denies Gelhaus's Motion For Summary Judgment Based On Qualified Immunity	5
C. The Ninth Circuit, By A 2-1 Decision, Affirms The Denial Of Qualified Immunity To Gelhaus	7
REASONS WHY CERTIORARI IS WARRANTED	12
I. REVIEW IS WARRANTED BECAUSE THE PANEL MAJORITY DEPARTED FROM THE CONTROLLING DECISIONS OF THIS COURT REQUIRING THAT QUALIFIED IMMUNITY BE GRANTED IN ALL BUT THE MOST OBVIOUS CASES IN THE ABSENCE OF A ROBUST CONSENSUS OF CASES IMPOSING LIABILITY IN FACTUAL CIRCUMSTANCES CLOSELY ANALOGOUS TO THOSE CONFRONTING AN OFFICER	17

TABLE OF CONTENTS – Continued

Page

A. An Officer Is Generally Entitled To Qualified Immunity In The Absence Of Clearly Established Law As Set Out In A Robust Consensus Of Cases Imposing Liability In Circumstances Closely Analogous To Those Confronted By The Officer 17

B. Existing Ninth Circuit Authority Did Not Establish The Unlawfulness Of Petitioner's Conduct "Beyond Debate" And Hence He Is Entitled To Qualified Immunity..... 20

C. Decisions In Other Circuits Have Applied Qualified Immunity In Closely Analogous Cases, Which Demonstrates That The Law Is Not Clearly Established, And Petitioner Is Entitled To Qualified Immunity..... 23

D. The Absence Of Clearly Established Law Mandated That Petitioner Be Granted Qualified Immunity..... 26

II. THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH *GRAHAM V. CONNOR*'S STANDARD FOR EVALUATING FOURTH AMENDMENT USE OF FORCE CLAIMS AND TO REPUDIATE THE NINTH CIRCUIT'S APPLICATION OF AN ESPECIALLY STRINGENT STANDARD OF REVIEW WITH RESPECT TO SUMMARY JUDGMENT WHERE OFFICERS ARE THE ONLY WITNESSES TO AN INCIDENT..... 27

TABLE OF CONTENTS – Continued

Page

A. The *Graham* Standards 29

B. The Majority Departed From *Graham* By Applying 20/20 Hindsight Without Regard To The Tense, Fast-Evolving Circumstances Confronting Petitioner And Relying On Speculation, Not Evidence, In Denying Summary Judgment 30

C. The Ninth Circuit's Rule Requiring Especially Stringent Review Of Summary Judgment Motions In Deadly Force Cases Where Officers Are The Only Witnesses To Events, Effectively Requires Defendants To Affirmatively Disprove Any Conceivable Contrary Scenario, Which Is Directly Contrary To This Court's Decisions Concerning Summary Judgment ... 34

CONCLUSION 36

APPENDIX

September 22, 2017, Opinion, *Estate of Andy Lopez, by and through successors in interest, Rodrigo Lopez and Sujay Cruz, et al. v. Erick Gelhaus, County of Sonoma*, United States Court of Appeals for the Ninth Circuit ..... App. 1

January 20, 2016, Order Granting In Part And Denying In Part Motion For Summary Judgment, *Estate of Andy Lopez, et al. v. Erick Gelhaus, et al.*, United States District Court, Northern District of California..... App. 75

TABLE OF CONTENTS – Continued

Page

December 22, 2017, Order, *Estate of Andy Lopez, by and through successors in interest, Rodrigo Lopez and Sujay Cruz, et al. v. Erick Gelhaus, County of Sonoma*, United States Court of Appeals for the Ninth Circuit ..... App. 102

Exhibit C to Declaration of James L. Morris, Filed in Support of Defendants' Motion for Summary Judgment on November 4, 2015 (docket entry 67) and contained in Ninth Circuit Excerpt of Record at Volume III, page 555, filed June 15, 2016 (Ninth Circuit docket entry 14-3) ..... App. 103

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 17

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 35

Anderson v. Russell, 247 F.3d 125 (4th Cir. 2001) 26

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) .. 12, 17, 18, 19, 23

Brosseau v. Haugen, 543 U.S. 194 (2004) 19

City and County of San Francisco v. Sheehan, ___ U.S. ___, 135 S. Ct. 1765 (2015) 16, 19

County of Los Angeles v. Mendez, ___ U.S. ___, 137 S. Ct. 1539 (2017) 29

Cruz v. City of Anaheim, 765 F.3d 1076 (9th Cir. 2014) 22

Curnow By and Through Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991) 10, 21, 22

District of Columbia v. Wesby, ___ U.S. ___, 138 S. Ct. 577 (2018) 17, 18, 19, 23

Dooley v. Tharp, 856 F.3d 1177 (8th Cir. 2017) 24, 25

Estate of Andy Lopez v. Gelhaus, 149 F. Supp. 3d 1154 (9th Cir. 2017).....1, 7

Estate of Andy Lopez v. Gelhaus, 871 F.3d 998 (9th Cir. 2017).....1

George v. Morris, 736 F.3d 829 (9th Cir. 2013) 10, 20, 21, 22

Gonzalez v. City of Anaheim, 747 F.3d 789 (9th Cir. 2014) 7, 28

TABLE OF AUTHORITIES – Continued

Page

Graham v. Connor, 490 U.S. 386 (1989).....*passim*

Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997)....10, 21

Hill v. California, 401 U.S. 797 (1971) 33

Hughes v. Kisela, 841 F.3d 1081 (9th Cir. 2016) (*amended by* 862 F.3d 775 (9th Cir. 2017) and petition for writ of certiorari filed September 25, 2017, Supreme Court Case No. 17-467)...10, 13, 23

Kenning v. Carli, 648 F. App'x 763 (8th Cir. 2016)..... 26

Malley v. Briggs, 475 U.S. 335 (1986).....12

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).....15, 35

Messerschmidt v. Millender, 565 U.S. 535 (2012) 19

Mullenix v. Luna, ___ U.S. ___, 136 S. Ct. 305 (2015).....12

Pearson v. Callahan, 555 U.S. 223 (2009) 24, 25

Plumhoff v. Rickard, ___ U.S. ___, 134 S. Ct. 2012 (2014)..... 15, 18, 27, 28

Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991).....26

Reichle v. Howards, 566 U.S. 658 (2012).....17, 23

Richardson v. McKnight, 521 U.S. 399 (1997).....16

Ryburn v. Huff, 565 U.S. 469 (2012).....19

Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) 19

Saucier v. Katz, 533 U.S. 194 (2001).....18, 29

Scott v. Harris, 550 U.S. 372 (2007).....28

TABLE OF AUTHORITIES – Continued

Page

Stanton v. Sims, 571 U.S. 3, 134 S. Ct. 3 (2013) 19, 24

Tennessee v. Garner, 471 U.S. 1 (1985) 29

Texas v. Brown, 460 U.S. 730 (1983).....33

White v. Pauly, ___ U.S. ___, 137 S. Ct. 548 (2017).....*passim*

Wood v. Moss, ___ U.S. ___, 134 S. Ct. 2056 (2014) 19

CONSTITUTION AND STATUTORY PROVISIONS

United States Constitution, Amendment IV .....*passim*

28 U.S.C. § 1254(1).....1

42 U.S.C. § 1983 .....2, 5, 17

OTHER AUTHORITIES

https://en.wikisource.org/wiki/AK-47_Operator%27s_Manual (last visited March 18, 2018).....32

http://www.vpc.org/press/new-data-shows-one-in-four-law-enforcement-officers-slain-in-the-line-of-duty-in-2016-felled-by-an-assault-weapon/ (last visited March 18, 2018) 15

OPINIONS BELOW

The Ninth Circuit's opinion, the subject of this petition, is reported at 871 F.3d 998 (9th Cir. 2017) and reproduced in the Appendix hereto ("App.") at pages 1-74. The Ninth Circuit's order denying rehearing, filed December 22, 2017, is reproduced in the Appendix at page 102. The district court's decision denying petitioner Gelhaus's motion for summary judgment based on qualified immunity is reported at 149 F. Supp. 3d 1154 (N.D. Cal. 2016) and is reproduced in the Appendix at pages 75-101.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit entered its judgment and its opinion on September 22, 2017. 871 F.3d 998 (9th Cir. 2017). After obtaining an extension of time, petitioner timely filed a petition for panel and en banc rehearing, and after the panel requested a response, on December 22, 2017, the court denied the petition. (App. 102.)

This Court has jurisdiction to review the Ninth Circuit's September 22, 2017 decision on writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege petitioner violated the rights of the decedent under the United States Constitution's Fourth Amendment, which provides:

> 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.

STATEMENT OF THE CASE

A. The Underlying Incident.

On the afternoon of October 22, 2013, patrolling Deputies Gelhaus and Schemmel observed a male who appeared to be in his mid to late teens (Mr. Lopez) walking on the sidewalk away from them in a dark hooded sweatshirt. Lopez carried what appeared to be an AK-47 assault weapon in his hand, held by the pistol grip, with the barrel pointed toward the ground. (ER 437-39.)[1] Gelhaus knew this neighborhood had a history of violent gang and weapon related crimes, he had previously confiscated that type of weapon nearby and knew about the destructive capabilities of an AK-47 – it could discharge its 30-round magazine in seconds, the bullets capable of penetrating car doors and armored vests. (ER 438, 441, 458-72, 550.)

Gelhaus radioed "Code 20," the highest emergency call to request immediate assistance by other units. (ER 439.) Schemmel, the driver, "chirped" the siren and activated all emergency lights/flashers to alert the individual to their police presence. (ER 559-60.) Schemmel proceeded through the intersection and stopped the patrol car at an angle, approximately 40 feet from Lopez. (ER 439, 559-60.) When slowing, Gelhaus

[1] "ER" denotes the excerpts of record in the Ninth Circuit.

opened his door, drew his firearm and positioned himself outside his open passenger door when they stopped, preparing to confront the individual. (ER 439-40, 559-60, 557.)

Lopez, still holding the pistol grip of the weapon, continued to walk away from the patrol car. Now outside of the car, Gelhaus gave at least one loud command (or more per witnesses) to Lopez to "Drop the gun!" (ER 440, 560, 473-85.) Rather than dropping the gun, Lopez turned his body towards the deputies in a clockwise direction while simultaneously bringing the barrel of the AK-47 up and towards them. (ER 439-40, 560.) In response, believing he was about to be shot, Gelhaus fired eight rapid gunshots – seven of which hit Lopez. (ER 439-40, 486-87, 560, 562-69.) It is undisputed that the shots were initiated when Lopez was facing Gelhaus, approximately 62 feet away. (ER 544-57, 562-76.)

After the shooting, it was determined that the gun was a plastic pellet gun made to look identical to an AK-47, but missing the legally mandated orange tip on the barrel. (ER 492-515, 546-48.) The weapon was indistinguishable from a real AK-47. (ER 446-54, 566; App. 103 (photograph showing real AK-47 [top] above replica [bottom]).)

B. The District Court Denies Gelhaus's Motion For Summary Judgment Based On Qualified Immunity.

Respondents, the Estate of Andy Lopez, by and through successors in interest, Rodrigo Lopez and Sujay Cruz, filed suit against Gelhaus and the County of Sonoma, alleging various claims, including a claim against Gelhaus under 42 U.S.C. § 1983 premised upon a violation of the Fourth Amendment through use of excessive force, as well as a cause of action against both Gelhaus and the County of Sonoma for wrongful death. (ER 587-98, 599-617.)

Defendants filed a motion for summary judgment, asserting that the Fourth Amendment claim as against Gelhaus was barred by qualified immunity. (ER 405-36.) Gelhaus argued he was entitled to qualified immunity both because the undisputed evidence established that his use of force was objectively reasonable and hence no constitutional violation had occurred, and that in any event, there was no clearly established law that would have put him on notice that use of force under these emergency circumstances would be unwarranted. (ER 405-586.)

After plaintiff filed opposition and the district court held argument, on January 20, 2016, the court granted the motion in part, but denied qualified immunity to Gelhaus on the Fourth Amendment claim, as well as summary judgment to Gelhaus and the County on the state wrongful death claim. (App. 90, 95, 99.) The district court held that there were triable

issues of fact as to whether Gelhaus had reasonably perceived a serious threat of harm from Lopez, noting that while it was undisputed that Lopez started to turn towards the deputies, with the barrel of the gun rising, a reasonable jury could conclude that the barrel had not risen far enough up to present a threat to the officers. (App. 89-90.)

In addressing the clearly established law for purposes of qualified immunity, the district court did not identify a case where officers were confronted by a suspect who refused to drop an assault weapon when commanded to do so and then began raising the barrel of the weapon towards the officers. Instead, the district court stated:

> [T]he relevant question is whether the law was clearly established such that an officer would know that the use of deadly force is unreasonable where the suspect appears to be carrying an AK-47, but where officers have received no reports of the suspect using the weapon or expressing an intention to use the weapon, where the suspect does not point the weapon at the officers or otherwise threaten them with it, where the suspect does not "come at" the officers or make any sudden movements towards the officers, and where there are no reports of erratic, aggressive, or threatening behavior. Based on the review of the cases above, the court finds that it was

> clearly established, and thus, qualified immunity does not shield Gelhaus from liability.

(App. 94-95; 149 F. Supp. 3d at 1164-65 (footnote omitted).)

Gelhaus appealed the denial of qualified immunity to the Ninth Circuit.

C. The Ninth Circuit, By A 2-1 Decision, Affirms The Denial Of Qualified Immunity To Gelhaus.

Following briefing and argument, on September 22, 2017, the Ninth Circuit issued a 2-1 decision affirming the denial of qualified immunity to Gelhaus.

Writing for the majority, the Honorable Milan Smith announced the panel would follow the Ninth Circuit's general principle that "'summary judgment should be granted sparingly in excessive force cases,'" particularly where, as here, "'the only witness other than the officers was killed during the encounter'" noting that the court has to "'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify.'" (App. 13 (citing *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795 (9th Cir. 2014) (en banc)).)

In concluding that a jury could find that Gelhaus's use of force was unreasonable, the majority found that there was a triable issue of fact as to whether or not Lopez had turned his head in response to the "chirp" of

the police vehicle siren, which may have indicated Lopez had not heard the siren, which would somehow make Lopez's subsequent turn towards the officers "less aggressive" in that he may have simply been confused about what he was hearing. (App. 15.) The majority also opined that there was a factual dispute as to the number of times that Gelhaus shouted – it could be only once or multiple times – and that if a jury determined there was only one command, Lopez might have been wondering if it was directed at him, or could have been "processing Gelhaus's order" before he was shot. (App. 16.)

The majority also concluded there was an issue of fact as to whether Lopez was holding the gun in his right or left hand, asserting it would make a difference whether Lopez turned the one way or the other, without explaining why that would be so. (*Id*.) Indeed, the majority asserted that the officers' dispute on this issue "provides an important basis for a jury to question the credibility and accuracy of the officers' accounts" (*id*.) – without explaining what other relevant inference a jury could draw, in light of the fact that the officers both testified the barrel of the weapon was moving upwards as Lopez turned.

As to the barrel of the gun moving upwards as Lopez turned, the majority acknowledged that the district court had found that it was undisputed that " 'the rifle barrel was beginning to rise,' " but agreed with the district court that given that it started in a position where it was pointed down to the ground, it could have been raised to a slightly higher level (although not

specifying what level that might be), without posing any threat to the officers. (App. 17.) The majority noted that neither officer ever stated "how much the barrel 'began' to rise" as Lopez commenced his turn, and speculated that "one would expect the barrel to rise an inch or so as the momentum of Andy's clockwise turn moved his left arm slightly away from his body" and "that incidental movement alone would not compel a jury to conclude that Gelhaus faced imminent danger giving the starting position of the gun." (App. 17-18.)

The majority found it significant that Gelhaus never testified that he knew where the barrel of the rifle was pointing at the time he shot Lopez, but at most, that the barrel of the rifle was being raised towards him. (App. 19.)

The majority also stated that although "ambiguous" (App. 7 n.4), a reenactment Gelhaus performed in his videotaped deposition somehow contravenes his statements that he fired with the barrel of the weapon coming up (App. 20) – even though review of the cited deposition establishes that Gelhaus was simply simulating Lopez's body turning movement, the subject of the question, and not the movement of the rifle, and indeed testified that he could not reproduce that rifle movement because a table was in his way (App. 7 n.4 and ER 113-14, 342).

The majority also found it significant that a witness who had encountered Lopez earlier and drove within 50 feet of him thought the gun looked fake. (App. 20.) It also found it important that Gelhaus had

previously encountered individuals with replica guns, and that Lopez had been carrying the weapon in broad daylight in a residential neighborhood at a time when individuals of his age – mid to late teens – could reasonably be expected to be playing. (App. 23.)

Based on these facts, the majority concluded a jury could find that the force used by Gelhaus was excessive. (App. 23-24 (citing *Hughes v. Kisela*, 841 F.3d 1081, 1085-87 (9th Cir. 2016) (*amended by* 862 F.3d 775 (9th Cir. 2017) (en banc) and petition for writ of certiorari filed September 25, 2017, Supreme Court Case No. 17-467)).)

With respect to the clearly established law prong of qualified immunity, the majority held that Gelhaus was on notice that his conduct could subject him to liability based upon *George v. Morris*, 736 F.3d 829 (9th Cir. 2013); *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997); and *Curnow By and Through Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991). (App. 44-46.)

The Honorable Judge Clifford Wallace dissented, noting that the multiple purported factual disputes identified by the majority were immaterial to the qualified immunity analysis. (App. 50-51.) Judge Wallace observed that the key, and undisputed fact, was that the gun barrel was beginning to rise as Lopez turned towards the officers, with no evidence that it had stopped rising, or would stop at any particular point. (App. 52-53.) As Judge Wallace noted, "the most natural reading of the district court's finding, and the only reasonable one, is that the gun was beginning to rise

(i.e., in the process of rising) immediately before Deputy Gelhaus shot Andy." (App. 53.) The dissent noted that the "majority has thus identified no evidence that even suggests that the gun had stopped rising at the time Deputy Gelhaus resorted to deadly force." (App. 54.)

As Judge Wallace observed, with respect to the clearly established law on qualified immunity, none of the cases cited by the majority addressed a situation where "the victim's gun 'was beginning to rise' towards the officer." (App. 56.)

Nor was there any evidence to suggest that Gelhaus could not reasonably have perceived the AK-47 as real, given that the third party witness's assessment of it as being a potential toy was based on his subjective belief that it would be odd for someone to be carrying such a weapon during daylight and identified no physical characteristics of the rifle that would make it appear to be less than the real thing. (App. 60-61.)

In light of the undisputed evidence and the absence of cases cited by the majority indicating the law was clearly established with respect to the circumstances confronted by Gelhaus, Judge Wallace concluded that the officer was entitled to qualified immunity. (App. 64-71, 74.)

REASONS WHY CERTIORARI IS WARRANTED

The Ninth Circuit has once again departed from the decisions of this Court concerning the application of qualified immunity and use of force under the Fourth Amendment. The court's refusal to follow the controlling authority of this Court would, in and of itself, warrant review, but this Court's intervention is required because the Ninth Circuit's decision has a direct, adverse impact on the actions of law enforcement officers confronting one of the gravest threats to public safety – an individual armed with an assault rifle.

Review is necessary because the Ninth Circuit has again ignored this Court's command that an officer is entitled to qualified immunity unless the plaintiff can point to a "robust 'consensus of cases of persuasive authority,'" making it clear that the officer's use of force in the particular factual circumstances was improper. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). As the Court has repeatedly emphasized, in other than the most egregious cases, for a right to be clearly established for purposes of denying qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741; *Mullenix v. Luna*, ___ U.S. ___, 136 S. Ct. 305, 308 (2015); *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017) (per curiam). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 136 S. Ct. at 308 (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

As Judge Wallace noted in his dissent, the panel majority did not identify a case with a factual scenario even remotely close to that established by the undisputed evidence here – an officer confronted by a suspect who appears to be carrying an assault weapon, who is alerted to police presence by a siren chirp and who disregards the command to drop the weapon and instead turns towards the officer with the barrel of the rifle starting to rise. Although the majority claims it is not analyzing clearly established law at a high level of generality (App. 39), it makes no attempt to identify any factual similarity between the cited cases and the situation confronted by Deputy Gelhaus. The most that can be gleaned from the panel majority's analysis is that the other cases involved issues of fact as to whether the suspect even had a weapon, or was pointing it at an officer; yet none involved the barrel of a weapon, much less the barrel of a devastatingly lethal assault rifle, rising as a suspect turned towards the officer. Indeed, prior Ninth Circuit authority and that of other circuits support the commonsense proposition that officers need not wait for a gun to actually be leveled or pointed at them before responding with deadly force to protect themselves and the public.

In fact, the majority tacitly acknowledges that this case presented "novel circumstances" but citing its decision in *Hughes v. Kisela*, *supra*, noted that this could be an appropriate basis for denying qualified immunity. (App. 39 n.16.) Yet, as the dissent observed, this is exactly contrary to this Court's decision in *White*, where the Court observed that the circuit court's

acknowledgment that the case "'present[ed] a unique set of facts and circumstances . . . should have been an important indication . . . that [the officer's] conduct *did not* violate a clearly established right'" and hence qualified immunity was appropriate. (App. 72 (citing *White*, 137 S. Ct. at 552 (emphasis added)).)

Gelhaus was forced to make a decision under tense, rapidly evolving circumstances in which a split second delay could have deadly consequences for himself, his partner, and residents of the surrounding neighborhood, as he confronted an individual apparently armed with an assault weapon that can discharge 30 rounds in seconds, with bullets capable of penetrating car doors and armored vests. No case would have alerted Gelhaus to the "magic point" at which it could be said that the rising barrel of an assault weapon would pose a risk warranting the use of deadly force, let alone require him to speculate in the heat of a moment fraught with peril, as to whether the barrel might cease rising at some point. These are precisely the circumstances in which this Court has repeatedly recognized that qualified immunity is warranted.

Although the Court should grant plenary review, or summarily reverse the Ninth Circuit's decision because the petitioner is entitled to qualified immunity in light of the absence of clearly established law, nonetheless, because of the importance of the underlying use of force issue, the Court should exercise its discretion to address the merits of the constitutional claim, and find that under the circumstances presented,

petitioner's use of force was objectively reasonable. *Plumhoff v. Rickard*, __ U.S. __, 134 S. Ct. 2012, 2020 (2014). Confronting individuals armed with assault weapons is among the most harrowing circumstances officers across the nation encounter in the field – statistics for 2016 indicate that 1 out of every 4 officers slain in the line of duty that year was killed with an assault rifle.[2] It is essential that clear guidelines be drawn for future cases.

In particular, the mode of analysis employed by the panel majority here must be repudiated as flatly inconsistent with this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989) and its progeny, which make it clear that use of force must be analyzed from the perspective of the officer at the time, confronted with tense, rapidly evolving circumstances, and not be subject to hindsight. As the dissent notes, the majority opinion relies largely on immaterial factual conflicts, and speculative inferences as opposed to actual evidence in concluding there was an issue of fact as to whether the force employed was reasonable. The undisputed evidence established that Gelhaus had spotted Lopez, an individual appearing to be in his mid to late teens carrying what appeared to be an assault rifle, alerted Lopez to police presence by chirping the siren and clearly commanded him to drop the weapon, only to be confronted with Lopez turning towards him with the barrel of the weapon rising. The suggestion

[2] *See*, http://www.vpc.org/press/new-data-shows-one-in-four-law-enforcement-officers-slain-in-the-line-of-duty-in-2016-felled-by-an-assault-weapon/ (last visited March 18, 2018).

that liability could be imposed under those circumstances poses a substantial risk to the safety of law enforcement officers in the field and the general public, as such armchair quarterbacking and nitpicking could dissuade officers from taking appropriate and decisive action when it is all too necessary for them to do so.

Unfortunately, the Ninth Circuit's approach here appears emblematic of that court's "special" treatment of motions for summary judgment in deadly force cases, where officers are the only witnesses to the event. By its own admission, the Ninth Circuit grants summary judgment only "sparingly" in such cases, and examines the evidence with particular rigor. That approach, as the dissent notes, acts as a license to deny summary judgment based on the "bare absence of evidence definitively disproving the existence of alternative facts for which there is no record," as opposed to an actual dispute of fact, and is tantamount to denying summary judgment based upon "'some metaphysical doubt as to the material facts,'" which is directly contrary to the authority of this Court. (App. 55-56 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).)

This Court has repeatedly recognized the need to grant review and correct the erroneous denial of qualified immunity because of the importance of the doctrine to society as a whole (*City and County of San Francisco v. Sheehan*, ___ U.S. ___, 135 S. Ct. 1765, 1774 n.3 (2015); *White*, 137 S. Ct. at 551-52) and, most particularly, to "protect[] the public from unwarranted timidity on the part of public officials." *Richardson v.*

McKnight, 521 U.S. 399, 408 (1997). This case presents precisely the circumstances in which this Court's intervention is warranted and necessary.

I. REVIEW IS WARRANTED BECAUSE THE PANEL MAJORITY DEPARTED FROM THE CONTROLLING DECISIONS OF THIS COURT REQUIRING THAT QUALIFIED IMMUNITY BE GRANTED IN ALL BUT THE MOST OBVIOUS CASES IN THE ABSENCE OF A ROBUST CONSENSUS OF CASES IMPOSING LIABILITY IN FACTUAL CIRCUMSTANCES CLOSELY ANALOGOUS TO THOSE CONFRONTING AN OFFICER.

A. An Officer Is Generally Entitled To Qualified Immunity In The Absence Of Clearly Established Law As Set Out In A Robust Consensus Of Cases Imposing Liability In Circumstances Closely Analogous To Those Confronted By The Officer.

As this Court has repeatedly recognized, officers are entitled to qualified immunity under section 1983 unless they violated a federal statutory or constitutional right, and the unlawfulness of their conduct was clearly established at the time of the events in question. *Reichle v. Howards*, 566 U.S. 658, 664 (2012); *District of Columbia v. Wesby*, __ U.S. __, 138 S. Ct. 577, 589 (2018). To be "clearly established" the law must be "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *al-Kidd*, 563 U.S. at 741 (quoting *Anderson v. Creighton*,

483 U.S. 635, 640 (1987)). In short, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *Id*. As this Court observed in *Wesby*:

> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority.'" It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that "every reasonable official" would know.

138 S. Ct. at 589-90 (citations omitted).

The Court has also repeatedly emphasized that the law must be clearly established with respect to the particular factual situation confronted by the officer. "The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" 138 S. Ct. at 590 (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)); *Plumhoff*, 134 S. Ct. at 2023 ("[T]he crucial question [is] whether the official acted reasonably in the particular circumstances that he or she faced.").

Although "there can be the rare 'obvious case' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not

address similar circumstances" nonetheless, a body of relevant case law is usually necessary to render the law clearly established. *Wesby*, 138 S. Ct. at 590; *White*, 137 S. Ct. at 551 ("While this Court's case law 'do[es] not require a case directly on point' for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." (internal quotation marks omitted)).

Because of the importance of qualified immunity to "society as a whole" (*Sheehan*, 135 S. Ct. at 1774 n.3), this Court has repeatedly reversed the denial of qualified immunity, frequently via per curiam opinion, based on the failure of the circuit courts to identify either controlling authority or a robust consensus of cases imposing liability in factual situations closely analogous to those confronted by the officer, and instead defining the purported right at too high a level of generality. *See Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases). Indeed, this Court has repeatedly reversed the Ninth Circuit based on the court's failure to identify factually analogous case law that would have put the defendants on notice that their conduct could subject them to liability.[3]

---

[3] *al-Kidd*, 563 U.S. at 742 ("We have repeatedly told courts – and the Ninth Circuit in particular – . . . not to define clearly established law at a high level of generality."); *see also*, *e.g.*, *Ryburn v. Huff*, 565 U.S. 469, 474 (2012) (per curiam); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *Stanton v. Sims*, 571 U.S. 3, 134 S. Ct. 3 (2013) (per curiam); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378 (2009); *Wood v. Moss*, __ U.S. __, 134 S. Ct. 2056, 2066-69 (2014); *Sheehan*, 135 S. Ct. at 1774-78.

B. Existing Ninth Circuit Authority Did Not Establish The Unlawfulness Of Petitioner's Conduct "Beyond Debate" And Hence He Is Entitled To Qualified Immunity.

The Ninth Circuit has once again failed to heed this Court's repeated admonition that other than in the most obvious of cases – which this most certainly is not – an officer is entitled to qualified immunity unless either controlling authority or a robust consensus of cases put the officer on notice that his or her conduct would subject them to liability in light of the particular factual circumstances confronting the officer. None of the cases cited by the Ninth Circuit addressed a factual situation closely analogous to that confronting Deputy Gelhaus – a suspect who disobeys a command to drop an apparent assault weapon of overwhelming lethality, and, instead, turns towards the officer with the barrel of the weapon rising.

In *George v. Morris*, 736 F.3d 829 (9th Cir. 2013), there was a clear factual dispute as to whether or not the husband, 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. In contrast, 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. Indeed, if anything, *George* actually undercuts the majority's position because in *George* the court reiterated that the Fourth Amendment does not always require "officers to delay their

fire until a suspect turns his weapon on them. If the person is armed – or reasonably suspected of being armed – a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." *Id*. at 838. At the very least, turning towards an officer and raising the barrel of an assault rifle is no doubt a "harrowing gesture" which could be objectively viewed as an immediate threat by Gelhaus.[4]

Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997) is also dissimilar to this case. Harris was shot in the back and injured by an F.B.I. sniper at the Ruby Ridge siege when the F.B.I.'s rules of engagement authorized deadly force to be employed against "any armed adult male" in the vicinity of the subject cabin. *Id*. at 1193-94. Unlike Gelhaus, the F.B.I. sniper in *Harris* was perched safely on a hill, out of harm's way and working under an unlawful directive. Unlike Lopez, Harris, though armed, was shot in the back while he was not making any "threatening movement of any kind," but was instead trying to return to the cabin. *Id.* at 1203.

Curnow By and Through Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991), is also patently

---

[4] The majority's suggestion, made from the comfort of well-secured chambers, that there is nothing that could reasonably be perceived as "harrowing" about someone refusing to drop an apparent assault weapon when commanded to do so and slowly raising the barrel as turning towards an officer who has virtually no protection from a hail of bullets that could be discharged in seconds (App. 46), displays precisely the casual disregard for the "tense, uncertain, and rapidly evolving" circumstances officers confront in the field that this Court has expressly repudiated (*Graham*, 490 U.S. at 396-97).

distinguishable. There, qualified immunity was denied 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. As the dissent notes, being shot in the back as a result of merely being in the vicinity of a gun (*Curnow*) is clearly different than a person being shot in the ***front*** of their body, while holding an assault weapon that is turning, with the barrel "beginning to rise." (App. 70-71.)

Indeed, far from there being a robust consensus of cases suggesting that liability could be imposed unless Lopez actually pointed the rifle at Gelhaus, a survey of the legal landscape even within the Ninth Circuit would have supported the commonsense proposition that an officer need not wait until the last, and likely fatal moment, before responding to protect themselves or others. As noted, in *George* the Ninth Circuit explicitly recognized that principle. 736 F.3d at 838.

Moreover, in *Cruz v. City of Anaheim*, 765 F.3d 1076, 1078 (9th Cir. 2014), the Ninth Circuit observed it "would be unquestionably reasonable for police to shoot a suspect," where the suspect was believed to be armed and "reached" for his waistband, even if he reached there for some other reason. If the simple act of reaching for a suspected (or known) weapon justifies an officer's use of deadly force, it is untenable that Gelhaus has been denied qualified immunity when confronting the barrel of an assault weapon rising and turning in his direction.

Nor could the majority rely on the rule announced in *Hughes v. Kisela*, that even assuming the facts of this case are "novel," it would not foreclose the court from rejecting qualified immunity. (App. 39 n.16 (citing *Hughes*, 841 F.3d at 1088).) As the dissent noted, in *White* this Court expressly held that the fact that the case presented unique circumstances "alone should have been an important indication to the majority that White's conduct did not violate a 'clearly established' right." (App. 72 (citing *White*, 137 S. Ct. at 552).)

Existing Ninth Circuit precedent did not put the alleged unlawfulness of Gelhaus's conduct beyond debate. *al-Kidd*, 563 U.S. at 741. Gelhaus was therefore entitled to qualified immunity.

C. Decisions In Other Circuits Have Applied Qualified Immunity In Closely Analogous Cases, Which Demonstrates That The Law Is Not Clearly Established, And Petitioner Is Entitled To Qualified Immunity.

This Court has noted that "[w]e have not yet decided what precedents – other than our own – qualify as controlling authority for purposes of qualified immunity." *Wesby*, 138 S. Ct. at 591 n.8; *see also Reichle*, 566 U.S. at 665-66 (reserving question whether court of appeals decisions can be "a dispositive source of clearly established law"). However, the Court has repeatedly recognized that a conflict among the federal appellate courts is a strong indication that the law is

not clearly established. *Stanton*, 134 S. Ct. at 5-7 (fact that "federal and state courts of last resort around the Nation were sharply divided" on constitutional issue means law not clearly established); *Pearson v. Callahan*, 555 U.S. 223, 243-45 (2009) (decisions by four Federal Courts of Appeals upholding defendant's conduct shows law not clearly established). That is the case here. The Ninth Circuit's decision is inconsistent with the decisions of other circuits addressing similar circumstances.

In *Dooley v. Tharp*, 856 F.3d 1177 (8th Cir. 2017), two deputies received information about a man (Dooley) in a military uniform, armed with a rifle, walking on a highway. The deputies drove up to Dooley from behind, saw he was carrying an apparent rifle over his shoulder with the muzzle down and then a deputy leaned out the window and ordered Dooley to drop the gun. Dooley turned his body while the muzzle was still pointed down, but then Dooley quickly took hold of the barrel and moved the rifle in a manner the district court described as "arc-like." *Id*. at 1178-80. The deputy fired a single shot, killing Dooley. Five seconds elapsed from the deputy's command to the gunshot. The rifle turned out to be a pellet gun attached to a wire sling buttoned to Dooley's coat, which explained Dooley's hand movements as he attempted to remove the sling to comply with the deputy's commands. The district court granted the deputy's motion for summary judgment on the Fourth Amendment, concluding that the deputy was entitled to qualified immunity

because the deadly force was objectively reasonable. *Id*. at 1180-81.

The Eighth Circuit affirmed. *Id*. at 1183. Despite the fact that 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 camera contradicted the deputies' description of the rifle movements, the court found that the deputy's mistaken perception that Dooley posed a threat of serious physical harm was nonetheless objectively reasonable. *Id*.

Dooley strongly supports the proposition that even if Gelhaus mistakenly perceived the extent of the threat posed by the turned and rising barrel of the assault rifle, that nonetheless use of deadly force was objectively reasonable, or at the very least its lawfulness was not "beyond debate" for purposes of qualified immunity. Indeed, *Dooley* is much closer to the circumstances Gelhaus confronted than *George* or any other case cited by the majority in rejecting qualified immunity here.[5]

Other circuits have also found qualified immunity applied even where deadly force was prompted by a subject simply reaching for a suspected or known

---

[5] Although *Dooley* was decided after the underlying incident here, as this Court noted in *Pearson*, post-event Circuit Court decisions that support a defendant's actions are relevant to determining clearly established law. 555 U.S. at 244 (noting that the Sixth Circuit had issued a decision supporting defendant's conduct "after the events that gave rise to respondent's suit," and including it in qualified immunity analysis).

weapon – circumstances much less threatening than those confronting Gelhaus. *See Anderson v. Russell*, 247 F.3d 125, 130-31 (4th Cir. 2001) (deadly force reasonable when suspect reaching toward bulge believed to be a gun); *Reese v. Anderson*, 926 F.2d 494, 500-01 (5th Cir. 1991) (suspect appeared to be reaching toward an unseen gun; officer justified in firing); *Kenning v. Carli*, 648 F. App'x 763, 764-70 (8th Cir. 2016) (deadly force lawful when suspect turned back towards where he placed gun).

D. The Absence Of Clearly Established Law Mandated That Petitioner Be Granted Qualified Immunity.

Given the controlling decisions of this Court, existing precedent in the Ninth Circuit, as well as case law in other circuits, it cannot be said that the law was clearly established with respect to Gelhaus's use of deadly force under the particular circumstances of this case, i.e., confronting an individual carrying an apparent assault rifle, who was alerted to police presence by a chirped siren, and who refuses a command to drop the weapon, and instead, turns with the barrel of the rifle rising. No case law indicated that an officer confronted with a devastatingly deadly weapon capable of discharging 30 rounds in mere seconds, penetrating car doors and ballistic vests, must speculate, in milliseconds, that the barrel might stop rising and halt at some unknown, and essentially unknowable point, at which it would not present a danger to the officer or to anyone else. These are precisely the circumstances in

which an officer is entitled to qualified immunity. The Ninth Circuit's refusal to adhere the controlling decisions of this Court necessitates the Court's intervention.

II. THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH *GRAHAM V. CONNOR*'S STANDARD FOR EVALUATING FOURTH AMENDMENT USE OF FORCE CLAIMS AND TO REPUDIATE THE NINTH CIRCUIT'S APPLICATION OF AN ESPECIALLY STRINGENT STANDARD OF REVIEW WITH RESPECT TO SUMMARY JUDGMENT WHERE OFFICERS ARE THE ONLY WITNESSES TO AN INCIDENT.

The panel majority's failure to identify clearly established law concerning the facts confronted by Gelhaus warrants review, and indeed summary reversal by this Court. However, as this Court has recognized, it is often beneficial to develop constitutional precedent with respect to use of force in particular circumstances confronted by police officers which may give rise to a claim of qualified immunity. *Plumhoff*, 134 S. Ct. at 2020. Petitioner submits that is precisely the case here. It is, unfortunately, growing more commonplace for officers in the field to confront individuals – including teenagers – carrying assault weapons capable of discharging devastating firepower in a split second. It would therefore be useful to provide guidance to the lower courts in analyzing such claims under *Graham v. Connor*, 490 U.S. 386. The panel majority

here underscores the need for this Court's guidance given, as the dissent notes, its failure to analyze the use of force from the perspective of the officer on the scene, but with precisely the "20/20 vision of hindsight" the Court rejected in *Graham*. *Id*. at 396.

Moreover, the focus of the panel majority on irrelevant factual discrepancies and wholly speculative inferences untethered to actual evidence, appears to stem from the Ninth Circuit's acknowledged rule that it will grant summary judgment only "sparingly" in deadly force cases where officers are the only witnesses and that the court will particularly scrutinize the evidence in such cases. (App. 13-14 (citing *Gonzalez v. City of Anaheim*, 747 F.3d at 795).) This case provides an appropriate vehicle for the Court to repudiate the notion that there is any sort of special standard applicable to summary judgment motions in deadly force cases where officers are the only witnesses. The Court should reaffirm the principle that where the undisputed evidence establishes that the force used was objectively reasonable, an officer is entitled to summary judgment. *Plumhoff*, 134 S. Ct. at 2021-22; *Scott v. Harris*, 550 U.S. 372, 386 (2007).

Here, proper application of the standards set forth by this Court in *Graham* and *Plumhoff* make it clear that Gelhaus's use of force was objectively reasonable and that he was entitled to summary judgment.

A. The *Graham* Standards.

In *Graham*, this Court held that claims for excessive force under the Fourth Amendment would be evaluated based upon the objective reasonableness of an officer's conduct. 490 U.S. at 395-97. Evaluation of use of force under the Fourth Amendment "requires careful attention of the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396. "The operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *County of Los Angeles v. Mendez*, __ U.S. __, 137 S. Ct. 1539, 1546 (2017) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Moreover, the reasonableness of force must be evaluated based on the information officers possessed at the time. *Saucier v. Katz*, 533 U.S. 194, 207 (2001); *Mendez*, 137 S. Ct. at 1546-47; *Graham*, 490 U.S. at 397 ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . "). Critically, the Court has emphasized that 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," making "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*, 490 U.S. at 396-97.

Although the panel majority recites the *Graham* standards (App. 12-13), it effectively ignores them, finding an issue of fact based largely on conjecture and Monday-morning quarterbacking.

B. The Majority Departed From *Graham* By Applying 20/20 Hindsight Without Regard To The Tense, Fast-Evolving Circumstances Confronting Petitioner And Relying On Speculation, Not Evidence, In Denying Summary Judgment.

The majority concludes there is a triable issue of fact as to whether Gelhaus should have realized that Lopez did not have a real AK-47, but only a replica, even though the weapon lacked the bright orange tip required by law. But the majority based its conclusion on the testimony of a civilian witness who had seen Lopez just prior to the incident and concluded that Lopez did not have a real gun because he subjectively thought it would be odd " 'at that time of the afternoon, you know, someone walking around with an AK-47, to me, just – I couldn't see somebody doing that.' " (App. 3.) "Indeed, at 'th[at] time of the day' he said, 'someone is not going to be carrying a real rifle.' " (*Id*.)

When the witness got within approximately 50 feet of Lopez, he slowed down to look at the gun, thought it looked fake and suspected it was a BB gun

because his mother-in-law had seen some children with them in the area several weeks earlier. (*Id*.)

As the dissent notes, the civilian witness's conclusion about the rifle was based on his own subjective experiences – he thought it would be odd for someone to walk around with an AK-47 in the afternoon (an assumption, Gelhaus as an officer who can encounter a deadly situation at any time of the day, did not have the luxury to make), and that it was likely a BB gun, based upon his having heard that children with BB guns had recently been active in the area (information to which Gelhaus was not privy). (*See* App. 60-61.)

Gelhaus knew what an AK-47 looked like based both upon his military experience, and the fact that he had encountered them in the course of serving as a police officer, and had seized an assault rifle in the same area only weeks before. (*Id*.) A side-by-side comparison of a real AK-47 and a replica rifle as Lopez carried underscores the realistic nature of the latter. (*See* App. 103 (real AK-47 at the top of the frame).)

The only direct, and indeed undisputed evidence – the testimony from the officers – established that once the officers had alerted Lopez to their presence by chirping the siren, he failed to obey Gelhaus's command to drop the rifle, but, instead, turned with the barrel beginning to rise towards the officers. As the dissent notes, the majority's conclusion that a jury could nonetheless conclude that the weapon did not pose a risk to Gelhaus or anyone else because it was not yet pointed at him, and "might" stop rising before it

reached some "magic point" at which it could pose a danger, is wholly speculative, contrary to *Graham* and its progeny, and ignores the specific tense circumstances Gelhaus confronted. This was a weapon of overwhelming firepower, capable of spraying 30 bullets in a matter of seconds at a range of less than 70 feet, each bullet capable of penetrating a car door or body armor – Gelhaus's only protection. Once the barrel turned and started moving upward, Gelhaus had very little time to react, without putting himself, his partner, and anyone else in the vicinity[6] in jeopardy. Gelhaus could reasonably perceive a threat and act reasonably to protect himself and others.[7] These are precisely the sort of tense, rapidly evolving circumstances in which this Court has made it clear courts should not exercise hindsight in second-guessing an officer's actions.

In addition, in armchair analysis akin to an episode of NCIS, the majority postulates that Gelhaus

---

[6] And the "vicinity" at risk is considerable – a U.S. Army Operator's Manual for the AK-47 notes that it has an effective range of at least 300 meters. https://en.wikisource.org/wiki/AK-47_Operator%27s_Manual (last visited March 18, 2018).

[7] The panel majority's suggestion that a jury could find the force unreasonable because Gelhaus did not actually see if Lopez had his finger on the trigger (App. 24) is untenable and irrational. The shooting occurred at a distance of over 60 feet, and it was undisputed that Lopez was holding the gun by its pistol grip with his finger capable of moving to the trigger in a split second. Not surprisingly, the majority cites no case suggesting that an officer must see a finger on a trigger as a gun is raised towards them before being able to reasonably defend themselves against the perceived threat.

should have, in the heat of the moment, somehow anticipated that Lopez might not have heard the siren chirp or thought it was something else though the chirp was plainly audible (App. 15 n.7) – or that Gelhaus did not know the command to drop the weapon was directed at him (App. 16) – though nobody else carrying a weapon (save the officers) was nearby. The majority similarly speculates that Gelhaus should have assumed that the weapon was a BB gun as he had encountered youths with BB guns before (App. 23) – but that had been at a range of a hundred yards in a park, not a neighborhood, and the youths had promptly obeyed his command to drop their weapons (App. 5).

Indeed, the majority effectively requires that an officer be correct in his perception of a threat; yet the standard enunciated by the Court in *Graham* concerns probable cause to use force – just as "[t]he 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," so too "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." 490 U.S. at 396 (citations omitted). An officer need only believe that there is probable cause to believe the force is necessary, and as the Court has observed, "the probable-cause requirement: . . . '[D]oes not deal with hard certainties, but with probabilities.'" *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality); *Hill v. California*, 401 U.S. 797, 804 (1971) ("[S]ufficient

probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.").

C. The Ninth Circuit's Rule Requiring Especially Stringent Review Of Summary Judgment Motions In Deadly Force Cases Where Officers Are The Only Witnesses To Events, Effectively Requires Defendants To Affirmatively Disprove Any Conceivable Contrary Scenario, Which Is Directly Contrary To This Court's Decisions Concerning Summary Judgment.

As the dissent noted, instead of viewing the facts as they would be perceived by a reasonable officer under the circumstances as established by undisputed evidence, the panel majority instead posits an analysis that "rests on the bare absence of evidence definitively disproving the existence of alternative facts for which there is no record." (App. 55.) As the dissent further observed:

> This novel rule – that we must accept as true all facts not conclusively disproved by evidence in the record even if those facts have no evidentiary support of their own – is plainly wrong.

(*Id*.)

Under the guise of applying its practice of granting summary judgment only "sparingly" in deadly force cases where officers are the only witnesses and scrutinizing the evidence particularly closely in such cases,

the panel majority effectively placed the burden on Gelhaus, not simply to prove his version of what occurred, but disapprove any other conceivable set of facts. This plainly runs afoul of this Court's decision in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), which held that when the "moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."

The majority's rejection of summary judgment on the reasonable use of force issue is not based on what evidence plaintiff actually has as to what occurred, but on speculating that the jury might disbelieve the officers' account and construct, out of whole cloth, a scenario that would not justify the use of deadly force. (App. 27.) Yet, as the Court emphasized in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986), to withstand summary judgment a party must present affirmative evidence to support their version of events – it is not enough to say that a jury might disbelieve the moving party's evidence:

> As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion." Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery.

Id. (citations omitted).

In a post-Sandy Hook, post-Parkland world, neither law enforcement officers nor the public they protect, have the luxury of assuming that someone in their mid to late teens carrying what appears to be an assault rifle on a sunny afternoon is more likely to be plinking cans with an illegal BB gun than presenting a credible threat of violence. This was a tragic incident, but under the governing decisions of this Court, Petitioner Gelhaus should not, and cannot, be held liable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY T. COATES
Counsel of Record
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-mail: tcoates@gmsr.com

NOAH G. BLECHMAN
MCNAMARA, NEY, BEATTY, SLATTERY,
BORGES & AMBACHER LLP
3480 Buskirk Avenue, Suite 250
Pleasant Hill, California 94523
Telephone: (925) 939-5330
Facsimile: (925) 939-0203
E-mail: noah.blechman@
mcnamaralaw.com

Counsel for Petitioner Erick Gelhaus