

No. 25-538

Supreme Court of the United States

CITY OF LOS ANGELES, CALIFORNIA,
ET AL.,

Petitioners,

v.

ESTATE OF DANIEL HERNANDEZ, BY AND
THROUGH SUCCESSORS IN INTEREST,
MANUEL HERNANDEZ, MARIA HERNANDEZ,
AND M. L. H., ET AL.,

Respondents.

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

BRIEF AMICUS CURIAE OF THE NATIONAL POLICE ASSOCIATION IN SUPPORT OF PETITIONERS

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Interests of the Amicus¹

The National Police Association (“NPA”) is a nonprofit corporation organized under Indiana law. The NPA pursues a general mission of advancing law enforcement interests, including participating in cases as *amicus curiae* when the cases raise legal questions important to law enforcement interests. The NPA is a national association representing police officers across the country.

In this case, the NPA seeks to support and defend the discretion of police officers to respond to the difficult and often life-threatening circumstances to which they are exposed in the line of duty. The growing complexity of constitutional rights for criminals created by the federal judiciary, attaching in the midst of life-threatening criminal attacks, threatens to paralyze police response to the most dangerous criminals threatening public order. The NPA believes that rules of immunity and civil liability

¹ No counsel for any party authored this brief in whole or in part, nor did parties or their counsel make any monetary contribution intended to fund its preparation or submission. Counsel of record received notice of the intent to file this brief more than ten calendar days before it was due (and they responded to that notice more than ten calendar days before it was due), but the notice was not strictly in accordance with Rule 37.2, as supplemented by Rule 30.1, because the electronic mail with the notice was delayed for several hours from Friday to Saturday, November 22, 2025 for reasons that appear to relate to internet connectivity.

that do not provide sufficient deference to police decision making threaten not only the interests of law enforcement officials, but the rule of law itself.

Summary of Argument

This Court has established 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". *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872 (1989). "[T]he calculus of reasonableness must embody 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." *Id.* at 396-97.

This Court has also held that "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended". *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014) (15 shots fired in ten second span).

Contrary to these and other precedents, the Ninth Circuit has repudiated the "reasonable officer" construct required by this Court. Instead, the Court's 6-5 en banc opinion below (the "Opinion") unreasonably hypothesizes that officers must engage in an utterly unrealistic, quasi-

judicial process of threat assessment as each shot is fired. Relevant research on officer decision making in life-threatening circumstances confirms the objective reasonability of Officer McBride's use of deadly force here. It also confirms that the Ninth Circuit's rule makes no sense in the context of the physiology of gunshot wounds.

Prior to the Opinion, the thicket of relevant precedents never clearly established a rule requiring such a shot-by-shot duty of consideration. For this reason, Officer McBride should obviously have been entitled to qualified immunity.

Because this case is extraordinarily well-documented, with second-by-second video of the entire incident, it provides a certwworthy vehicle for affording police officers a safe harbor that permits a reasonable 10-15 second interval to use of deadly force to neutralize an attacker. As a matter of law, the effects of gunfire on someone attacking a police officer with a weapon in such a time interval cannot be known with sufficient certainty to declare the threat to the officer sufficiently attenuated to forbid further shots.

Argument

I. THE OPINION'S ASSESSMENT OF THE USE OF DEADLY FORCE IS UTTERLY CONTRARY TO THIS COURT'S PRECEDENT.

A. The Perspective of the Reasonable Officer on the Scene: Speed and Complexity of Events.

The circumstances of this police shooting were the subject of exhaustive investigation, including an official investigation by the California Department of Justice,² and well-documented in multiple video recordings in the record. They show Officer McBride making every effort to protect herself and bystanders from an armed criminal perpetrator³ who by all accounts was “crazed” and confrontational. Understanding the perspective of a reasonable officer on the scene requires judicial understanding of the

² Cal. Dept. of Justice, *Report on the Investigation into the Death of Daniel Hernandez on April 22, 2020* (Dec. 2022). Judicial notice should be taken of the cited portions of this report pursuant to Fed. R. Evid. 201.

³ As a matter of California law, decedent was engaging in very serious misconduct quite apart from the prior accident he caused. California law makes it a felony to draw or exhibit a deadly weapon with the intent to resist or prevent arrest or detention by a peace officer. Cal. Penal Code § 417.8; *see also id.* § 417(a).

complex mix of duties and tasks faced by the officer.

Officer McBride arrived at the scene of a motor vehicle accident with multiple severely damaged vehicles (4-ER840-45) and was immediately told upon exiting the patrol car that there was a “crazy guy with a knife” threatening to hurt himself and others (4-ER849). There were multiple individuals in the area “screaming and yelling”. (*Id.*)

At this juncture, Officer McBride had a duty to provide aid to injured motorists, to secure a crime scene, to attend to pedestrians in the area and keep them safe, and to locate an armed and dangerous individual. Emergency medical personnel who were dispatched to the scene would soon arrive at the unsafe and uncontrolled area. Citizens who stood in the streets and on the sidewalk presented potential unforeseen dangers.

With limited information, the responding officers, including Officer McBride, had to draw inferences about the environment and plan from them. For example, they had to identify who was injured, assess the degree of those injuries for triage purposes, and determine who or what might cause further injuries. Treatment of injured persons could not effectively take place in the area, so long as a known or suspected threat remained uncontrolled. In assessing dangerous individuals or circumstances that could cause

more injuries, the officers had to prioritize and respond to the threats.

The body-cam video shows Officer McBride getting out of her car into these chaotic circumstances at 1:47 (4-ER854 (time stamp to Exhibit A to McBride Declaration)). It illustrates the exigent nature of the circumstances and the multiple assessments and judgments she was required to make. We emphasize the video record because it is well established that the high levels of stress associated with life-threatening interactions can lead to incomplete witness accounts by all involved.⁴ Here, the audio track recording includes the following:

Motorist: “He has a knife; he has a knife”

McBride: “Why does he want to hurt himself?”

Motorist: “We don’t know, he’s the one who caused the accident.”

McBride: [on the radio] “Give me a back-up”

⁴ See generally Hope, L., Evaluating the Effects of Stress and Fatigue on Police Officer Response and Recall: A Challenge for Research, Training, Practice and Policy, *J. Applied Research in Memory, and Cognition*, 5, 239-245 (2016).

McBride: [Speaking to motorist] Hey if it's possible I need you to step out of your vehicle and go on the sidewalk. Right now.

McBride: [on the radio] "Can I get a backup for a 415 with a knife?"

Motorist: "Me?"

McBride: "Yes, I need you to step out now."

Motorist: "There, there."

McBride: [speaking to another citizen] "Go...Go. Go, Go, right now!"

McBride: [speaking on radio] "Hold on."

McBride: [speaking to her partner] "Partner right now we need to get cover!"

McBride: [speaking to all onlookers in the area] All-everybody, go away!" "Que se meuva."

Dispatcher: "Newton unit's responding, be advised, the suspect is armed with a knife, cutting himself. He's inside his vehicle. He TC'd [traffic collision] against five vehicles off of 32nd Street."

Here we see Officer McBride speaking to the motorist to gather more information while maintaining steady observation over the black truck in front of her. She realizes that the

incident would best be resolved with more help and requests it. At the same time, she is appraising the not-yet-immediate threat posed by the decedent, she politely asks the motorist to exit the vehicle. Officer McBride's demeanor is not panicked; she is level-headed and in control, reaching for the handle of the door to let the motorist out.

When another man approaches Officer McBride, she tells him to leave. She is focused on the most immediate threats. This was a tense, dangerous moment which would reasonably invoke elevated emotional response from anyone, including well-trained officers.

Officer McBride's statement about "cover" shows that she was mindful about finding something that could protect her and the other officers from a sudden attack by the decedent. By "cover," she was referring to some object placed between the officers and potential attacker that could stop projectiles or edged weapons from penetrating.

Officer McBride also quickly responds to the onlookers within the zone of danger posed by decedent, telling everyone to go away. Mindful of the diverse language conditions in Los Angeles, she roughly repeated the order in Spanish, "Que se mueve".

The Court should consider this to be an impressive display of what is often called multi-

tasking (task switching in psychology). Officer McBride masterfully switches from concerns about an unlocated armed assailant, to concerns about the public, to concerns about her fellow officers. However, task-switching has been shown to cut efficiency and raise risk during periods of human performance.⁵ It can also result in slower reaction time due to mental overload,⁶ but in complex environments the need to task switch remains critically important.

Officer McBride's performance on video demonstrated her keen ability to manage multiple stimuli with poise and precision while under highly elevated stress. At this point, Officer McBride had done everything within her power to make the scene as safe as possible for herself and members of the public. All of these techniques were expressions of an intent to preserve lives, including that of the decedent.

Less than a minute after exiting the patrol car (at about the 2:47 time stamp on the body cam video), Officer McBride has spotted the decedent in or behind the truck and yells, "hey man, let me see your hands, let me see your hands, man".

⁵ Rogers, R., & Monsell, S., The Costs of a Predictable Switch Between Simple Cognitive Tasks, *Journal of Experimental Psychology*, 250-264 (1995).

⁶ Rubinstein, J., Meyer, D. & Evans, J. E., Executive Control of Cognitive Processes in Task Switching. *Journal of Experimental Psychology: Human Perception and Performance*, 763-97 (2001).

Police officers are trained to understand that it is the suspect's hands that will kill you. They are trained to fixate on the hands above all other things, to identify if an object may be present and to identify with a reasonable degree of certainty what that object is. Hands kept hidden from officers can create a tremendous amount of anxiety due to the speed with which a weapon can suddenly be displayed and used against an officer.

The decedent appeared from behind the truck at approximately 2:53 on the body cam video, advancing directly toward Officer McBride. With each step, he increased the time/pressure constraints that govern decision making. McBride tried to keep a distance between herself and the decedent sufficient to give her more time to plan, negotiate, issue commands, and watch for compliance. Officer McBride held her firearm in her right hand as a show of force, an unambiguous threat designed to warn any reasonable person that continued forward movement would be countered, if necessary, with the use of lethal force. She also placed her support hand up in the universal "stop" motion and commanded, "stay right there," but the decedent continued to approach rapidly.

At approximately 2:54, Officer McBride told the decedent to drop the knife, but he continued to approach rapidly. At approximately 2:57, she told him again to drop the knife (commands repeated at 2:58 and 2:59), but he continued to

approach rapidly. She lifted her pistol from a low-ready position and pointed it directly at the decedent. This was a final warning.

The decedent strode towards her without pause, continuing to close the distance. He spread his arms confrontationally, making himself seem larger and more threatening. One may reasonably interpret his body language as suggesting that he was daring McBride to shoot him. Indeed, one may reasonably infer that the decedent was engaged in conduct known as "suicide by cop".⁷ The rising incidence of this

⁷ "Suicide-by-cop" is a term used to describe law enforcement assisted suicide in which a person exhibits behaviors to intentionally engage in dangerous, life-threatening, and criminal behavior towards law enforcement officers or others while law enforcing officers are present. Hutson, H., Anglin, D., Yarbough, Hardaway, K., Russell, M., Strote, J., *et al.*, Suicide by Cop, *Annals of Emergency Medicine*, 32, 665-669 (1998). The Police Executive Research Forum (PERF) lists the following criteria to establish the occurrence of suicide-by-cop:

- “- Threatens the life of the officer or another person, or
- “- Attempts to make the officer believe he poses such a threat,
- “- In order to give the officer no choice but to use lethal force to stop the threat.”

In a study of the phenomena in Los Angeles County between the years 1987 to 1997, suicide-by-cop accounted for 11% of all officer-involved shootings and 13% of all officers' justifiable homicides. The median time from arrival of officers at the scene to the time of the shooting was 15 minutes with 70% of shootings occurring within 30 minutes

phenomenon, and its potential application here, militates in favor of greater deference to officers' decisions concerning deadly use of force, as the very purpose of the decedent's behavior appeared to be to create the circumstances requiring Officer McBride to use deadly force.

A bystander's video offers what is perhaps the sharpest view of the decedent walking rapidly toward Officer McBride. There, he emerges from behind the truck at approximately 0.09 (4-ER838; time stamp on Smith Decl. Ex. C.) and by the time Officer McBride fires the first shot, he appears to have already closed more than half the distance towards her. In the body cam video, one can observe that Officer McBride is retreating almost the entire length of the car on her right side as the decedent advances.

The two shots are fired at approximately 3:02 (body cam video time stamp), or less than nine seconds after the decedent appeared from behind the truck. This is an extraordinarily short

of arrival of officers. "Suicide by cop" is surprisingly common, and the numbers of incidents are rising. Another study of 419 "suicide-by-cop" incidents from 1994-2014 revealed that 4% had a replica or fake firearm, 5% kept their hands in their pockets or otherwise appeared to have a weapon as they approached the officer and refused commands, while 16% were armed with a knife. Patton C., & Fremouw, W., Examining 'Suicide by Cop': A Critical Review of the Literature, *Aggression and Violent Behavior*, 27, 107-20 (March-April 2016).

period of time for decision making, putting this case in a category unlike many other cases where police officers have the luxury of much longer interactions with potential threats. The Court should bear in mind that within these nine seconds, Officer McBride was required to assess the threat, decide on the response, and then initiate the response—the latter involving complex motor responses required to make ready and fire a weapon⁸—all while paying attention as well to bystanders, fellow police and other circumstances.

In assessing reasonability, it is also important to understand that Officer McBride and other witnesses perceived the decedent to be much closer than he was. (E.g., 2-ER172 (Bystander testifies officer was twenty feet away from decedent at time of first shot).) Visual perceptual distortions are common during periods of high arousal, when activation of the sympathetic nervous system causes changes in optics including narrowed periphery, loss of near vision, loss of depth perception, loss of night vision, and loss of monocular vision.⁹ The perception of time is also distorted.¹⁰

⁸ See generally Burrows, C., Critical Decision Making by Police Firearms Officers: A Review of Officer Perception, Response and Reaction, *Policing: A Journal of Policy and Practice*, 1(3), 273-283 (2007).

⁹ Godnig, E. C., Body Alarm Reaction and Sports Vision, *Journal of Optometry*, 12(1), 3-6 (2001); Siddle, B. K., &

After the first two shots, the decedent got up almost immediately, and while not fully erect, was off his knees and poised to continue his advance when Officer McBride fired what was in substance a sustained volley of four shots from 3:05 to 3:08 (time stamps on body cam video), killing the decedent.

Officer McBride could and did utilize the short pauses between shots to analyze what she was seeing and, to the best of her ability, determine if more lethal force is needed to end the threat. Officers are trained to look for signs and indications of the threat ending, for example a person dropping their weapon, or lying completely still and submissive on the ground with their hands showing. They listen for compliant statements—or the absence of them. Officer McBride could detect none of this, instead seeing decedent in “a crouched position that appeared to be a sprinter’s stance while screaming in rage”. (4-ER851.)

It was only after the second, longer volley of four shots that decedent no longer posed an overt,

Breedlove, H., How stress affects vision and shooting stance, *Police Marksman*, 16-20 (May-June 1995).

¹⁰ Pitel, M., *et al.*, Giving Voice to Officers Who Experienced Life-Threatening Situations in the Line of Duty: Lessons Learned About Police Survival, *SAGE Open [Access Journal]*, 1-13 (July-September 2018).

active, and continuing threat. Until the very last shot, decedent appeared to be attempting to get up and close the distance to attack Officer McBride. In total, McBride fired six times and struck the decedent six times in approximately six seconds, an extraordinary feat of marksmanship under extremely stressful circumstances.

The Opinion below focuses upon a gap of a little longer than a second dividing the third and fourth shot from the fifth and sixth shot.¹¹ (Pet. at 17a.) During that tiny time interval, we are told, “McBride could have and should have first reassessed the situation to see whether [the decedent] had been subdued”. (*Id.*)

During this time, Officer McBride needed to assess the decedent’s continuing conduct, assess the position of bystanders, and aim and shoot accurately. Although he had been shot four times in four seconds by that point (*see* Pet. at 29a), there was no observable information to confirm that the decedent had ceased his efforts to get up and close the distance with Officer McBride or had become compliant with her commands. As set forth below, this is consistent with the physiology of bullet wounding.

¹¹ The California Department of Justice report (*see supra* n.4) has a useful table showing the exact time interval for each shot (at p. 44), judicial notice of which may be taken pursuant to Fed. R. Evid. 201 given the undisputable recorded evidence of the encounter.

To make matters worse, “[b]ecause of Mr. Hernandez’s rotation, angle, and compressed body position, the remaining two final shots were so challenging that even a very talented officer would have to be visually and attentionally focused only on an accurate shot placement”—and thus less able to perceive subtle changes that might be associated with a cessation of the threat.¹²

Under perfect laboratory conditions, the cognitive time gap between action and reaction is between 0.5 and 0.75 seconds; it takes at least that much time to recognize a threat, analyze its meaning, formulate a response selection, and initiate motor response.¹³ An experiment conducted with shooters told to stop shooting at a target when it turned red confirmed that physiological delays resulted in an average of two

¹² Cal. DOJ Report at 46.

¹³ Dror, I., Perception of risk and the Decision to Use Force, *Policing*, 1(3), 265-272 (2007); Godnig, E., Body Alarm Reaction and Sports Vision, *Journal of Behavioral Optometry*, 12(1), 3-6 (2001); Hillman, M., Physical lag times and their impact on the use of deadly force, *The Tactical Edge*, 25-29 (1995); Lewinski, W. L., & Hudson, B., The impact of visual complexity, decision making and anticipation: The Temple study, experiments 3 and 5, *Police Marksman*, 28(6), 24-27 (2003); Siddle B., *Sharpening the Warriors Edge* (PPCT Research Pubs. 1995).

extra shots fired after the “stop” signal.¹⁴ Real-life situations like the circumstances here are much, much more complicated.

The physiological limits of information processing, decision processing and assessing the results of the decision in a life-threatening situation are a part of the totality of circumstances faced by officers under attack. These circumstances are entirely different than those experienced by appellate judges, and police under attack cannot and should not be expected to evaluate threats like judges. As Justice Holmes declared: “Detached reflection cannot be demanded in the presence of an uplifted knife”. *Brown v. United States*, 256 U.S. 335, 343, 41 S. Ct. 501, 502 (1921).

B. The Perspective of the Reasonable Officer on the Scene: Gunshots and Incapacitating Subjects.

The general constitutional rule is that officers must have probable cause to fear “that the suspect poses a significant threat of death or serious injury to the officer or others” before using deadly force. *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S. Ct. 1694, 1697 (1985). Gunshot injuries cannot be relied upon, however, to incapacitate a subject and remove the significant threat to the

¹⁴ Bartel, L., *et al.*, “Time to Stop: Firearm Simulation Dynamics,” *J. Forensic Biomechanics*, 16(1) (2025).

officer. The Opinion's focus on whether or not the decedent was "clearly incapacitated" ignores the physiological realities of gunshot wounds and incapacitation.

The FBI's Firearms Training Unit, in a 1989 Report entitled "Handgun Wounding Factors and Effectiveness,"¹⁵ summarized the difficulties of incapacitating attacking criminals with a handgun, pointing out that:

- "The human target can only be reliably incapacitated only by disrupting or destroying the brain or upper spinal cord." (Report at 9)
- "Barring central nervous system hits, there is no physiological reason for an individual to be incapacitated by even a fatal wound, until blood loss is sufficient to drop blood pressure and/or the brain is deprived of oxygen." (*Id.* at 8.)
- "*...there is sufficient oxygen within the brain to support full, voluntary action for 10-15 seconds after the heart has been destroyed.* (*Id.*; emphasis added.)

As the Report explains, "[f]ew, if any, shooting incidents will present the officer with an

¹⁵ Patrick, U., Handgun Wounding Factors and Effectiveness (FBI Firearms Training Unit July 14, 1989).

opportunity to take a careful, precisely aimed shot at the subject's head". (*Id.* at 3.) Training is therefore properly "oriented toward 'center of mass' shooting" (*id.*)—precisely what Officer McBride did.

Center mass firing assures (1) aiming at the largest available target area to increase hit accuracy, (2) that bullets strike the thickest part of the target and do not pass through to harm innocent citizens and, (3) that the bullets strike vital areas of the body that can stop the person.

Officers know that the mere fact that a bullet has struck a suspect—even center mass—does not remove the threat to themselves or bystanders. Here, it was only Officer McBride's last shot to the decedent's head that clearly incapacitated him. *See also* FBI Report at 16 ("Physiologically, no caliber or bullet is certain to incapacitate any individual unless the brain is hit.").

Further exacerbating the threat level, and correspondingly attenuating the constitutional rights to be inferred in favor of the decedent, he was approaching a police officer, weapon in hand and refusing to drop it, while high on methamphetamines—and the officer correctly perceived the symptoms of meth or PCP intoxication (Pet. at 147a). The officer's correct perception, ignored entirely in the Opinion below, was highly relevant to the appropriate level of force to be applied.

It is common knowledge among police officers that meth or PCP intoxication means attacking suspects are more difficult to incapacitate with gunfire (or otherwise) and pose greater risks to officers and bystanders. This perception has a solid scientific basis. As the FBI Report explains: “The effects of chemicals can be sufficient to keep a mortally wounded adversary functioning. . . . Stimulants, anesthetics, pain killers or tranquilizers can all prevent incapacitation by suppressing pain, awareness of the injury, or eliminating concerns over the injury.” (*Id.*)

The Opinion’s failure to address this important risk factor highlights the difficulty of federal judges in complying with this Court’s directive to assess the suspect’s constitutional rights while taking the perspective of a reasonable officer on the scene. It is an issue of national importance given the very high percentage of deadly force uses where decedents were under the influence of meth or similar drugs.¹⁶

¹⁶ For example, a review of 189 Colorado cases from 2014 to 2019 found “[m]ethamphetamine was present in 44 percent of those who died”. Sherry, A. & Markus, B., Meth, Guns and Aggressive Tactics Combine to Give Colorado One of Nation’s Highest Police Shooting Rates,” *Colorado Public Radio News* (Jan. 31, 2020). Hospital data suggests that “[m]ethamines were found to be the most dangerous substance in terms of OIS [officer-involved shootings]”. O’Neill, L., The Role of Mental Health, recent Trauma, and

From the required perspective of the reasonable officers, use of deadly force during an entire 10-15 second interval even after gunshots have struck an attacker is inherently reasonable. It should be reasonable as a matter of law in nearly all cases.¹⁷

C. The Opinion Conflicts with Decisions of this Court and the Appropriate Course of Judicial Proceedings.

The Opinion addressed the vital federal question of constitutional limitations on use of force “in a way that conflicts with relevant decisions of this Court”. Rule 10(c). Arguably, the sheer number of federal judges finding Officer McBride’s conduct to raise a jury question calls for action by this Court to right a Ninth Circuit departure from an “accepted and usual course of judicial proceedings” within the meaning of Rule 10(b).

Suicidal Behavior in Officer-Involved Shootings: A Public Health Perspective, *Int'l J. Env. Res. Public Health* 22(6) (June 2025).

¹⁷ The dissent below rejects the idea that a shooting interval of six seconds is reasonable as a matter of law because “[i]f an officer clearly incapacitates a suspect in the first second of a six-second time frame, the reasonableness of firing another five shots could create a jury question”. (Pet. at 39a.) Unless that first shot destroyed the brain or upper spinal cord of the attacker, the attacker is not clearly incapacitated.

Five of the eleven federal judges required to second-guess Officer McBride's decision making did find her actions objectively reasonable. (Pet. 32.) The six finding her actions objectively unreasonable, however, give no deference to reasonable officer decision making. They defer to the right of the jury to utilize the sort of "moment of threat" perspective resoundingly rejected by this Court in *Barnes v. Felix*, 605 U.S. 73, 145 S. Ct. 1353 (2025).

They say that "[a] jury could conclude that [the decedent's] continued movements on the ground were due to pain from four gunshot wounds and that his movements . . . were nonthreatening" (Pet. at 23a), taking the position that the "video evidence does not *conclusively* show that Hernandez's final movements were intentional rather than convulsive" (*id.* n.6; emphasis added). Within a 10-15 second timeframe, a reasonable officer will not stop shooting a suspect high on meth who is still displaying the ability to resume his or her attack. Officers cannot reasonably be expected to wait for conclusive judicial proof the threat is gone when confronting an armed suspect in a dynamic encounter.

The Opinion also cites *Plumhoff v. Rickard*, 572 U.S. 765 (2014), where this Court applied the *Graham* principles in the context of a high-speed vehicle chase. This Court found no constitutional right for the decedent to be free from twelve shots

fired at him as his car moved away from the police—based on future risk to “others on the road”. *Id.* at 777. *A fortiori*, the decedent here, attacking officers directly, should have even less of a federal constitutional right to be to be free from the use of deadly police force—six bullets that terminated his life.

The Opinion relied upon this Court’s remark that *Plumhoff* “would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight” (*id.*), seizing upon a 1.36 second gap between Officer McBride’s fourth and fifth shot to characterize this as a new “round”. This Court, however, was referring to a new round of shots in *Plumhoff* after both the initial three-shot volley and the following twelve-shot volley, which both occurred in the space of approximately 10 seconds.

As early as 1949, Justice Jackson warned that:

“This Court has gone far toward accepting the doctrine that . . . all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the

constitutional Bill of Rights into a suicide pact.

Terminiello v. Chicago, 337 U.S. 1, 37, 69 S. Ct. 894, 911 (1949) (Jackson, J., dissenting). A federal judiciary that finds a fundamental constitutional right of those who attack police officers to be free from the use of deadly force promotes an anarchy that defeats the very liberty this Court is charged to preserve.

Moreover, as the dissent below correctly observed, the Opinion’s “flawed reasoning also creates perverse incentives . . . any millisecond an officer tarries in protecting herself and others is a millisecond closer to liability. That rule discourages any reassessment. When in doubt, officers should now continue shooting or risk liability. Not a great message.” (Pet. at 39a)

II. THE OPINION EVISCERATES QUALIFIED IMMUNITY DOCTRINE CONTRARY TO THIS COURT’S PRECEDENT.

The overarching purpose of the qualified immunity doctrine is to protect “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986). Judges finding Officer McBride to be incompetent or malicious do not merely err, but arguably display a substantial departure “from the accepted and usual course of

judicial proceedings” hostile to law enforcement. Rule 10(b).

The Opinion relies chiefly upon *Zion v. County of Orange*, 874 F.3d 1072, 1077 (9th Cir. 2017), which the Petition amply demonstrates did not control here. (Pet. at 29-31.) *Zion* was also manifestly in conflict with this Court’s precedents. The decedent attacked one officer with a knife and ran away. A second officer fired nine shots, and the decedent fell to the ground; the second officer then ran *toward* him and fired nine more rounds. *Id.* at 1075.

The Ninth Circuit found that the “two volleys came in rapid succession, *without time for reflection*” (*id.* at 1077; emphasis added), yet at the same time declared because the decedent dropped to the ground, appeared to have been wounded, and was “making no threatening gestures,” the jury could find he “was no longer an immediate threat” and that the officer “should have held his fire unless and until Zion showed signs of danger or flight” (*id.* at 1076).¹⁸

¹⁸The second officer thereafter walked around in a circle for “several seconds” and returned to the decedent to stomp on his head—conduct which was not objectively reasonable. (*Id.* at 1077.) Arguably the second volley might have been found unreasonable because the second officer approached the decedent before making it—attenuating a reasonable perception of continuing threat—but the opinion provides no discussion of these circumstances. Officer McBride could not have analogized her conduct to that of the second officer, and this Court should not do so.

Inferring from *Zion* a rule that once a suspect drops to the ground, the threat supporting the use of deadly force has been eliminated is contrary to the fundamental physiological realities discussed above. Adopting such a rule poses unreasonable risks to the Nation's police.

Review of the most difficult decision making police officers ever face calls for this Court to fashion the strongest of qualified immunities. No context demands greater deference to public order needs than the use of deadly force against those who attack police officers with deadly weapons, for those who attack police officers threaten the very foundation of public order.

Finally, this Court has decreed that official immunity is to be available to public officials under § 1983 if it was "historically accorded the relevant official" in an analogous situation "at common law", *Imbler v. Pachtman*, 424 U. S. 409, 421, 96 S. Ct. 984, 990 (1976). This case offers a compelling argument for the need to confine immunity to its common law roots. It defies credulity to suggest that a police official attacked with a deadly weapon would have suffered civil liability for damages at common law.

III. THIS CASE OFFERS AN IMPORTANT OPPORTUNITY TO PROVIDE A SAFER HARBOR IN QUALIFIED IMMUNITY LAW FOR OFFICERS ATTACKED BY SUSPECTS.

The NPA certainly agrees immunity should apply unless constitutional rights of those who attack its members constitute “clearly established law” that is specific enough for officers to understand and apply. *Plumhoff*, 572 U.S. at 778-79; *see also id.* at 780 (those seeking to overcome qualified immunity should demonstrate “a controlling case or a robust consensus of cases”).

The NPA is concerned, however, that as the federal courts of appeals create a dense forest of case-by-case precedent trying to “clearly establish” rules for the use of deadly force, the resulting complexity will overwhelm officers and produce a sort of defensive policing that will result in more deaths, not less. Critically, these additional deaths will fall on the innocent victims of criminals, and not upon those advancing on police with weapons in obvious violation of criminal law.

Judges live the lives of the “detached reflection” to which Justice Holmes refers. Few can easily imagine decision making when under violent attack by criminals with guns, knives or other weapons. A safe harbor that allows police a 10-15 second interval to resist such attacks

without judicial second-guessing recognizes the simple reality that until that time interval has passed the attacker continues to pose a threat to the officer. *Cf. Zion*, 874 F.3d at 1075 (noting the “murky boundary” of circumstances “when the suspect no longer poses a threat”).

Finally, the Court may wish to reconsider *Graham* and reintegrate the ancient common law “good faith” standard that can protect officers like Officer McBride in these and other circumstances. A safe harbor rule declining to second-guess police decision making in the first 10-15 seconds while officers are under attack unless bad faith somehow exists can continue to provide a § 1983 remedy in rare cases involving conduct where there may be a disputed issue of fact as to whether the officer is “acting out of anger or emotion rather than any legitimate law enforcement purpose”. *Zion*, 874 F.3d at 1077. Absent a time interval giving an officer under armed attack an opportunity for genuine “detached reflection”—a time interval greater than the 1.36 seconds here—judgments made by the officer in the heat of armed attack require greater deference.

Conclusion

For the foregoing reasons, and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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