No. 17-1354

In The
Supreme Court of the United States

ERICK GELHAUS,

Petitioner,

vs.

ESTATE OF ANDY LOPEZ,
by and through successors in interest,
Rodrigo Lopez and Sujay Cruz, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITON TO PETITION FOR WRIT OF CERTIORARI

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1. INTRODUCTION

Petitioners seek review of the decision of the Ninth Circuit Court of Appeals arising out of Deputy Gelhaus' fatal shooting of 13 year-old Andy Lopez, who was carrying a toy replica automatic rifle by its grip. At all times, the toy rifle was pointed towards the ground, with Lopez's hand on the grip, away from the trigger. Deputy Gelhaus shot at Lopez eight times, hitting him seven times, from approximately 62 feet.

The question presented is whether there is qualified immunity for a police officer who shoots a 13-year-old boy seven times, particularly where there is evidence that the first shot may have disabled the youth by striking the upper arm of the hand holding the replica rifle's grip. Assuming that evidence is credited, as it must be, does qualified immunity apply to the next six shots?

Lopez was casually walking mid-afternoon near a city street. Deputies Gelhaus and Schemmel, on routine patrol, saw Lopez. The deputies were not responding to a call of criminal conduct or suspicious activity. They had no reason to think Lopez was a gang member or that he was engaged in criminal activity, except that he was holding, in his left hand, the grip of what appeared to be an assault rifle, pointed towards the ground. Lopez did not attempt to evade the deputies and nothing about his conduct was suspicious. Lopez was just walking along, minding his own business.

The Petition criticizes the Ninth Circuit panel for referring to the testimony of a civilian witness who correctly perceived the rifle was, in fact, a toy. But, the question is, why could an untrained civilian recognize the toy rifle for what it was, but Officer Gelhaus could not? (Petition, pages 30-31.) See App. 3. "When Licea got within approximately fifty feet of Andy, he slowed down to look at the gun. When he saw it, he thought 'it look[ed] fake.' . . . Licea did not fear for his life or call the police; he continued on his way." "Another witness estimated that Andy was '11 or 12 years old,' and described him as 'the little guy,' 'no more than five feet.'" App. 3, n. 2.

Once or twice, Gelhaus yelled from behind, "Drop the gun," "Put the gun down," or something similar. He did not use the patrol car's loudspeaker, certainly a more effective method for communicating with a suspect.

> At his deposition, Gelhaus was asked to reenact how Andy was holding the gun, "his turning motion," and "what you saw him do." The video depicted the gun in Gelhaus's fully-extended arm and at his side as he turns, consistently pointed straight down towards the ground.

App. 7.

As Lopez turned, Gelhaus shot eight times, with seven bullets hitting Lopez.

The panel majority noted:

> At the time of the shooting, Andy was standing next to an open field in a residential neighborhood. The site of the shooting is also close to three schools and the shooting occurred when school was out of session. There were no other people present at the shooting. There were a few individuals walking in the surrounding neighborhood. Andy had been walking in the general direction of several houses before Gelhaus shouted, and Gelhaus submits that he did not want to let Andy get near them.

App. 8.

After summarizing the facts, the Ninth Circuit panel concluded, "On these facts, a reasonable jury could conclude that Andy did not pose an 'immediate threat to the safety of the officers or others,' *George*, 736 F.3d at 838 . . . and that Gelhaus's use of deadly force was not objectively reasonable." App. 24. Further, "[T]he cases upon which Gelhaus relies to establish that his conduct was objectively reasonable involved threats to officers that were far more direct and immediate than that presented by Andy." App. 26.

Also, "Moreover, Gelhaus indisputably had time to issue a warning, but never notified Andy that he would be fired upon if he either turned or failed to drop the gun." App. 25.

> In sum, viewing the facts in the light most favorable to plaintiffs, as we must at this stage of proceedings, Gelhaus deployed deadly

> force while Andy was standing on the sidewalk, holding a gun that was pointed down at the ground. Gelhaus also shot Andy without having warned Andy that such force would be used, and without observing any aggressive behavior. Pursuant to *Graham*, a reasonable jury could find that Gelhaus's use of deadly force was not objectively reasonable.

App. 30-31. "Based on the present record, Gelhaus could not reasonably have misconstrued Andy's turn [towards the deputies] as a 'harrowing gesture.'" App. 46.

Petitioners provide no explanation why Deputy Gelhaus, from 62 feet away, shot Lopez over and over and over again. Petitioners provide no evidence that one bullet was not sufficient to disable Andy and eliminate the perceived threat.

Lopez's expert presented evidence that Lopez was first shot in his upper left arm, the arm holding the toy's grip (suggesting Gelhaus successfully targeted the arm holding the toy rifle, thus removing any threat). No evidence was presented that, before Lopez was shot multiple times, his hand was near the trigger.

Lopez's toy rifle was pointed at the ground. The toy rifle may have been, as petitioners continually point out, "rising" as Lopez turned, but that does not mean it was not always pointed at the ground.

In this regard, it is important to note statements made by the California State Sheriffs Association, California Police Chiefs Association and California Peace

Officers' Association in their Amicus Brief in Support of the Petition for Rehearing. "[A] weapon trained on the ground does not pose . . . an objective threat." (Page 6.) "[A] bullet fired from a gun 'trained on the ground' is almost certainly going to hit nothing but the ground." (Page 9.)

2. REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

The District Court's Order properly denied petitioners' motion for summary judgment, which was based on their erroneous claim that this action is barred by qualified immunity. The Court of Appeals properly affirmed the District Court's Order, correctly applying the District Court's binding findings of fact.

The Petition for Writ of Certiorari ignores fundamental rules for review of the denial of summary judgment and the effect of the District Court's findings of fact.

The Court of Appeals' decision is based on binding Ninth Circuit decisions, as well as a consensus of authority. Further, the Petition ignores the decedent's unique status as a 13-year-old child who was fatally shot seven times by a deputy sheriff. Petitioners' authorities are readily distinguishable. Further, the Ninth Circuit's rule that summary judgment should be granted sparingly in deadly force cases is followed by several circuits and is not an aberrant practice.

3. PETITIONERS IGNORE FUNDAMENTAL RULES FOR REVIEW OF THE DENIAL OF SUMMARY JUDGMENT

The Petition provides a bare-bones factual statement, consisting of less than two full pages, omitting all facts conflicting with petitioners' view of events.

In reviewing a denial of summary judgment, all facts in the record and inferences drawn from them must be viewed in the light most favorable to the nonmoving party (Lopez). *Tolan v. Cotton*, 572 U.S.___, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014). In ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Rather than stating facts in the light most favorable to Lopez, as they are required to do, petitioners do the reverse, resolving all conflicts or ambiguities in their own favor. To this end, petitioners, in a mocking tone, deride the decision of the Ninth Circuit panel majority, which correctly applied this fundamental rule. See Petition, pages 7-10.

In addition, petitioners minimize factual gaps or ambiguities in the evidence as "immaterial factual conflicts" and "speculative inferences." Petition, page 15. For example, petitioners claim Lopez was "alerted . . .

to police presence by chirping the siren." (Page 15.)[1] There is no evidence Lopez, a 13-year-old boy, was **alerted to police presence** or understood the "chirp" was directed towards him.

Likewise, petitioners claim Deputy Gelhaus "clearly commanded [Lopez] to drop the weapon." (Page 15.) Petitioners do not mention that Gelhaus shouted a command from behind Lopez, rather than using the patrol car's public address system.

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[1] The majority panel states, "[B]ecause Schemmel and Gelhaus disagree as to whether Andy 'briefly glance[d] backwards' over his right shoulder after the patrol car's 'chirp,' we must assume Andy did not briefly glance backwards and therefore was unaware that someone was behind him until Deputy Gelhaus shouted 'drop the gun.'" App. 15. The panel majority continues, "This disputed fact is significant because it sheds light on Andy's motivations in turning to face the officers. In particular, Andy's subsequent turn appears less aggressive because he could have been attempting to see if he was the object of the call, or could have been turning out of startled confusion given that he was carrying only a toy gun." App. 15.

In footnote 7, the panel majority continued assuming that, since the chirp is audible in a recording of the dispatch call, it "may account" for the chirp in its analysis. "The chirp on the recording lasts for a fraction of a second. The tone ascends briefly and resembles the 'blip' of an emergency vehicle. Drawing reasonable inferences in favor of the plaintiffs, the chirp did not put Andy on notice that anyone, much less a police officer, sought his attention. The chirp was emitted from a vehicle on the other side of an intersection more than 100 feet behind Andy. Even if Andy somehow knew that the chirp was emitted from a police car, as opposed to some other kind of emergency vehicle, the car could have been attempting to make a U-turn or another maneuver." App. 15.

Petitioners do not contend Gelhaus warned Lopez of the consequences of not dropping the weapon – that he would be repeatedly shot until he was dead.

When Lopez turned in response to Gelhaus' command, Gelhaus shot him seven times. Yet, petitioners claim Gelhaus and Schemmel were "**confronted** with Lopez turning towards him with the barrel of the weapon rising." (Page 15, emphasis added.) This description is contrary to the binding District Court factual finding, "Andy was already holding a weapon pointed down at his side, and **merely turned around** in response to an officer's command, **with no 'sudden movement' towards the weapon**." App. 89 (emphasis added).

There is no evidence Lopez "confronted" the deputies.[2] He "turned around in response to an officer's command." For his attempt to comply, Lopez was shot seven times.

Likewise, at page 26, petitioners write, "Gelhaus' use of deadly force under the particular facts of this case . . . who was alerted to police presence by a chirped siren, and who **refuses a command**[3] to drop

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[2] Merriam Webster On-line Dictionary defines "confront" as "to face especially in challenge: oppose, confront an enemy. The mayor was confronted by a group of protesters." https://www.merriam-webster.com/dictionary/confront.

[3] Merriam-Webster defines "refuse" as: "1: to express oneself as unwilling to accept, refuse a gift, refuse a promotion. 2 a: to show or express unwillingness to do or comply with, refuse to answer the question; b: to not allow someone to have or do

the weapon, and, instead turns with the barrel of the rifle rising." (Emphasis added.) There is no evidence Lopez "refused" a command. There is also no evidence Lopez volitionally raised the barrel of the rifle, as the Petition suggests. These statements are contrary to the District Court's binding factual findings.

4. THE PETITION IGNORES THE DISTRICT COURT'S BINDING FINDINGS OF FACT

The District Court's factual determinations are binding for purposes of this Petition. *United States v. John J. Felin & Co*., 334 U.S. 624, 639, 68 S. Ct. 1238, 92 L. Ed. 1614 (1948); *In re 620 Church Street Bldg. Corp*., 299 U.S. 24, 27, 57 S. Ct. 88, 81 L. Ed. 16 (1936).

Therefore, we turn to the decision of the District Court, which distinguished the shooting of Andy Lopez from cases upon which Gelhaus and Sonoma County relied below. The Petition ignores those findings.

The District Court made the following dispositive finding of fact, "Andy was already holding a weapon pointing down at his side, and merely turned around in response to an officer's command, with no 'sudden movement' towards the weapon." App. 89.

The Ninth Circuit majority panel states, regarding the District Court's findings:

(something): deny they were refused admittance to the game." https://www.merriam-webster.com/dictionary/refuse.

> The [District] court expressly found that it "can conclude only that the rifle barrel was beginning to rise; and given that it started in a position where it was pointed at the ground, it could have been raised to a slightly higher level without posing any threat to the officers. . . ." As a practical matter, this finding makes sense. Neither officer ever stated how much the barrel "began" to rise as Andy commenced his turn, despite having the opportunity to do so. Moreover, one would expect the barrel to raise an inch or so as the momentum of Andy's clockwise turn moved his left arm slightly away from his body. But that incidental movement alone would not compel a jury to conclude that Gelhaus faced imminent danger given the starting position of the gun. Furthermore, this interpretation is bolstered by Gelhaus's admission that the weapon would benignly "swing somewhat" with each step that Andy took.

App. 17-18.

The District Court concluded, again making binding findings of fact:

> [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.

App. 94-95, emphasis added.

The District Court made an additional finding of fact in distinguishing cases relied upon by petitioners below.

> [E]ach of the cases cited by defendants involves a suspect who either (1) physically assaulted an officer, (2) pointed a weapon (or an object believed to be a weapon) at officers or at others, (3) made a sudden movement towards what officers believed to be a weapon, or (4) exhibited some other threatening, aggressive, or erratic behavior. **[T]his case involves none of those facts**. . . .

App. 89, emphasis added.

The panel majority states:

> In light of the plaintiff's evidence, and the inconsistencies in Gelhaus' testimony, it is not the case that the District Court's finding that Andy's gun posed no threat to the officers "is so utterly discredited by the record that no reasonable jury could [believe it]." *Scott*, 550 U.S. at 380. The record supports the District Court's conclusion, and certainly would not compel a jury to conclude to the contrary. Thus, in this interlocutory appeal, we must accept the District Court's factual finding that

> the position of Andy's gun barrel never posed any threat to Gelhaus or Schemmel as Andy turned. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam) ("[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment."); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) ("[W]e must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence.").

App. at 21-22.

For the purposes of this Petition, the facts determined by the District Court are treated as established.

5. THE CONSTITUTIONAL VIOLATION IS CLEARLY ESTABLISHED

The Supreme Court's "case law does not require a case directly on point for a right to be clearly established, [but] existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, ___ U.S. ___, 2018 U.S. LEXIS 2066, *6, quoting *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 196 L. Ed. 2d 463, 468 (2017). "[G]eneral statements of the law are not inherently incapable of giving fair notice and clear warning to officers." *Kisela v. Hughes*, *supra*, 2018 U.S. LEXIS 2006, *7, quoting *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 196 L. Ed. 2d at 468, *supra*.

But, petitioners criticize the District Court since it "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." (Petition, page 6, emphasis added.)

Petitioners claim, "[T]he Court has repeatedly emphasized that the law must be clearly established **with respect to the particular factual situation** confronted by the officer." (Petition, page 18, emphasis added.) Under petitioners' argument, Gelhaus has qualified immunity unless Lopez identifies a factually identical case holding Gelhaus is not entitled to a qualified immunity – a 13-year-old boy, walking along a city street, carrying a replica toy rifle by its grip, etc.

Petitioners also claim, citing *City & Cnty. of San Francisco v. Sheehan*, ___ U.S. ___, 135 S. Ct. 1765, n. 3 (2015), "[T]his court has repeatedly reversed the denial of qualified immunity . . . based on the failure of the circuit court 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." (Petition, page 19.) But, in fact, the reference to "too high a level of generality" only "means more particularized than, 'the right to be free from unreasonable searches and seizures.'" *Id.* at 1776, citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1160 (2011).

Petitioners' argument misstates applicable law. The Supreme Court has demanded, as one alternative, a robust consensus of cases imposing liability. The

Supreme Court has not demanded a "robust consensus in factual situations **closely analogous** to those confronted by the officer."

District of Columbia v. Wesby, ___ U.S. ___, 138 S. Ct. 577, 589-590 (2018) states, "The rule must be 'settled law,' which means it is dictated by 'controlling authority' or 'a robust "consensus of cases of persuasive authority."'" "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.'" *White v. Pauly*, 137 S. Ct. at 551, *supra*, emphasis added.

Contrary to petitioners' claim, the Supreme Court has never required a factually identical case to satisfy the "clearly established" standard. But, that is what petitioners would require.

> Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair

> warning that their alleged treatment of Hope was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). *Accord*, *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377-378, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009) ["[O]fficials can still be on notice that their conduct violates established law . . . in novel factual circumstances," citing *Hope v. Pelzer*.].

The Supreme Court has rejected the notion, asserted by petitioners, that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

"[A] body of relevant case law" may "clearly establish" the violation of a constitutional right. *Brosseau v. Haugen*, 443 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004); *Ashcroft v. al-Kidd*, 563 U.S. 731, 736, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) ("[Q]ualified immunity is lost when plaintiff's point either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.' ").

Contrary to petitioners' claim, previous cases arising out of "fundamentally similar" or "materially similar" facts are not required to establish that the constitutional right is "clearly established."

Petitioners swing back and forth between the two strands of constitutional analysis, relying on

whichever strand seems most useful at the moment, while ignoring the other strand. For example, in its discussion of "Why Certiorari is Required," the Petition first discusses the requirement for a "robust 'consensus of persuasive authority' making it clear that the officer's use of force **in the particular factual circumstances** was improper." (Page 12.) Then, on page 13, the Petition discusses Judge Wallace's dissent, noting that "the panel majority did not identify a case with a factual scenario even close to that established by the undisputed evidence here – an officer confronted by a suspect who appears to be carrying an assault rifle, who is alerted to police presence by a siren chirp and **disregards** the command to drop the weapon and instead turns towards the officer with the barrel of the rifle starting to rise." Petitioners argue, "[the majority] makes no attempt to identify any factual similarity between the cited cases and the situation confronted by Deputy Gelhaus." (Page 13.) "Factual similarity" is not required.

The Petition criticizes the panel majority for believing qualified immunity can be properly denied in "novel circumstances." (Page 13.) Petitioners argue this is "exactly contrary" to the rule of *White v. Pauly*, 137 S. Ct. 548, *supra*. Not so, *White v. Pauly* states:

> Of course, "general statements of the law are not inherently incapable of giving fair and clear warning" to officers, *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997), but "in the light of pre-existing law the unlawfulness must be

> apparent," *Anderson v. Creighton*, *supra*, at 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523. For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside "an obvious case." *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam); see also *Plumhoff v. Rickard*, 572 U.S. ___, ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069 (2014) (emphasizing that *Garner* and *Graham* "are 'cast at a high level of generality'").

137 S. Ct. at 552.

6. THIS CASE IS MOST SIMILAR TO *GEORGE V. MORRIS*, IN WHICH A NINTH CIRCUIT PANEL CONCLUDED A POLICE OFFICER VIOLATED A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT

The mere fact that a suspect possesses a weapon does not justify deadly force. *Harris v. Roderick*, 126 F.3d 1189, 1202 (9th Cir. 1997). The use of deadly force is constitutionally unreasonable unless an officer has "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." *Moore v. Indehar*, 514 F.3d 756, 762 (8th Cir. 2008).

This case is most similar to *George v. Morris*, 736 F.3d 829 (9th Cir. 2013), decided a month before Lopez was fatally shot. *George* affirmed the District Court's denial of a motion for summary judgment based on

qualified immunity. The Ninth Circuit panel also correctly relied on *Harris v. Roderick*, 126 F.3d 1189, *supra*, and *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991). Although not factually identical to this case, these three cases demonstrated a body of law which clearly indicated it would violate a clearly established constitutional right if Gelhaus repeatedly shot Lopez, who, the District Court determined, did not present an imminent threat of harm to Gelhaus and Schemmel.

In *George*, Donald George had terminal brain cancer and was receiving chemotherapy. At 5:30 a.m., Carol, his wife, awoke and gave Donald a snack and then returned to bed. Shortly after, Donald took the keys to the couple's truck. He retrieved his pistol from the truck and loaded it with ammunition. Carol called 911, stating Donald had a gun.

Deputies were dispatched for a domestic disturbance involving a firearm. When Deputies Morris and Rogers responded, Carol met them at the front door. She asked them to be quiet and not to scare Donald, while also advising that he was on the patio with his gun. The deputies decided to establish a perimeter around the house.

Donald opened the door to the balcony. Deputy Schmidt identified himself as law enforcement and instructed Donald to show him his hands. Hearing yelling, Deputy Rogers headed into the backyard. When Donald came into view, he was holding a gun with the barrel pointing down. A few seconds later, Donald was shot.

The District Court concluded that Carol's evidence, which included an expert witness's report, called into question whether Donald ever manipulated the gun, or pointed it directly at deputies. 736 F.3d at 832-833.

The Court of Appeal affirmed the District Court's denial of summary judgment, stating, "If the deputies indeed shot the sixty-four-year-old decedent without objective provocation while he used his walker, with his gun trained on the ground, then a reasonable jury could determine that they violated the Fourth Amendment." *Id*. at 839.

7. A 13-YEAR-OLD CHILD IS NOT AN ADULT AND THE CHILD'S AGE IS RELEVANT TO THE CONSTITUTIONAL ANALYSIS

Petitioners would treat this case as an ordinary deadly force case. But, it is not – the victim is a 13-year-old boy. There is a judicial consensus that a 13-year-old is not the same as an adult. Courts treat minors differently than adults, affording them a special status. This special status should also apply to a police officer's application of deadly force on a 13-year-old boy.

Andy's age is a relevant factor in assessing both his acts and the conduct of Deputy Gelhaus. A 13-year-old child is not an adult and should not be expected to act like an adult. Similarly, a 13-year-old child should not be treated like an adult.

J. D. B. v. North Carolina, 564 U.S. 261, 279-280, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) said recently,

in a case concerning suppression of a 13-year-old boy's confession made without benefit of a *Miranda* warning:

> [A] child's age, when known or apparent, is hardly an obscure factor to assess. Though the State and the dissent worry about gradations among children of different ages, that concern cannot justify ignoring a child's age altogether. Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age. Indeed, they are competent to do so even though an interrogation room lacks the "reflective atmosphere of a [jury] deliberation room," post, at 295, 180 L. Ed. 2d, at 338. . . . In short, officers . . . need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.

A civilian witness, Jose Licea, recognized Andy was a "kid." "Licea couldn't tell Andy's age," "but by the height [Licea] was figuring it was a kid." App. 3. There is nothing in the record to indicate why Gelhaus did not come to the same conclusion.

J. D. B. v. North Carolina also states:

> [E]ven where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, "[a]ll American jurisdictions accept the idea that a person's childhood is a relevant circumstance" to be considered. . . . Restatement (Second) of Torts § 283A, Comment b, page 15 (1963-1964) ("[T]here is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of [children]."). As this discussion establishes, "[o]ur history is replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults. *Eddings*, 455 U.S., at 115-116, 102 S. Ct. 869, 71 L. Ed. 2d 1. We see no justification for taking a different course here. So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances "unknowable" to them . . . nor to ["]anticipat[e] the frailties or idiosyncrasies" of the particular suspect whom they question. . . . The same "wide basis of community experience" that makes it possible, as an objective matter, "to determine what is to be expected" of children in other contexts . . . likewise makes it

> possible to know what to expect of children subjected to police questioning.

564 U.S. at 274, citations omitted.

"[A]s any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' *Johnson* [*v. Texas*, 509 U.S. 350], 367, 125 L. Ed. 2d 290, 113 S. Ct. 2658. . . . " *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). See, e.g., *Naovarath v. State*, 105 Nev. 525, 529, 779 P.2d 944 (1989) ["Children are and should be judged by different standards from those imposed upon mature adults. To say that a thirteen-year-old deserves a fifty or sixty year long sentence, imprisonment until he dies, is a grave judgment indeed if not Draconian. To make the judgment that a thirteen-year-old must be punished with this severity and that he can never be reformed, is the kind of judgment that, if it can be made at all, must be made rarely and only on the surest and soundest of grounds."]; California Penal Code section 26 ["All persons are capable of committing crimes except those belonging to the following classes: One – Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness. . . ."]; "Section 26 embodies a venerable truth, which is no less true for its extreme age, that a young child cannot be held to the

same standard of criminal responsibility as his more experienced elders. A juvenile court must therefore consider a child's age, experience, and understanding in determining whether he would be capable of committing conduct proscribed by section 602." *In re Gladys R.*, 1 Cal. 3d 855, 864 (1970).

Andy Lopez was a 13-year-old child. Passersby described Andy as "a kid" or "11 or 12 years old," and "the little guy." Gelhaus was required to treat him as such.

8. SHOOTING A 13-YEAR-OLD CHILD SEVEN TIMES IS CONSTITUTIONALLY DIFFERENT THAN SHOOTING HIM ONCE OR TWICE

This case is also different because Deputy Gelhaus, from approximately 62 feet away, shot Andy Lopez seven times. The Petition does not discuss whether multiple applications of deadly force are constitutionally suspect, particularly where the subject may have been disabled by the first shot. There is a judicial consensus that when an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity.

Lopez's witness, Mark Shattuck, an expert in reconstruction and biomechanics, reconstructed the scene. (3 ER 562-564.) He reported that Lopez was struck by seven bullets. Four bullets struck Lopez's torso, one hit near his torso in his upper left arm, and two struck his lower forearm/wrist areas. (3 ER 567.)

Dr. Shattuck attempted to determine the likely order of the shots. (3 ER 567.) He concluded, "**The first shot is to the upper left arm** and is consistent with Mr. Lopez having turned to the right to face the Deputies and consistent with the upper arm being slightly raised and rotated at this point in time, consistent with the replica AK-47 turning and ascending." (3 ER 567-568, emphasis added.)

Dr. Shattuck's reconstruction suggests Deputy Gelhaus immediately and successfully targeted Lopez's left arm (the arm holding the toy rifle's grip), thereby, potentially, disabling Lopez. If correct, Gelhaus eliminated the perceived threat with his first shot. But, Gelhaus shot Lopez six more times.

One would reasonably expect that once Lopez was shot in the upper left arm, he would have dropped the rifle. Certainly, that is a question of fact. At a minimum, it would have made it extremely difficult for Lopez to raise, sight, and shoot a real AK-47.[4]

The record contains no evidence as to whether Lopez continued holding the replica rifle after he was shot. The record contains no evidence as to whether Gelhaus, once Lopez was shot in the left shoulder, believed Lopez continued to be a threat or whether such a belief would have been reasonable. The record

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[4] The current version of an AK-47, which uses synthetic materials, with a loaded magazine, weighs 10.5 pounds. Earlier versions, which used furniture wood, weigh more. https://en.wikipedia.org/wiki/Comparison_of_the_AK-47_and_M16#Size_and_weight.

contains no evidence as to why Gelhaus shot Lopez six more times.

A jury could reasonably determine that continuing to shoot 13-year-old Andy Lopez, without attempting to determine whether he was still a threat, was constitutionally unreasonable.

See, *e.g., Hopkins v. Andaya*, 958 F.2d 881, 887 (9th Cir. 1992), "[W]e cannot say as a matter of law that Andaya acted reasonably when he then shot the unarmed Stancill four more times. At the time of the second shooting, it was far from clear that Andaya reasonably feared for his life. Stancill had been wounded and was unarmed; Andaya was armed with several weapons and could hide behind a car. Andaya had already called for help; he needed only to delay Stancill for a short period of time. He could have evaded Stancill, or he could have attempted to subdue him with his fists, his feet, his baton or the butt of his gun. To endorse Andaya's chosen course of action – firing four more shots – would be to say that a police officer may reasonably fire repeatedly upon an unarmed, wounded civilian even when alternative courses of action are open to him."].

Dickerson v. McClellan, 101 F.3d 1151, 1162 (6th Cir. 1996) is similar:

> The plaintiffs cite *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994), to support their view that excessive force claims should not be segmented. The *Rowland* panel, of which Retired Associate Justice Powell was a member,

> stated that "the better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances. Artificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness." *Id*. at 173. Although the court stated that each distinct act of force became reasonable in light of what the officer knew at each point in the progression of events, the court held that the officer was not entitled to qualified immunity because it concluded that "a man suffered a serious leg injury over a lost five dollar bill." *Id.* at 174. *Rowland* conflicts with our precedent in *Russo*, which analyzed the progressive escalation of force at each step in the sequence of events. Moreover, the *Russo* analysis may apply in the instant case if it is determined that the officers' initial decision to shoot was reasonable under the circumstances but there was no need to continue shooting at Dickerson. . . .

Similarly, *Mitchell v. Schlabach*, 864 F.3d 416, 430-431 (6th Cir. 2017) held it was unreasonable to continue to shoot the suspect, who may have been killed by the first shot:

> [E]ven if reasonable jurors could conclude that the first shot was warranted, the second shot raises its own set of issues regarding reasonableness. When plaintiffs allege excessive force with respect to multiple shots, "the appropriate method of analysis is to 'carve up['] the incident into segments and judge

> each on its own terms to see if the officer was reasonable at each stage." . . . "When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity." . . . The video depicts Mitchell slowing down and hunching over immediately after Schlabach fired his first shot. . . . In addition, the postmortem examination report indicates that "[d]eath occurred almost immediately from rapid exsanguination resulting from right atrial laceration caused by gunshot wound #A" and that "[o]nly minimal traumatic injuries were observed from the motor vehicle crash and gunshot wound #B." . . . **A reasonable juror could conclude that Mitchell posed no serious threat to anyone after the first shot, which may have killed him "immediately," *id.*, and which at a minimum visibly slowed him down**. . . . ("[A] jury could certainly conclude that shooting at a man 43 times, including at least 12 shots after he had fallen to the ground, amounts to an unreasonable and excessive use of force, under the circumstances described here.").

(Emphasis added.)

See, e.g., Lamont v. New Jersey, 637 F.3d 177, 184 (3d Cir. 2011) ["Here, the troopers opened fire as Quick yanked his right hand out of his waistband. At that point, the troopers reasonably believed that Quick was pulling a gun on them. But after Quick made this sudden movement, his right hand was visible to the

troopers, who were standing between five and eight feet away and had their flashlights trained on him. (Indeed, Modarelli has stated that he could see Quick's right hand while firing his weapon.) Although Quick's weaponless right hand was fully visible immediately after the troopers began firing, the troopers continued to fire for roughly 10 seconds, shooting a total of 39 rounds. On these facts, a reasonable jury could conclude that the troopers should have recognized that Quick was unarmed and stopped firing sooner."]; *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) ["When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity."]; *Lytle v. Bexar County Tex.*, 560 F.3d 404, 414 (5th Cir. 2009) ["While the scant record at this point in the proceedings precludes any certainty regarding the amount of time this took, when drawing all reasonable inferences in the plaintiff's favor, we must assume that the Taurus backing up toward O'Donnell and the shooting were not 'in near contemporaneity' . . . . We must therefore infer that sufficient time might have passed for O'Donnell to perceive that the threat to him had ceased. Consequently, a jury could find that there was no threat to O'Donnell at the time of the shooting, and this lack of a threat weighs against a conclusion of reasonableness."]; *Horton v. Pobjecky*, 883 F.3d 941, 950 (7th Cir. 2018) ["[T]he fluid nature of these situations also highlights the limited scope of the constitutional permission to use deadly force. Even though an officer may in one moment confront circumstances in which he could constitutionally use deadly force, that does not necessarily

mean he may still constitutionally use deadly force the next moment. The circumstances might materially change. 'When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity.' "].

A jury could reasonably determine Gelhaus acted unreasonably in shooting at Lopez eight times, hitting him seven times.

Petitioners, on page 36, invoke the memories of Sandy Hook and Parkland to justify Gelhaus' conduct ("In a post-Sandy Hook, post-Parkland world, neither police officers nor the public they protect have the luxury of assuming . . . "). One could fairly describe the shooting of Andy Lopez as a police analog of those tragic events, albeit with only one victim.

9. PETITIONERS' ATTEMPT TO DEMONSTRATE A CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION AND DECISIONS OF OTHER CIRCUITS FAILS

Petitioners, as they did before the Ninth Circuit, attempt to demonstrate a conflict between this case and decisions of other Circuits. As they did below, petitioners primarily rely on *Dooley v. Tharp*, 856 F.3d 1177 (8th Cir. 2017).

In so doing, petitioners omit many relevant facts from their description. In *Dooley*, officers responded to calls reporting that a man in military uniform armed with a rifle was "flipping off" passing motorists. One

caller reported the man may have exited a car with an upside down American flag hanging from the open trunk. The officers noted the potential meaning of the upside down flag and were concerned the man had military training. *Id.* at 1179.

> When the officers saw Dooley, he had a rifle slung over his shoulder. [Officer] Tharp leaned out of the passenger side window yelling, "Drop the gun! Drop it!" The video shows Dooley turning clockwise. . . . After completing the turn, Dooley's body was not quite square with the camera, with the muzzle of his rifle remaining pointed toward the ground. The video shows Dooley quickly taking hold of the barrel with his right hand and bringing his right hand toward his waist, whereupon Tharp again shouted, "Drop the gun! Drop it!" The video then shows Dooley using his right hand to move the rifle in a manner that the District Court described as "arc-like," during the course of which Dooley moved his left hand. Tharp fired a single shot. . . .

Id. at 1180. *Dooley* is factually dissimilar to this case.

With regard to the other cases they cite, petitioners provide brief, token summaries which does not accurately reflect the facts. For example, petitioners' entire description of *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991) is "suspect appeared to be reaching toward an unseen gun; officer justified in firing."

The factual omissions are significant. *Reese v. Anderson* summarizes the facts. "On June 14, 1989, a

robbery occurred at a convenience store in Waco. Responding to a radio call, Waco police officer Steve Anderson spotted the suspected getaway car and gave chase at speeds of forty to sixty miles per hour. During the chase, according to Anderson and not disputed by Reese, the front-seat passenger twice discarded beige objects that appeared to be portions of a cash register. Eventually the car spun out of control and came to stop with the passenger side directly in front of Anderson's now-stopped patrol car." 926 F.2d at 495-496.

> Anderson repeatedly yelled for the driver and Crawford to raise their hands. They complied, and each time he yelled, Crawford nodded. Anderson inferred from these actions that the occupants heard and understood his commands despite the siren.
>
> As Anderson continued to yell, Crawford started reaching down with his right hand, lowering it out of Anderson's sight behind the still-closed car door. Anderson yelled again for Crawford to raise his hands, and he complied immediately, replying with words that looked like "Okay" or "Alright." After a couple of seconds, Crawford again started reaching down. Again Anderson yelled, and again Crawford complied. All the while, Anderson had his gun pointed at Crawford.
>
> At this point in his narrative, Anderson notes that "The passenger in the front seat [Crawford] looked to me like a black male known as Bennie Sanders [who] I knew . . .

> had been arrested . . . several months back for armed robbery."
>
> After a couple more seconds, Crawford again began reaching down. This time he turned slightly to his left, away from Anderson, leaning over and tipping his right shoulder downward. He reached further down toward the floorboard and to the left side of his seat.
>
> "At this point," Anderson recites, "I felt strongly the subject had picked up a gun and was going to shoot me as soon as he raised his hands up above the closed door." Anderson was ten feet away from Crawford and feared he would be shot before having time to react. Nearby was Officer Mary Crook, who had joined in the pursuit, and Anderson feared that she too was in danger. When Crawford started to sit up, raising his right hand, Anderson shot him once in the head, killing him.

926 F.2d at 496. There is much more to *Reese* than "suspect appeared to be reaching toward an unseen gun; officer justified in firing."

Kenning v. Carli, 648 Fed. Appx. 763, 767 (11th Cir. 2016) is similar. In contrast to petitioners' bare-bones description, the opinion states:

> The record evidence unequivocally supports the officers' claim that Cortes posed such a threat when he was shot. Specifically, upon looking through his blinds and seeing Galarza with two police officers in the yard, Cortes appeared in the doorway of his trailer armed

> with a gun. After some hesitation, Cortes initially complied with the officers' commands to drop the gun by placing it in the threshold of the open trailer doorway. He then walked down the trailer steps with his hands up. However, when he reached the bottom step, Cortes stopped moving forward and failed to get down on the ground, as he was instructed to do. Carli and Hernandez both testified that Cortes subsequently turned and took a step back toward the open trailer door, causing them to fear that he was trying to retrieve the gun he had left there and, consequently, to fire at him. Their testimony is supported by the autopsy report, which shows that all of the gunshots that hit Cortes entered the back of his body – either in his back or in the back of his right arm.

10. IT WAS CLEARLY ESTABLISHED THAT SHOOTING 13-YEAR-OLD ANDY LOPEZ SEVEN TIMES VIOLATED HIS CONSTITUTIONAL RIGHTS

In this case, it is clear from at least three converging lines of established constitutional law, Gelhaus violated Andy Lopez's constitutional rights by shooting him seven times, resulting in Andy's death.

- Ninth Circuit precedent established a body of law which clearly demonstrated it was not constitutionally permissible for Gelhaus to fatally shoot Andy Lopez since he presented no imminent threat to the deputies. *George v. Morris*, 736 F.3d 829,

supra; *Harris v. Roderick*, 126 F.3d 1189, *supra*, and *Curnow v. Ridgecrest Police*, 952 F.2d 321, *supra*.

- Andy, a 13-year-old boy, who was described by passersby as "a kid" and "eleven or twelve years old," was not an adult and could not, constitutionally, be treated as if he was an adult. *J. D. B. v. North Carolina*, *supra*, 564 U.S. at 274, 279-280, 131 S. Ct. 2394, 180 L. Ed. 2d 310; *Roper v. Simmons*, 543 U.S. at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1, *supra*.

- Gelhaus violated clearly established law by shooting Andy, who was likely disabled by the first shot, which hit him in the upper left arm (the arm holding the toy rifle's grip), six more times. *Hopkins v. Andaya*, 958 F.2d at 887, *supra*; *Dickerson v. McClellan*, 101 F.3d at 1162, *supra*; *Mitchell v. Schlabach*, 864 F.3d at 430-431, *supra*; *Lamont v. New Jersey*, 637 F.3d at 184, *supra*; *Ellis v. Wynalda*, 999 F.2d at 247, *supra*; *Lytle v. Bexar County Tex.*, 560 F.3d at 414, *supra*; *Horton v. Pobjecky*, 883 F.3d at 950, *supra*.

11. THE NINTH CIRCUIT RULE OF GRANTING SUMMARY JUDGMENT "SPARINGLY" IN DEADLY FORCE CASES IS FOLLOWED BY SEVERAL CIRCUITS AND IS NOT AN ABERRANT PRACTICE

The Petition argues, at pages 34 to 36, that the Ninth Circuit 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" . . . "runs afoul" of Supreme Court precedent. The Petition claims this practice as aberrant.

To make their argument, petitioners cite *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986) (anti-trust conspiracy) and *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, *supra* (libel). The Supreme Court has never applied the rule stated in *Matsushita* and *Anderson Liberty Lobby* to the decedent's burden to produce evidence in a deadly force case.

Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994), applying the Ninth Circuit rule, which is akin to that employed by several other circuits, states:

> Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. . . . The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the

> plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts. . . . In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact-finder that the officer acted unreasonably.

(Citations omitted.)

Contrary to petitioners' claim, the Ninth Circuit's rule is not unique. The Second, Fifth, Seventh, and D. C. Circuits employ the same approach. So, counting the Ninth Circuit, at least five circuits follow the approach. See, e.g., *Texas v. Kleinert*, 855 F.3d 305, 310, n. 1 (5th Cir. 2017) ["Because Kleinert is the only surviving witness to his encounter with Jackson, we view his testimony with caution."]; *Flythe v. Dist. of Columbia*, 791 F.3d 13, 19 (D.C. Cir. 2015) ["[H]istory is usually written by those who survive to tell the tale, and in this case the only survivor is Officer Eagan. Tremayne Flythe is dead and, although several witnesses observed the two men face each other, none can testify as to exactly what happened between them. Under these circumstances, where 'the witness most likely to contradict [the officer's] story – the person [he] shot dead – is unable to testify,' . . . courts . . . 'may not simply accept what may be a self-serving account by the police officer.' . . . Instead, courts must 'carefully examine all the evidence in the record . . . to determine whether the officer's story is internally consistent and

consistent with other known facts.' *Id.* Courts 'must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.' Id."]; *Abdullahi v. City of Madison*, 423 F.3d 763, 772, n. 7 (7th Cir. 2005); *O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003) ["[G]iven the difficult problem posed by a suit for the use of deadly force, in which 'the witness most likely to contradict [the police officer's] story – the person shot dead – is unable to testify[,] . . . the court may not simply accept what may be a self-serving account by the police officer.' . . . Rather, the court must also consider 'circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.' . . . where 'the witness most likely to contradict the officers' testimony is dead,' the court should 'examine all the evidence to determine whether the officers' story is consistent with other known facts' . . .," citations omitted]; *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 592 (5th Cir. 2001) ["In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach. So a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at trial."]; *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994) ["The award of summary judgment to the defense in deadly force cases may be made only with

particular care where the officer defendant is the only witness left alive to testify. In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach. So a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial."].

The Ninth Circuit approach is not irrational or contrary to the administration of justice. Rather, it recognizes that the defendant in a civil rights case (the police officer) has rendered the decedent incapable of opposing defendant's version of events.

12. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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