Case Number 18-55035

U.S.D.C. Case Number: 15-cv-1386

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

S.R. NEHAD, *et al.*,
Plaintiffs and Appellants,

v.

NEAL N. BROWDER, *et al.*,
Defendants and Appellees.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES, AND PUBLIC JUSTICE IN SUPPORT OF APPELLANTS

On Appeal from Order
of the United States District Court
for the Southern District of California

The Honorable William Q. Hayes, District Judge Presiding

Scott J. Street (SBN 258962)
BAUTE CROCHETIERE &
HARTLEY LLP
777 S. Figueroa Street, Suite 4900
Los Angeles, CA 90071
Telephone: (213) 630-5000
Facsimile: (213) 683-1225

Brian Hardingham (SBN 288773)
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
Telephone: (510) 622-9Hl.

Peter Bibring (SBN 223981)
Adrienna Wong (SBN 282026)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-9500
awong@aclusocal.org

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

Page(s)

Corporate Disclosure Statement 5

Statement of Compliance.. 5

Kisela v. Hughes,
138 S. Ct. 1148 (2018) 32
Lehman v. Robinson,
228 F. App'x 697 (9th Cir. 2007) 15
Long v. City & County of Honolulu,
511 F.3d 901 (9th Cir. 2007)... 25
Perez v. City of Roseville,
882 F.3d 843 (9th Cir. 2018)... 28
Price v. Sery,
513 F.3d 962 (9th Cir. 2008)... 9
Robinson v. Arrugueta,

Epps, Garrett, "Supreme Court: Police Can't Brutalize Your Elderly Mother," *The Atlantic* (May 8, 2014) 13

L.A. Police Dep't, Special Order No. 5: "Policy on the Use of Force – Revised" (Apr. 18, 2017) 20

National Consensus Policy on Use of Force 3 (Jan. 2017) 22

New Orleans Police Dep't Ops. Manual, Chapter 1.3: Use of Force, at 7-8 (Apr. 2018)... 21

Robert F. Kennedy Human Rights Global Justice Clinic, N.Y.U. School of Law, Int'l Human Rights Law Clinic – University of Va. School of Law, & Justin Hansford – St. Louis Univ. School of Law, WRITTEN SUBMISSION TO INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IN SUPPORT OF THE THEMATIC HEARING ON EXCESSIVE USE OF FORCE BY THE POLICE AGAINST BLACK AMERICANS IN THE UNITED STATES 42 (Feb. 12, 2016)................ 13

San Diego Police Dep't Policy Manual (8/3/16 ed.), at 4 19

Seattle Police Dep't Manual Policies 8.000, 8.200 (Sept. 2015) 21

Stoughton, Seth W., *Policing Facts*, 88 Tul. L. Rev. 847, 865 (2014) 18

Urbonya, Kathryn R., "Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security," H

profit, non-partisan organization dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The ACLUs of Northern California, Southern California, and San Diego & Imperial Counties are the ACLU's three California affiliates. These affiliates have a longstanding commitment to preserving the constitutional rights of persons involved in encounters with law enforcement and have often participated in legal matters as parties or as friends to the court to address the legal issues that arise in such encounters.

Public Justice is a national public interest legal organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. As part of this work, Public Justice has long represented those whose rights have been violated by law enforcement officers.

ARe ci

shooting and killing Fridoon Nehad—even though Nehad was unarmed and holding only a ballpoint pen, even though Nehad was doing nothing more threatening than walking slowly through an alley when Browder confronted and shot him, and even though Browder provided no warning and gave no consideration to alternatives to deadly force.

The decision below undermines well-established law governing a police officer's use of deadly force and the district court's role in adjudicating summary judgment, in three ways.

First, this Court's law is clear that "reasonableness" of police deadly force under the Fourth Amendment is an objective test: officers may not escape liability for the unreasonable use of deadly force just because they claim to have been afraid. But the district court relied on Browder's testimony that he believed he was in danger, while ignoring evidence that Browder was under no immediate threat when he shot Nehad—evidence that calls into question the objective reasonableness of Browder's fear.

Second, this Court requires courts evaluating police deadly force to consider (1) whether the officers gave proper warnings before using deadly force, and (2) the availability of less intrusive alternatives. *Glenn v. Washington Cty.*, 673 F.3d 864, 872 (9th Cir. 2011). But the district court simply disregarded evidence that Browder neither warned Nehad that he

would shoot nor gave any consideration to alternatives to deadly force, although alternatives were available.

Finally, the district court dismissed clearly-established law that gave Browder fair notice that it was unreasonable to shoot Nehad under the circumstances presented, disregarding substantial evidence that Nehad did not present objectively threatening behavior when Browder shot him.

The district court reached the wrong result in this case, but its reasoning threatens a wider harm to the law governing police force. The court's legal errors justifying its one-sided examination of facts, if affirmed, threaten to allow police officers to escape liability for shooting innocent people, based on little more than the officers' after-the-fact assertion that they were afraid. The Constitution does not allow this result. This Court should reverse the lower court's decision.

A. An Officer's Claim Of Subjective Fear Is Not Sufficient Justification For Deadly Force, Particularly In The Face Of Contradictory Facts.

"The intrusiveness of a seizure by means of deadly force is unmatched." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). The Constitution therefore prohibits law enforcement from using deadly force against a person who presents no significant threat to other people. *Id.* at 3, 11. Indeed, the "most important" factor for evaluating the reasonableness of

deadly force is whether the suspect posed an "immediate threat to the safety of the officers or others." *Glenn*, 673 F.3d at 872. An officer's subjective belief that such a threat exists is not enough to justify deadly force; the belief must be objectively reasonable and supported by the facts. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010); *Price v. Sery*, 513 F.3d 962, 971 (9th Cir. 2008).

Here, the evidence taken in the light most favorable to Nehad demonstrates that a reasonable officer would have known that he posed no threat—let alone a threat serious and immediate enough to justify killing him within seconds. It is undisputed that Nehad carried no weapon, that he was committing no crime, and that he did not threaten Browder. A video of the incident demonstrates that Nehad was walking slowly down an alley, that he made no threatening movements, and that he was stopped at least 17 feet away (well out of arm's reach) from Browder when Browder shot him. Based on these facts, a reasonable jury could conclude that Nehad did not pose a threat that justified Browder killing him. This Court has reversed summary judgment in multiple cases involving similar circumstances. *Hayes v. County of San Diego,* 736 F.3d 1223, 1235 (9th Cir. 2013) (reversing summary judgment order because evidence showed that "Hayes was complying with Deputy King's order when he raised the knife and posed no

clear threat at the time he was shot without warning”); *Glenn*, 673 F.3d at 878 (reversing summary judgment order because “[t]he circumstances of this case can be viewed in various ways, and a jury should have the opportunity to assess the reasonableness of the force after hearing all the evidence”); *Bryan*, 630 F.3d at 832 (holding that officer’s actions violated plaintiff’s Fourth Amendment rights because he “was neither a flight risk, a dangerous felon, nor an immediate threat” despite throwing “bizarre tantrum” twenty feet away from officer).

Nevertheless, the district court held that Browder was entitled to summary judgment because he did not violate Nehad’s Fourth Amendment rights—relying on Browder’s claim that he felt he faced an immediate threat when he shot Nehad, while omitting the objective evidence demonstrating that, in fact, there was no such threat. In analyzing whether the shooting was reasonable, the court mentioned Browder’s supposed belief or perception at least six times. ER 9-10. The court framed its analysis according to what was purportedly in Browder’s mind before he shot Nehad, rather than assessing the objective facts to consider what a reasonable officer in Browder’s situation would have done. *See, e.g.*, ER 9 (“All of the actions taken by Officer Browder were consistent with his stated belief”).

The lower court’s analysis violates this Court’s precedent in two

ways. First, the court erroneously credited Browder's self-serving testimony as undisputed fact. *See Estate of Lopez by & through Lopez v. Gelhaus*, 871

Second, the district court departed from this Court's precedents establishing an *objective* standard for use of force,

uncorrected, the district court's decision will raise serious questions about the fairness of the justice system, particularly for communities disproportionately harmed by police violence and implicit bias.[3] Members of the public may increasingly fear that officers need only claim that they felt endangered to escape accountability for unreasonably taking someone's life.

The Court should reverse the decision below to ensure that district courts consistently adjudicate police use of force cases with the objectivity

---

lower courts have misread *Garner* and *Graham* as requiring broad deference to police officers' statements that they feared for their lives," resulting in "erosion of the jury's role in dete

that the Fourth Amendment requires.

B. The District Court Failed To Consider Evidence That Browder Did Not Warn Nehad Or Consider Less Deadly Alternatives Before Shooting Him.

In evaluating whether an officer's use of deadly force was justified, this Court requires courts to consider whether it could have been avoided. In particular, this Court instructs lower courts to consider (1) whether the officers gave proper warnings before using deadly force, and (2) the availability of less intrusive alternatives. *Glenn*, 673 F.3d at 872. Here, Appellants presented evidence showing both that Browder gave no warning at all *and* that he failed to consider numerous feasible alternatives to the use of deadly force. But the district c

1272, 1285 (9th Cir. 2001). “Mere commands, absent a statement that force will be used if the command is ignored, have not been found to constitute adequate warning.” *Hulstedt v. City of Scottsdale*, 884 F. Supp. 2d 972, 992 (D. Ariz. 2012).

This Court has repeatedly reversed orders granting summary judgment to police officers in excessive force ca

against suspect).

This Court has also reversed summary judgment in favor of an officer where the officer gave a warning, but the warning was insufficient. In *Glenn*,

Appellants' Br. at 38. Despite this testimony, however, the district court assumed that Browder told Nehad to "'Stop. Drop it.'" before he shot him. ER 13. In doing so, the district court impermissibly construed the facts against Nehad, even though this Court's case law—and the established summary judgment standard—prohibit it from doing so. Construed in the light most favorable to Nehad, the evidence demonstrates that Browder said nothing at all before shooting.

Furthermore, even if Browder had told Nehad to "stop" or "drop it," that statement would not constitute a sufficient warning under this Court's case law, because it did not inform Nehad he would be shot if he did not comply with the order. *Glenn*, 673 F.3d at 875.[4] Browder's failure to warn Nehad that he would use deadly force against him is a factor that must weigh against Browder in the analysis of whether his conduct was reasonable.

---

[4] By contrast, courts have held that police acted reasonably in shooting suspects who did not obey warnings and who continued acting aggressively toward the officers *after* receiving a warning. *See Williams v. City of Scranton*, 566 F. App'x 129, 132 (3d Cir. 2014) (suspect "rapidly moved toward Smith with a large knife, ignored repeated warnings to stop and drop the knife, and was no more than five feet away from [Officer] Smith at the time she was shot"); *Garczynski v. Bradshaw*, 573 F.3d 1158, 1168 (11th Cir. 2009) (suspect did not show his hands when ordered and instead swung gun toward officers, who then fired); *Robinson v. Arrugueta*, 415 F.3d 1252, 1256 (11th Cir. 2005) (suspect ignored uniformed officer's command to put his hands up and suddenly drove his car toward officer, who was standing in between two cars and thus could have been crushed).

The district court also refused to consider evidence of alternatives to deadly force, deeming that factor irrelevant to the reasonableness analysis. ER 11 ("[T]he appropriate inquiry is whether [he] acted reasonably, not whether [he] had less intrusive alternatives available to him"). The district court stated several times that Browder had been forced to make a "split-second judgment," and that courts should not "second-guess" such judgments by considering whether the officer could have resorted to a less intrusive alternative. ER 8, 10-11, 13, 17. The court did not determine that Browder was actually forced to make a "split-second" decision to shoot Nehad based on all the facts before it.[5] Rather, it *assumed* that was the case, as a matter of law—then refused to consider evidence showing that Browder had the opportunity to take more time to properly evaluate the situation and to assess the availability of alternatives, under the rationale that doing so would be "second-guessing" his judgment. *Id.* at 13.

The district court's refusal to consider evidence of available alternatives contradicts this Court's precedents. Though "police officers need not employ the 'least intrusive' degree of force possible," *Bryan*, 630 F.3d at 831 n.15, they must at least "act within that range of conduct" the

[5] *See* Seth W. Stoughton, *Policing Facts*, 88 Tul. L. Rev. 847, 865 (2014) (observing that the Supreme Court's description of officers' "split-second" decision-making about use of force is widely-repeated by lower courts but generally does not reflect the reality of police practice or training).

Ninth Circuit has "identif[ied] as reasonable." *Glenn*, 673 F.3d at 876. This Court has clearly stated that the availability of alternatives to the use of deadly force is "relevant to ascertaining [the] reasonable range of conduct." *Id.* at 878. Accordingly, when determining the level of force to use, police officers "are required to consider [w]hat other tactics if any [are] available." *Id.* at 876 (internal quotation marks omitted). And courts analyzing officers' use of force should include "the presence of feasible alternatives [as] a factor . . . in [their] analys[e]s." *Bryan*, 630 F.3d at 813; *see also Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (considering "alternative techniques available for subduing [suspect] that presented a lesser threat of death or serious injury"). "[I]f there were clear, reasonable and less intrusive alternatives to the force employed, that militate[s] against finding [the] use of force reasonable." *Glenn*, 673 F.3d at 876 (internal quotation marks omitted).

The importance of considering alternatives to deadly force is not only recognized by this Court, but also widely reflected in police standards and policies. *Cf. Garner*, 471 U.S. at 18-19 (looking to policies adopted by police departments to determine when use of deadly force is reasonable). The San Diego Police Department's own use of force policy states that "[d]eadly force shall be used only when all reasonable alternatives have been

exhausted or appear impractical."[6] Training in other California police departments incorporates these principles. *See, e.g., A.K.H. by & through Landeros v. City of Tustin*, No. SACV1201547JLSRNBX, 2014 WL 12672480, at *2 (C.D. Cal. Jan. 16, 2014), aff'd and remanded sub nom. *A. K. H by & through Landeros v. City of Tustin*, 837 F.3d 1005 (9th Cir. 2016) (officer "testified that he was trained that deadly force should be used as a last resort in only the direst of circumstances" and "when no other reasonable measures are available").[7]

Across the country, police "[r]ecruits are taught (1) to use firearms as a last resort, and to use only the minimal amount of force necessary in all cases; (2) to use deadly force only if there is no other way to protect the officer or another person against imminent death or serious physical injury; and (3) where feasible and consistent with personal safety, to give some warning before shooting." *Breitkopf v. Gentile*, 41 F. Supp. 3d 220, 236

---

[6] San Diego Police Dep't Policy Manual (8/3/16 ed.), at 4, *available at* https://uaptsd.files.wordpress.com/2016/11/san-digo-police-dept-policy-manual.pdf.

[7] *See also* L.A. Police Dep't, Special Order No. 5: "Policy on the Use of Force – Revised" (Apr. 18, 2017), *available at* http://assets.lapdonline.org/assets/pdf/17%20SO%205.pdf (identifying "[t]he availability of other resources" as a factor relevant to the reasonableness of force, and directing officers to "attempt to control an incident by using time, distance, communications, and available resources in an effort to de-escalate the situation, whenever it is safe and reasonable to do so").

(E.D.N.Y. 2014) (discussing training in New York City); *see also Wolfanger v. Laurel Cnty.*, No. CUV, A, 6:06-358-DCR, 2008 WL 169804, at *9 (E.D. Ky. Jan. 17, 2008), aff'd, 308 F. App'x 866 (6th Cir. 2009) (noting that, in Laurel County, Kentucky, "[d]eadly force may never be used on mere suspicion of an offense" and that officers "are reminded of the principal of 'lesser force' in any apprehension, and should use deadly force as a last resort"). Departmental policies in Dallas, New Orleans, and Seattle—to name just a few places—direct officers to consider and use alternatives before resorting to deadly force,[8] and a national consensus report issued by eleven of the most significant law enforcement leadership and labor organizations recommends policies requiring officers to "use de-escalation techniques and other alternatives to higher levels of force . . . whenever

[8] *See e.g.,* Dallas Police Dep't, General Order 906.00 (June 2015), *available at* http://www.dallaspolice.net/reports/Shared%20/Documents/General-Order-906.pdf ("At the point when an officer should reasonably perceive the potential exists that deadly force may be an outcome of any situation, the officer must use reasonable alternatives if time and opportunities permit."); New Orleans Police Dep't Ops. Manual, Chapter 1.3: Use of Force, at 7-8 (Apr. 2018), *available at* https://www.nola.gov/getattachment/NOPD/Policies/Chapter-1-3-Use-of-Force-EFFECTIVE-4-01-18.pdf/ (directing officers to use "advisements, herives if timr levels o.1846 -1.1(avaTD.0007Apr.1orce-EFf force)256.7(Orlto)

possible and appropriate before resorting to force."[9]

Here, Appellants offered substantial evidence, including expert testimony, demonstrating that Browder had reasonable alternatives to shooting Nehad. *Cf. Glenn*, 673 F.3d at 877-78 (holding that a jury can rely on such evidence in determining whether force is reasonable). In fact, the district court even noted that the alternatives available to Browder "include[d] (but are not limited to) simply not confronting [Nehad] one-on-one (Back-up units were due to arrive in seconds), tactically repositioning to cover to gain time and properly assess the true nature of any perceived threat, using less lethal weapons in his possession, etc." ER 11 (quoting ECF No. 138-3 at 443). But the court refused to address that evidence in its analysis. This Court has repeatedly reversed grants of summary judgment in similar circumstances. *See Hayes*, 736 F.3d at 1233 (officer's immediate use of deadly force rather than "less severe alternatives" was a "central issue" in the case); *Glenn*, 673 F.3d at 877-78 (whether an alternative such as a taser was preferable was a disputed question of fact); *Bryan*, 630 F.3d at 831 (officer's failure to consider less intrusive alternatives such as waiting for backup factored "significantly" in the court's analysis). It should do so again

[9] *National Consensus Policy on Use of Force* 3 (Jan. 2017), *available at* http://www.theiacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf.

here.

In addition to being legal error, the district court's omission has grave implications for public safety. The requirement that police officers consider less deadly alternatives is essential to minimizing police shootings. When courts grant summary judgment in shooting cases without addressing the potential alternatives, they diminish police departments' incentives to train officers in effective tactics that save lives. This reinforces a "shoot-first" ethic and leaves officers ill-equipped to avoid creating dangerous situations or to de-escalate them when they arise. Even officers with the best intentions are left more likely to shoot people who pose no real threat or who would have otherwise surrendered without the use of force.

This Court should reverse the district court's summary judgment order

considering alternatives to the use of deadly force—even if, unlike Nehad, the victim has a weapon. A reasonable jury could find that Nehad did not display objectively threatening behavior before Browder shot him and that even if Nehad did pose a potential threat, the threat was not immediate. Browder had fair notice under existing case law that it would be unconstitutional to shoot Nehad in such circumstances.

This Court's decision in *Glenn* is directly on point. In *Glenn*, the police responded to a 911 call from a woman who said her son Lukus was suicidal, intoxicated, breaking things around the house, and carrying a pocketknife. Within four minutes of arriving at the scene, the police shot Lukus multiple times, killing him. The district court granted the officers' summary judgment motion, crediting their testimony that they believed he might be a danger to the officers and others because he had a knife. This Court reversed and remanded the case for trial. It explained that Lukus' possession of a pocketknife, although "an important consideration," was "not dispositive … otherwise, that a person was armed would always end the inquiry." 673 F.3d at 872.

This Court instead focused on what Lukus did with the knife, noting that when the officers arrived he was not threatening anyone with the weapon, and contrasting Lukus' possession of a knife from cases involving

suspects who wielded a weapon "in a more threatening manner," such as a suspect who raised a rifle at officers and said "I told you fuckers to get the fuck back." *Id.* at 873 (citing *Long v. City & County of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007)). Furthermore, the Court noted that the officers "could have moved farther away at an

plaintiff was entitled to a jury trial even though he was shot while walking toward the officers with a knife raised because he was still six to eight feet away and was not threatening or charging the officers, and because the officers did not warn him or consider any less intrusive alternatives before shooting. *Id.* at 1234. *Hayes* reiterates that it was clearly established that the mere possession of a knife is not a basis for using deadly force, even when a person is far closer to an officer than Nehad was. It also clearly establishes that even forward motion towards an officer with a knife in hand does not justify the use of force, when the person is not charging the officer and has not been warned that his actions are perceived as a threat or that he will be fired upon if he continues. Like the victim in *Hayes*, Nehad was not moving aggressively, made no charging or sudden motion, and was not warned that deadly force would be used against him.

Furthermore, just last year, the Court denied qualified immunity to an officer who in 2010 shot a man holding an X-Acto knife, because "[a] reasonable jury could conclude that the relatively slight and somewhat impaired Bui, who made no threatening motions with the small blade in the officers' presence, did not present a significant threat of death or serious physical injury." *Bui v. City & County of S.F.*, 699 F. App'x 614, 615 (9th Cir. 2017).

credit the deputies' testimony that [the man] turned and pointed his gun at them, nor assume that he took other actions that would have been objectively threatening. Given that version of events, a reasonable fact-finder could conclude that the deputies' use of force was constitutionally excessive." *Id.*; *see also Estate of Lopez by & through Lopez v. Gelhaus*, 871 F.3d 998, 1011-13 (9th Cir. 2017) (reaching similar result in shooting of suspect who had gun that was pointing down at ground and citing numerous other cases involving comparable degrees of apparent danger in which court denied summary judgment).

This law is not unique to the Ninth Circuit. *See Perez v. City of Roseville*, 882 F.3d 843, 857 (9th Cir. 2018) (noting that decisional law from other circuits may demonstrate that law was clearly established at time of the challenged conduct). Appellate courts in other circuits have held that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it. *See, e.g., Tenorio v. Pitzer*, 802 F.3d 1160, 1166 (10th Cir. 2015) (affirming denial of qualified immunity in shooting of person with small knife because suspect "was not charging Pitzer" but "had merely taken three steps toward the officer," was "not within striking distance" of officers, and "made no aggressive move toward any of the officers with his knife"); *Zulock v.*

testimony showed otherwise. And the

charging when Browder shot him, and plaintiffs presented expert testimony that Browder had numerous options, including—like the officer in *Deorle*—taking cover and observing Nehad. ER 11 n.4.

The district court also held that *Deorle*, *Lopez*, and *George* were distinguishable because Browder was responding to a 911 call about "a potentially dangerous situation involving a suspect reported to be threatening people with a knife." ER 9. But the officers believed the suspect was armed with a dangerous weapon in those prior cases. In *George* and *Deorle* that belief was based on the substance of a 911 call. Thus, the "hot call" Browder received does not distinguish this case from that controlling authority. Moreover, it is clearly-established law that "[a] desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Deorle*, 272 F.3d at 1281.

In sum, the district court erred by dismissing directly relevant precedent that gave fair notice to Browder that it was unreasonable to shoot someone who did not pose an immediate threat to his safety simply because he thought that person held a knife. The Court should affirm the precedents it set in *Hayes*, *Glenn*, and *Deorle*, among other cases, and reverse the

district court's ruling on qualified immunity.[10]

In emphasizing the relevance of pre-shooting conduct to the state law negligence claim, Appellants' brief appears to concede in a passing comment the very legal question the Supreme Court left open last year. *See* Appellants' Br. at 58 ("For example, an officer's pre-shooting conduct, while not relevant to constitutional liability, is indisputably relevant to determining negligence under state law."). While Nehad's theories in this case may not emphasize the relevance of pre-shooting conduct to his constitutional claims, the weight of the federal circuits hold that the "totality of the circumstances" should also include whether the officer's pre-shooting conduct unreasonably created his justification for deadly force, as Browder's did here. *See, e.g., Estate of Starks v. Enyart*

judged on standards distinct from their constitutional claims without opining on the relevance of an officer's pre-shooting conduct to constitutional liability for excessive force.

CONCLUSION

For the above reasons, *amici curiae* urge the Court to reverse the District Court's summary judgment order.

DATED: June 27, 2018 Respectfully submitted,

BAUTE CROCHETIERE & HARTLEY LLP

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

/s/ Scott J. Street

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I certify that the total word count of the BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES, AND PUBLIC JUSTICE IN SUPPORT OF APPELLANTS, excluding covers, certificates of interested parties or entities, table of contents, table of authorities, and certificate of compliance is 6,926.

DATED: June 27, 2018

Respectfully submitted,

BAUTE CROCHETIERE & HARTLEY LLP

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

/s/ Scott J. Street

SCOTT J. STREET
Attorneys for *Amici Curiae*
ACLU OF SOUTHERN CALIFORNIA and PUBLIC JUSTICE, et al.

CERTIFICATE OF SERVICE

S.R. NEHAD, et al. vs. NEAL N. BROWDER, et al.
Case No. 18-55035

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 777 S. Figueroa Street, Suite 4900, Los Angeles, CA 90017.

On June 27, 2018, I served true copies of the following document(s) described as: **BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES, AND PUBLIC JUSTICE IN SUPPORT OF APPELLANTS** on the interested parties in this action as follows:

(SEE ATTACHED SERVICE LIST**)**

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on June 27, 2018, at Los Angeles, California.

/s/ Scott J. Street
SCOTT J. STREET

SERVICE LIST

S.R. NEHAD, et al. vs. NEAL N. BROWDER, et al.
Case No. 18-55035

Louis R. Miller
Daniel S. Miller
Mira Hashmall
Sean G. McKissick
MILLER BARONDESS, LLP
1999 Avenue of the Stars, Suite 1000
Los Angeles, CA 90067
Telephone: (310) 552-4400
Facsimile: (310) 552-8400

Attorneys for Appellants S.R. NEHAD, K.R. NEHAD, and ESTATE OF FRIDOON RAWSHAN NEHAD

Brian E. Watkinslants S.R.

Kevin M. Osterberg
HAIGHT BROWN & BONESTEEL LLP
3880 Lemon Street, Suite 410
Riverside, CA 92501
Telephone: (951) 341-8300
Facsimile: (951) 341-8309
E-mail: kosterberg@hbblaw.com

Attorneys for Appellees NEAL N. BROWDER, AND THE CITY OF SAN DIEGO