NO. 20-1006

In The
Supreme Court of the United States

CITY OF HAYWARD, A MUNICIPAL CORPORATION, ET AL.,

PETITIONERS,

VS.

JESSIE LEE JETMORE STODDARD-NUNEZ,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* PEACE OFFICERS' RESEARCH ASSOCIATION OF CALIFORNIA, PORAC LEGAL DEFENSE FUND, *ET AL.* IN SUPPORT OF THE PETITION

MICHAEL L. RAINS (CA BAR NO. 91013),
(COUNSEL OF RECORD)
TIMOTHY K. TALBOT (CA BAR NO. 173456)
ZACHERY A. LOPES (CA BAR NO. 284394)
COUNSEL FOR AMICI CURIAE
RAINS LUCIA STERN ST. PHALLE & SILVER, PC
2300 CONTRA COSTA BLVD., SUITE 500
PLEASANT HILL, CA 94523
TELEPHONE: (925) 609-1699
FACSIMILE: (925) 609-1690
E-MAIL: MRAINS@RLSLAWYERS.COM

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

This matter presents the Supreme Court with the opportunity to correct the Ninth Circuit Court of Appeals' erroneous application of the law on a legal issue of substantial importance to all sworn law enforcement professionals: the manner in which a court determines "clearly established" law when applying the doctrine of qualified immunity.

The Peace Officers' Research Association of California ("PORAC") is a professional federation of local, state, and federal law enforcement associations representing over 77,000 members. PORAC is the largest law enforcement organization in California and the largest statewide association in the nation.

The PORAC Legal Defense Fund ("PORAC LDF") is a legal defense fund for law enforcement officers with over 140,000 members nationwide, in all 50 U.S. states and four U.S. territories. PORAC LDF provides legal representation to its members in civil, criminal, and administrative matters arising out of the course and scope of their employment. Specifically, PORAC LDF provides its law enforcement

members with legal representation immediately following their involvement in officer-involved shootings, or when other forms of force are used to make arrests, prevent escapes or overcome resistance. PORAC LDF also provides its law enforcement members legal representation in defense of civil rights actions filed pursuant to 42 U.S.C. § 1983, including allegations of unlawful use of force in violation of the Fourth Amendment.

The San Bernardino County Sheriff Employees' Benefit Association ("SEBA") is the state-law recognized collective bargaining association representing more than 3,800 sworn law enforcement personnel employed by the County of San Bernardino, California. SEBA's members include sheriff's deputies, sergeants, detectives and lieutenants, district attorney investigators, probation corrections officers and supervisors, coroner investigators, specialized fire officers, and welfare fraud investigators.

The Oakland Police Officers' Association ("OPOA") is the state-law recognized collective bargaining association representing more than 700 sworn law enforcement personnel

employed by the City of Oakland, California. OPOA's members include police officers, sergeants, lieutenants and captains.

The Fresno Police Officers' Association ("FPOA") is the state-law recognized collective bargaining association representing more than 700 sworn law enforcement personnel employed by the City of Fresno, California. FPOA members include police officers, sergeants, lieutenants, captains, and deputy chiefs.

As collective bargaining associations, SEBA, OPOA and FPOA represent their members in all matters of employee-employer relations, including, but not limited to providing legal representation for their members in civil, criminal, and administrative matters arising out of the course and scope of the members' employment, through contract for such benefits with PORAC LDF.

The San Francisco Police Officers' Association ("SFPOA") is the state-law recognized collective bargaining association for more than 2,100 sworn law enforcement personnel employed by the City and County of San Francisco,

California. SFPOA's members include police officers, sergeants, lieutenants, captains, assistant inspectors and inspectors. SFPOA represents its members in all matters of employee-employer relations, including, but not limited to providing legal representation for its members in civil, criminal, and administrative matters arising out of the course and scope of the members' employment, through a self-funded legal defense trust.

The Association for Los Angeles Deputy Sheriffs ("ALADS") is the state-law recognized collective bargaining association for more than 7,800 sworn sheriff's deputies employed by the County of Los Angeles, California. ALADS represents its members in all matters of employee-employer relations, including, but not limited to providing legal representation for its members in civil, criminal, and administrative matters arising out of the course and scope of the members' employment, through a self-funded legal defense trust.

PORAC, PORAC LDF, SEBA, OPOA, FPOA, SFPOA, and ALADS ("*Amici*") collectively represent the

professional interests of approximately 150,000 sworn law enforcement personnel. All have a significant interest in peace officers' protection from Section 1983 civil suits under the doctrine of qualified immunity – one of the primary issues presented in this matter.

Amici timely notified the parties of their intent to file an amici curiae brief more than 10 days prior to filing. Sup. Ct. R. 37.2(a). Petitioners provided consent to the filing of this brief. Respondent did not. Therefore, pursuant to Supreme Court Rule 37.2(b), *Amici* respectfully moves this Court for leave to file the attached brief in support of Petitioners.

As set forth in the attached brief, the decision of the Ninth Circuit erroneously applies the law, thereby imposing adverse consequences on law enforcement officers and their ability to protect the public.

This Court has set forth three core principles when assessing whether an officer used reasonable force under the Fourth Amendment, and/or whether that officer is entitled to qualified immunity. The first states that force must be judged from the officer's on-scene perspective, not with the 20/20

vision of hindsight. *Graham v. Connor*, 490 U.S. 386 (1989). The second states that the analysis must incorporate the understanding that peace officers are forced to act under circumstances that are tense, uncertain, and rapidly evolving. *Id*. The third instructs courts to define "clearly established" law with specificity, such that it fairly affords peace officers reasonable notice of what force is lawful, and unlawful, under specified conditions. *Anderson v. Creighton*, 483 U.S. 635 (1987).

The Ninth Circuit's decision in this case violates all three of these core principles. In finding that the police officer was not entitled to qualified immunity in this case, the Ninth Circuit purported to define "clearly established" law by declaring a *per se* rule that shots fired into the side or rear of a vehicle reflect an objectively unreasonable decision to use deadly force. This statement by the Ninth Circuit cannot stand.

Peace officers are human beings, not machines. Their on-scene perspective necessarily incorporates their human physiological limitations. Those limitations include an inevitable temporal lag between an officer's *perception* of

external facts, their *decision* to act on that perception, and their *ability to physically react*. These are all discrete steps, and they take time, even more so when the circumstances confronted are complex and dynamic.

This may sound obvious, but does not appear to have been given consideration by the Ninth Circuit. In the context of fast-moving threats – such as the rapidly approaching vehicle in this case – an officer's reasonable decision to stop firing immediately upon perceiving the cessation of a threat does *not mean that no more shots will be fired*. Indeed, expert analysis has revealed that an officer may fire multiple shots *after* the officer makes a decision to stop firing.

In light of these facts, the Ninth Circuit's sweeping *per se* rule must be overturned, because the mere *location* of shots cannot, on its own, reflect the reasonableness of an officer's decision. Declaring otherwise impermissibly analyzes an officer's actions with the 20/20 vision of hindsight, unencumbered by the physiological limitations placed on the officer's own on-scene ability to perceive and react.

Amici's members are directly impacted by the erroneous legal conclusions of the Ninth Circuit and its resulting practical impact. *Amici* are uniquely suited to provide this Court an experienced and considered viewpoint on both the legal issues and practical consequences presented by the Ninth Circuit's decision. *Amici* therefore respectfully request leave to file the attached brief urging this Court to grant the Petition.

Respectfully submitted,

/s/ Michael L. Rains

Michael L. Rains
Timothy K. Talbot
Zachery A. Lopes
Counsel for Amici Curiae
Rains Lucia Stern St. Phalle & Silver, PC
2300 Contra Costa Blvd., Suite 500
Pleasant Hill, CA 94523
Telephone: (925) 609-1699
Facsimile: (925) 609-1690
Email: MRains@RLSlawyers.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

BRIEF OF *AMICI CURIAE*

Amici respectfully submit this brief as *Amici Curiae* in support of Petitioner City of Hayward, *et al.*, urging the Court to grant review in Case No. 20-1006.[1]

INTERESTS OF *AMICI CURIAE*

As identified in *Amici's* Motion for Leave to File Brief of *Amici Curiae*, *Amici* and their members have a significant interest in peace officers' protection from Section 1983 civil suits under the doctrine of qualified immunity – one of the primary issues presented in this matter.

ARGUMENT

Peace officers' ability to protect the public's safety is particularly influenced by the confluence of this Court's

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or its counsel made a monetary contribution to the brief's preparation or submission. The parties were timely notified of *Amici's* intention to file this brief in accordance with Supreme Court Rule 37.2(a). Petitioners consented, and Respondent did not.

Fourth Amendment and "qualified immunity" jurisprudence. The Ninth Circuit's decision in this case must be reversed because it articulates "clearly established" law in a manner that ignores three core principles of this Court's precedent, thereby undermining the primary purpose of qualified immunity – avoiding the significant social costs caused by deterring necessary and appropriate law enforcement action.

A foundational principal in the analysis of uses of force under the Fourth Amendment states that "[t]he '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." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the *facts and circumstances confronting them*…." *Id.* (emphasis added); *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (reasonableness of force "should be judged from [the officer's] on-scene perspective"); *Plumhoff v. Rickard*, 572

U.S. 765, 775 (2014) (quoting *Graham*); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *Graham*).

In conducting this analysis, this Court has consistently instructed reviewing courts to incorporate a second foundational principal – the understanding that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-397; *Kisela*, 138 S. Ct. at 1152; *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) ("Police officers conduct approximately 29,000 arrests every day – a dangerous task that requires making quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving'").

Qualified immunity, in turn, is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *White v. Pauly*, 137 S. Ct. 548, 551 (2017). To reach this threshold in the Fourth Amendment context, this Court has repeatedly set forth a third foundational principal – courts

must articulate "clearly established" Fourth Amendment law with specificity. *Kisela*, 138 S. Ct. at 1152 ("[S]pecificity is especially important in the Fourth Amendment context); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("clearly established law" must be set forth in a "particularized, and hence more relevant, sense").

Such specificity is necessary to give effect to qualified immunity's primary purposes: (1) allowing public officials to take action "with independence and without fear of consequences" where clearly established rights are not implicated (*Harlow v. Fitzgerald*, 457 U.S. 800, 814, 819 (1982)), and, in the Fourth Amendment context; (2) "protect[ing] officers from the sometimes 'hazy border between excessive and acceptable force.'" *Saucier*, 533 U.S. at 206. The latter purpose is achieved by articulating "clearly established" law in a manner that puts officers "on notice [that] their conduct is unlawful" before they act. *Id.*

This Court has expressed the degree to which the necessary specificity must be articulated in various ways. It must be stated with clarity such that "every reasonable official would have understood that what [he or she] is doing violates" the law. *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). The contours of the right in question must be sufficiently clear so that it "plac[es] the statutory or constitutional question beyond debate," "squarely govern[ing]" the facts of a particular case to provide practical guidance on what manner of force is lawful. *Id.* at 12-13. In short, "in the light of pre-existing law the unlawfulness must be apparent" under a similar set of facts. *Anderson,* 483 U.S. at 640.

The circuit courts have required frequent instruction from this Court on "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White,* 137 S. Ct. at 552. In *White* this Court observed that it "ha[d] issued a number of opinions reversing federal courts in qualified immunity cases," a necessary task

"both because qualified immunity is important to 'society as a whole,' [] and because as 'an immunity from suit,' qualified immunity "is effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 551-552 (citations omitted).

Indeed, this Court recently observed that it has "repeatedly told courts—*and the Ninth Circuit in particular*—not to define clearly established law at a high level of generality." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1775-1776 (2015)(emphasis added).

These three core principles – judging force from the officer's perspective, with an acknowledgement that such action is taken in uncertain and rapidly evolving situations, and articulating "clearly established" law with particularity so as to avoid the deterrence of official action when warranted – are all undermined by the Ninth Circuit's decision in this case.

Among other issues addressed by the Petition, *Amici* are particularly concerned by the Ninth Circuit's isolated declaration that:

> "an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him."

Petition, Appendix A, 6a.

As correctly identified by Petitioners, this assertion effectively renders shots being fired into the side or rear of a vehicle "per se unconstitutional [] regardless of [the vehicle's] proximity to the officer, its speed, or the risk of injury to others." Petition, p. 19.

The fundamental problem with this pronouncement by the Ninth Circuit is that it purports to articulate "clearly established" law without any regard for the perspective – or physiological limitations – of an individual officer on-scene forced to make split-second judgments in rapidly evolving and dangerous circumstances.

To state the obvious, peace officers are human beings, not machines. They simply do not have the physiological ability to *instantaneously react* to visual stimuli. This means that, in the context of fast-approaching threats (such as the suspect's vehicle in this case), an officer's deployment of force will necessarily temporally lag behind the preceding perception of that threat, sometimes causing shots to be fired into the side or rear of a vehicle when the threat perceived and acted upon was the vehicle's approach. Importantly, the same is true for *halting* force once an officer perceives that the threat is no longer present.

This fact is confirmed by expert analysis. The physiological "reaction" response to external stimuli is a complex biological process. It is not a singular event. Rather, it involves both the processing of information as well as the

time it takes to initiate and complete a physical response to that processed information.[2]

As relevant to this case, *stopping* an on-going action – such as the firing of a pistol – in response to external stimuli is particularly complicated. The ability to "stop" itself constitutes "a complex of dynamic processes, which can be affected by several different factors, all of which have an impact on reaction time…."[3] These factors include, but are not limited to, the time lapse between and the sequencing of the

---

[2] Audrey Honig, PhD & William J. Lewinski, PhD, *A Survey of the Research on Human Factors Related to Lethal Force Encounters: Implications for Law Enforcement Training, Tactics, and Testimony*, 8(4) Law Enforcement Executive Forum 129, 141 (July 2008) ("Honig 2008") ("In a shooting scenario, processing takes about four times longer than the actual response phase. [citations omitted] This applies to both the initial processing of information that ultimately drives the officers' actions as well as the processing of any change in information intended to cease the officer's current course of action").

[3] William J. Lewinski, PhD & Christa Redmann, *New Developments in Understanding the Behavior Science Factors in the "Stop Shooting" Response*, 9(4) Law Enforcement Executive Forum 35, 37 (October 2009) ("Lewinski 2009").

"go stimulus" and "stop stimulus," the amount and type of stimulus being processed simultaneously, whether a subjective "decision" needs to be made and the number of options available, and the emotional response of the subject.[4] Of particular relevance is the fact that the more complex a scenario is, the longer an individual will take to process and facilitate a reactionary response.[5]

This is why the relatively simple and everyday task of engaging a car's brake pedal requires a reaction time from the perception of an *expected* stimulus to physical action of

---

[4] Lewinski 2009, 36-37, 42-43; Sarah Shomstein & Steven Yantis, *Control of Attention Shifts between Vision and Audition in Human Cortex,* 24(47) The Journal of Neuroscience 10702, 10706 (November 24, 2004) (switching attention between vision and audition modalities – and vice versa – compromises utility of each).

[5] Honig 2008, 141; William J. Lewinski, PhD, William B. Hudson, PhD & Jennifer L. Dysterheft, MS, 14(2) *Police Officer Reaction Time to Start and Stop Shooting: The Influence of Decision-Making and Pattern Recognition*, Law Enforcement Executive Forum 1, 12 (2014) ("Lewinski 2014"), ("with an increase in choices for attention and focus, as well as a decision, an officer's reaction time increases significantly").

approximately 0.70-0.75 seconds.[6] This increases to 1.5 seconds or longer following perception of an unexpected stimulus, such as a suspect's sudden change in threat presentation.[7]

This perception-reaction time lag has consequences for analyzing a peace officer's discharge of a firearm. For instance, persons inexperienced in shooting firearms are capable of firing three rounds or more in 1.5 seconds.[8] In contrast, the average peace officer – a trained firearms professional – is capable of firing one shot every 0.25 seconds

---

[6] Marc Green, *"How Long Does it Take to Stop?" Methodological Analysis of Driver Perception-Brake Times*, 2(3) Transportation Human Factors, 195, 206 (2000) ("Green 2000") ("All things considered, there are many studies that agree that a mean brake [reaction time] of about 0.70 to 0.75 sec is the best that can be expected on the road").

[7] Green 2000, 209 ("the data clearly show that the surprised driver takes longer to brake. Overall, it takes the average driver roughly twice as long, 1.5 sec or more, to respond to an intrusion compared to a completely expected event….").

[8] Lewinski 2009, 35.

from the onset of simple external stimuli, resulting in approximately six shots in 1.5 seconds.[9]

A corollary fact of this data is that "when the average officer stops shooting based solely on a perception of change [] the fastest the officer is able to do this is 35/100ths of a second," "resulting in two shots being fired" *after the officer decides to stop firing* based on processing the perception of a very simple and singular "stop" stimuli.[10] From the onset of perception of complex external stimuli – such as a dynamic, visually complex, and rapidly-unfolding situation – officers can require between 1 to 1.5 seconds to stop shooting,

---

[9] Lewinski 2009, 38; Lewinski 2014, 11 ("From a simple, visual stimulus, which officers were anticipating from the ready to fire position, the average time from visual perception to the start of movement was 0.25 seconds").

[10] Lewinski 2009, 38 ("for most officers who perceive a threat and respond to that threat by shooting until the threat stops, those officers (shooting and assessing) will still fire at least two rounds [] This will occur not when the subject has changed their threatening behavior but after the officer begins to detect a change in the threatening behavior. This distinction is important because the psychological processes of perception and detection often take many times longer than the physical responses involved").

resulting in "*an extra four to six rounds after the threat stops*."[11] In sum, "[t]he act of putting on the brakes on a motor activity like shooting takes time, particularly under conditions of intense focus as might occur when an officer is shooting to save his or her own life."[12]

When the above data is considered in the context of a fast-approaching threat, such as an oncoming car, it becomes apparent that the Ninth Circuit's sweeping declaration that rounds fired into the side or rear of a vehicle always reflect an objectively unreasonable *decision* to use force simply cannot stand.

A car traveling at a mere 10 miles per hour covers approximately 14.5 feet per second. If a peace officer standing in front of that approaching vehicle discharged his or her firearm *at the moment of acceleration* (itself an impressive

---

[11] Lewinski 2009, 43 (emphasis added); Lewinski 2014, 12.

[12] Lewinski 2009, 43.

feat of quickness), the officer would be capable of firing four shots within each passing second, or *each* 14.5 feet of travel. Being that the length of the suspect's car in this case is approximately 15 feet (representing about a second of travel at 10 mph),[13] and in consideration of the above data that the average peace officer would discharge an extra four to six rounds *after* perceiving that the threat has passed, it is entirely possible – even probable – that rounds would be lodged into the side and rear of the car as it moved to the side of and past an officer. *Such would occur even if the officer immediately*

[13] The 2021 model of a Honda Civic is 182.7 inches in length, or 15.23 feet. See https://www.caranddriver.com/honda/civic-2021/specs. It is not known what year the suspect's car was, but generally newer models of cars are longer and wider than older models.

made the decision to stop firing at the exact moment the front of the car began to pass the officer's body.[14]

This also makes it entirely consistent for an officer to assert that the decision to fire was made as the car approached, and an investigation to find that the officer continued to fire as the car moved past. Petition, Appendix A, 3-4 ("the coroner's report states that … 'TROCHE continued to fire his handgun at the car as it went past him.' Firing the gun 'as [the car] went past him' is inconsistent with Officer Troche's statement that he fired at the vehicle only as it approached

[14] Lewinski 2009, 49 ("a vehicle travelling at 10 miles per hour is going to travel about 14 and a half feet in one second. An officer standing in front of the vehicle with his or her weapon out as it begins to accelerate may take as little as 0.6 of a second to raise his or her weapon and fire one round (Lewinski, 2002) and spin to evade the vehicle. Even with this amazingly fast reaction time, which would occur without thought, the vehicle travelling at 10 miles per hour would cover over seven feet before it was hit with the first round. If the officer had any thought at all before he or she reacted, the first round to hit the vehicle would strike it after it had travelled over 14 feet. The same comparison could be made about the impact on the officer's stop shooting response and the influence of the time to assess that the vehicle had gone by and was no longer a threat").

him"). Thus, contrary to the Ninth Circuit's statement, Troche's statement is *not* necessarily inconsistent with the coroner's report's findings.

As the above hypothetical illustrates, the Ninth Circuit's broad statement of "clearly established" law is fundamentally flawed because it does not comport with how a "reasonable officer on the scene" could *possibly* act when judged from the officer's on-scene and real-world perceptions. *Graham*, 490 U.S. at 396; *Saucier*, 533 U.S. at 205. Setting forth a rule that an officer made an objectively unreasonable *decision* based merely on the resulting *location* of fired rounds ignores the physiological factors at play. It also represents the epitome of improperly judging a peace officer's actions, during moments that are "tense, uncertain, and rapidly evolving," "with the 20/20 vision of hindsight" from the tranquility of the judge's chambers. *Graham*, 490 U.S. at 396.

While the above is merely illustrative, and not meant to govern the analysis of the facts of this particular case, it

demonstrates another flaw with the Ninth Circuit's general statement of "clearly established" law – it falls woefully short of setting forth clearly established law with specificity and particularity sufficient to put future officers on adequate notice of what force is lawful. *Kisela*, 138 S. Ct. at 1152 ("[S]pecificity is especially important in the Fourth Amendment context); *Saucier*, 533 U.S. at 206.

This conclusion is demonstrated by the appellate court's misplaced reliance on *Orn v. Tacoma*, 949 F.3d 1167 (9th Cir. 2020). As correctly stated in the Petition, *Orn* is materially different from this case because in *Orn*, the officer "*ran behind* [the suspect's] vehicle as it sped way," essentially chasing it, while firing seven rounds directly into the rear window. *Orn*, 949 F.3d at 1173 (emphasis added); Petition, 14-15. There are no facts in this case suggesting Officer Troche ran behind the suspect's vehicle while it was speeding away and made the decision to discharge rounds. In *Acosta v. City and County of San Francisco*, 83 F.3d 1143 (9th Cir.

1996), a factual dispute existed as to whether the suspect's vehicle was moving at all, and even if it was, whether its speed was so slow that no reasonable officer could have believed his or her life was in danger. *Id.* at 1147-1148. Such is not the case here. Petition, 8-10.

The existing precedent which should have governed this case, *Wilkinson v. Torres,* 610 F.3d 546 (9th Cir. 2010), went unmentioned by the appellate court, despite being central to the District Court's reasoning to grant qualified immunity. Petition, 17-18; *Wilkinson,* 610 F.3d at 551 ("The [suspect's vehicle] was accelerating, its tires were spinning, mud was flying up, and a fellow officer was nearby either lying fallen on the ground or standing, but disoriented. The situation had quickly turned from one involving a crashed vehicle to one in which the driver of a moving vehicle, ignoring police commands, attempted to accelerate within close quarters of two officers on foot. In this 'tense, uncertain, and rapidly evolving' situation, a reasonable officer had probable cause to

believe that the threat to safety justified the use of deadly force").

The Petition should be granted and the Ninth Circuit's decision should be reversed because it impermissibly articulates "clearly established" law with unreasonable generality, without reference to the real-world physiological limitations of a peace officer's ability to perceive and react during tense, uncertain, and rapidly-evolving circumstances. If the Ninth Circuit's statement that shots fired into the side or rear of a car always demonstrates an objectively unreasonable force decision is not reversed, peace officers will either be forced to hesitate during life-or-death moments or will be unfairly deemed to have acted unreasonably and found liable for civil rights violations. This will both compromise their ability to protect themselves and the public, and discourage prompt action to prevent serious bodily injury or death when the passing of mere seconds is significantly consequential.

It is noteworthy that the data discussed above validates this Court's oft-repeated and prescient intuition about the complexities confronted by peace officers. Frankly, this Court has had it right all along. *Amici* ask this Court and others to acknowledge that a peace officer's on-scene perception *includes his or her physiological limitations*, which cannot be ignored when analyzing force, or when articulating "clearly established" law. Ignoring those limitations in either context unjustly analyzes a peace officer's actions "with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

/ / /

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Michael L. Rains

Michael L. Rains
Timothy K. Talbot
Zachery A. Lopes
Counsel for Amici Curiae
Rains Lucia Stern St. Phalle & Silver, PC
2300 Contra Costa Blvd., Suite 500
Pleasant Hill, CA 94523
Telephone: (925) 609-1699
Facsimile: (925) 609-1690
Email: MRains@RLSlawyers.com