UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 18-55035

S. R. Nehad, K.R. Nehad, and Estate of Fridoon Rawshan Nehad,

Plaintiffs-Appellants,

٧.

Neal Browder, City of San Diego and Shelley Zimmerman,

Defendants-Appellees.

On Appeal from an Order of the United States District Court For the Southern District of California The Honorable William Q. Hayes, Judge Presiding United States District Court No. 15-cv-01386 WQH(NLS)

BRIEF BY AMICI CURIAE THE CALIFORNIA STATE
ASSOCIATION OF COUNTIES, THE LEAGUE OF
CALIFORNIA CITIES AND THE INTERNATIONAL
MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF
APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Amici curiae,

comprised of 24 city attorneys from all regions of the State.

The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

advancing the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts. Established in 1935, IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters for its more than 2,500 members across the United States and Canada. IMLA has identified this case as one of interest to its members.

STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT

No counsel for any party in this case authored any part of this brief. No party or counsel for any party in this case

contributed money intended to fund preparation or submission of this brief. No person or entity other than amici and their counsel contributed money intended to fund preparation or submission of this brief.

INTRODUCTION

Every day, law enforcement officers face a "dangerous" and complex world." Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992). "Every day of the year, law enforcement officers leave their homes to police, protect, and serve their communities. Unlike most employees in the workforce, peace officers carry firearms because their occupation requires them on occasion to confront people who have no respect either for the officers or for the law." Gonzalez v. City of Anaheim, 747 F.3d 789, 799 (9th Cir. 2014) (Trott, J., dissenting in part and concurring in part). "By asking police to serve and protect us, we citizens agree to comply with their instructions and cooperate with their investigations. Unfortunately, not all of us hold up our end of the bargain. As a result, officers face an ever-present risk that routine police work will suddenly become dangerous." *Mattos v.* Agarano, 661 F.3d 433, 453 (9th Cir. 2011) (en banc) (Kozinski, C.J., concurring in part and dissenting in part). And given the nature of the work, "[p]olice officers are often

forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The situation the officer faced in this case demonstrates these realities, and it is unfortunately not a unique set of circumstances.

The situation is this: An officer responds to a scene

(often times alone and in the dark) and confronts an

approaching suspect holding something the officer believes is

a weapon and the suspect refuses lawful commands to drop

it. Add to the mix, like in this case, that the officer was told

the suspect is armed and has engaged in threatening

behavior. Anyone would feel threatened in this situation.

But the officer, unlike a citizen, cannot run in the other

direction or seek refuge in his car. Hthefa[(aoe)-4(c)8oC to915rcess 672.44(ce)

decisions in fractions of a second. Thankfully, these situations are often resolved without the use of deadly force and without injury to the officer or suspect. Other times, however, officers use deadly force believing the existence of a threat sufficient to warrant deadly force. And sometimes mistakes are made. Like in this case, the officer only learned afterward that the suspect was not actually armed with a knife, as he thought, but was holding a shiny metallic pen. When this occurs, courts are faced with the difficult task of determining whether the use of deadly force violated the Fourth Amendment.

In cases like this one, amici believe it is vitally important for courts—like the district court did in this case

whether the use of deadly force violated the Fourth

Amendment. Otherwise, the analysis can easily slide into an improper hindsight critique of what an officer thought and how an officer reacted. *Graham* expressly forbids this.

Although many courts have explained proscription

of hindsight analysis, the Seventh Circuit recently did so extremely well in *Horton v. Pobjecky*, 883 F.3d 941, 950 (7th Cir. 2018):

[W]e must refuse to view the events through hindsight's distorting lens. [Citation]. We must consider the totality of the circumstances, killed and assaulted in the line of duty. **See** Federal Bureau of Investigation, 2017 Law Enforcement Officers Killed and Assaulted (2018). According to that report, in the last ten years, from 2008-2017, 544,443 law enforcement officers were assaulted while on duty. **Id.** at table 85,

period in 2017—from 25 to 39. Federal Bureau of Investigation, 2018 Law Enforcement Officers Killed (2018). From 2014 to 2017, firearm assaults on officers have steadily increased, resulting in 35.5% more firearm assaults. Id. And assaults in general have increased by 22.9% over this same three-year period. Id.

DISCUSSION

A. Graham
Constitutes The Exclusive Framework For Evaluating
Use Of Force Under The Fourth Amendment, Faithful
Adherence To The Graham Factors Is Critically
Important In SiftUETWgaD9 1 380.95 571.54 Tm[()] TJJ5 4u9c953(s)/Figure 1 and 1 and

Properly applying *Graham* "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Deference is given to the officers on-the-scene decisions and 20/20 hindsight is prohibited. *Id.*

"The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay 'would gravely endanger their lives or the lives of others' [citation] [,] even when, judged with the benefit of hindsight, the officers may have made 'some mistakes.' [Citation]. The Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments.' [Citation]."

City & County of San Francisco, Calif. v. Sheeha licefa Cal781nl..49 Tmld.41/3

Haugen, 543 U.S. 194, 197-198 (2004), "at the moment when the shots were fired." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014); *see also Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."); *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) ("A reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often ... too late to stake safety precautions.' [Citation].").

In recent years, the Ninth Circuit has gone beyond

Graham in its Fourth Amendment jurisprudence adding

additional factors to the reasonableness test. E.g., Mattos v.

Agarano, 661 F.3d 433, 441 (9th Cir. 2011) (en banc) (

(9th Cir. 2010); see Vos v. City of Newport Beach, 892 F.3d 1024, 1033-1034 (9th Cir. 2018). ("[T]he Graham factors are not exclusive. Other relevant factors include the availability

Amendment." *Mendez*, <u>137 S.Ct. at 1546</u> (emphasis added); see Saucier, 533 U.S. at 205 ("Graham sets forth a list of factors relevant to the merits of the constitutional excessive force claim"). Indeed, *Mendez* abrogated the Ninth Circuit's "provocation doctrine" a rule allowing consideration of an officer's separate pre-force Fourth Amendment violation in the reasonable force analysis because "it [was] an unwarranted and illogical expansion of Graham.". Id. at 1548. Thus, this Court's conclusion that "the *Graham* factors are not exclusive", *Vos*, <u>893 F.3d at</u> 1033, is dramatically at odds with *Mendez's* instruction that Graham "sets forth ... [the] exclusive framework for analyzing" Fourth Amendment force claims. *Mendez*, 137 S.Ct. at 1546. *Mendez* accordingly places this Court's prior precedent in question. See Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (panel need not follow prior circuit precedent where subsequent Supreme Court authority "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly

officer's reasonable perception that the suspect was armed

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B. Applying Qualified Immunity To Cases Where An Officer

"[q]ualified immunity '

was holding a knife. However, after employing deadly force, it was learned the suspect was holding a pen. Thus, the officer made a mistake of fact and

This data set out in the brief's introduction regarding the dangers officers face underscores the importance of qualified immunity and allowing officers to make reasonable mistakes. Law enforcement officers make split-second decisions having life and death implications in the field under tense and ever changing circumstances. Qualified immunity recognizes this, and for policy reasons provides officers protection from liability when they make reasonable mistakes. Finding officers immune from liability for employing excessive force based on the mistaken belief that a suspect is armed and threatening furthers this policy. As appellees observe in their brief, qualified immunity provides an "accommodation for reasonable error [] because 'officials should not err always on the side of caution' because they fear being sued." Hunter v. Bryant, 502 U.S. 224, 229 (1991).

CONCLUSION

Given *Mendez*, this Court should hesitate before analyzing the reasonableness of the officer's use of force with factors not articulated in

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure

32(a)(7)(B) and Circuit Rule 29-2(c)(2), I certify that the

Brief by Amici Curiae the California State Association Of

Counties, the League of California Cities and the

International Municipal Lawyers Association in Support of

Appellees is proportionately spaced, has a typeface of 14

points or more and contains 3,550 words.

Dated: August 28, 2018 Daley & Heft, LLP By:

/s/ Lee H. Roistacher

Attorneys for Amici Curiae, the California State Association of Counties, the League of California Cities and the International Municipal Lawyers Association

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