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,

v.

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, the California State Association of Counties (CSAC), the League of California Cities (League), and International Municipal Lawyers Association (IMLA), are non-profit corporations, have no parent corporation and issue no stock.

IDENTITY STATEMENT AND INTEREST OF AMICI

CSAC's membership consists of the 58 California Counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined this case raises issues affecting all counties.

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee,

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.

IMLA is a non-profit organization dedicated to 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. He or she is duty bound to deal with the situation and safeguard the community.

Situations like the one encountered by the officer in this case are undoubtedly dangerous, but what is often lost is that the officer, quite literally, is making life and death

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 – to follow the Supreme Court's directions when analyzing 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 *Graham's* 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, including the pressures of time and duress, and the need to make split-second decisions under intense, dangerous, uncertain, and rapidly changing circumstances. [Citation]. We must recognize that in such circumstances, officers often lack a judge's luxury of calm, deliberate reflection.... [Para.] Judges view facts from afar, long after the gunsmoke cleared, and might take months or longer to decide cases that forced police officers to make split-second decisions in life-or-death situations with limited information. We as judges have minutes, hours, days, weeks, even months to analyze, scrutinize and ponder whether an officer's actions were 'reasonable,' whereas an officer in the line of duty all too frequently has only that split-second to make the crucial decision. The events here unfolded in heart-pounding real time, with lives on the line. [The officer] lacked our luxury of pausing, rewinding, and playing the videos over and over.

Amici also believes it is vitally important in cases like this one for courts to truly understand the dangers of modern police work. The Federal Bureau of Investigation (FBI) publishes an annual report of law enforcement officers

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, https://ucr.fbi.gov/leoka/2017/tables/table-85.xls. This number is staggering considering that over this same ten-year period, an average of 555,700 officers were employed and subject to the report. *Id.* This means that over ten years, about as many officers are assaulted as are employed. Further, of the 544,443 assaulted officers, 22,130 were assaulted with firearms, 9,652 were assaulted with a knife or other bladed weapon, and 80,269 were assaulted with some other "dangerous weapon." *Id.* And during this ten-year period, *496 officers were feloniously killed*. *Id.* Moreover, the trends in this data demonstrate that things are only getting more dangerous for law enforcement. As of July 31, 2018, there has been a 56% increase in the number of officers feloniously killed in 2018 as compared to the same

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. Given The Supreme Court's Admonition That *Graham* Constitutes The Exclusive Framework For Evaluating Use Of Force Under The Fourth Amendment, Faithful Adherence To The *Graham* Factors Is Critically Important In Situations Where An Officer Uses Deadly Force Under The Mistaken But Reasonable Belief That The Suspect Is Holding And Refusing To Drop A Weapon

Graham dictates that courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the "countervailing government interests at stake" to determine whether a use of force was objectively reasonable. *Graham*, 490 U.S. at 396-397; *see also County of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1546 (2017); *Scott v. Harris*, 550 U.S. 372, 383 (2007).

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. Sheehan*, 135 S. Ct. 1765, 1775 (2015). Thus, under *Graham,* the Fourth Amendment is not violated if the officer reasonably believes a suspect poses a threat of injury or death, *Brousseau v.*

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) ("As we have previously explained, '[the *Graham*] factors, however, are not exclusive. Rather, we examine the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.'") (quoting *Bryan v. MacPherson*, 630 F.3d 805, 831

(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 of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officers that the subject of the force used was mentally disturbed.") (citing *Bryan*, 630 F.3d at 831); *Deorle v. Rutherford*, 272 F.3d 1272, 1282–83 (9th Cir. 2001); *see also Hung Lam v. City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017) (including events leading up to use of force in the Fourth Amendment reasonableness analysis).

These additional factors are what appellants and their amici principally rely on to argue triable issues of fact precluded summary judgment in this case. The appropriateness of utilizing factors beyond those articulated in *Graham* is certainly questionable after the Supreme Court's recent pronouncement that *Graham* "sets forth a settled and *exclusive framework* for analyzing whether the force used in making a seizure complies with the Fourth

Amendment." *Mendez*, 137 S.Ct. at 1546 (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*, 893 F.3d at 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

irreconcilable" even where the "issues decided by the higher court [are] not [ ] identical").

Moreover, factoring into the Fourth Amendment reasonableness analysis whether force other than deadly force was available or whether warnings were given is really nothing more than an improper hindsight analysis of the appropriateness an officer's on-the-scene tactical decisions. *See Fisher v. City of San Jose*, 558 F.3d 1069, 1080 (9th Cir. 2009) (en banc) ("a reasonable role for a judicial officer" is not telling a police officer "what tactics are permissible"). Indeed, considering tactical decisions in the Fourth Amendment's reasonableness analysis runs afoul of the Supreme Court's admonition that "'a Fourth Amendment violation [cannot be] based merely on bad tactics that result in a deadly confrontation that could have been avoided.'" *Sheehan*, 135 S.Ct. at 1777 (quoting *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002), *abrogated on other grounds, Mendez*, 137 S.Ct. 1539; *see George v. Morris*, 736 F.3d 829, 839 n. 14 (9th Cir. 2013) (holding that it is irrelevant in a

Fourth Amendment reasonableness analysis whether the officer's conduct leading up to a deadly confrontation was "imprudent, inappropriate, or even reckless"); *Knox v. City of Fresno*, 708 F. Appx. 321, 323 (9th Cir. 2018) (citing *Mendez* for proposition that in an excessive force analysis "[t]he reasonableness of the officer's prior actions and decisions are not to be taken into account").

Under *Graham*, "the Fourth Amendment does not require a police officer to be omniscient, and absolute certainty of harm need not proceed an officer's act of self protection." *Easley v. City of Riverside*, 890 F.3d 851, 857 (9th Cir. 2018) (quotation marks, citations and edits omitted). As such, properly applying *Graham* leads to the conclusion that the Fourth Amendment is not violated when an officer uses deadly force under the reasonable but mistaken belief that the suspect is holding a weapon. *E.g.*, *Rodriguez v. Swartz*, ___F.3d ____, 2018 WL 3733428, at *5 (9th Cir. Aug. 7, 2018) ("[I]f a police officer shot a suspect after the suspect brandished what looked like a gun, the

officer's reasonable perception that the suspect was armed would entitle the officer to qualified immunity—even if the "gun" turned out to be a cell phone.") (citing *Simmonds v. Genesee County*, 682 F.3d 438, 442, 445 (6th Cir. 2012) ("Although 20/20 hindsight now informs us that [suspect] was unarmed at the time" he was "brandishing a silver object" so "all of the information available to the officers *at the time they used force* constituted probable cause that [suspect] 'pose[d] a threat of serious physical harm ....' [Citation]."); *Hammett v. Paulding County*, 875 F.3d 1036, 1051-1152 (11th Cir. 2017) (concluding use of deadly force was reasonable where officer reasonably, but mistakenly, believed suspect was armed and moved aggressively toward the officer); *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 788 (4th Cir. 1998) ("Officer ... acted on the perception that [the suspect] had a knife in his hand. Where an officer is faced with a split-second decision in the context of a volatile atmosphere about how to restrain a suspect who is dangerous, who has been recently—and potentially still is—

armed, and who is coming towards the officer despite officers' commands to halt, we conclude that the officer's decision to fire is not unreasonable."); *see also Sherrod v. Barry*, 856 F.2d 802, 805 (7th Cir. 1988) ("Knowledge of facts and circumstances gained after the fact (that the suspect was unarmed) has no place in the trial court's or jury's proper post-hoc analysis of the reasonableness of the actor's judgment."). The Eleventh Circuit's recent analysis in *Hammett* is instructive:

> The undisputed testimony establishes [the suspect] ... was carrying something and disobeyed an officer's instruction to show his hands. After refusing to show his hands, [he] moved aggressively toward [the officer] and raised his hands rapidly toward [the officer's] face. 'Non-compliance of this sort supports the conclusion that use of deadly force was reasonable.' [Citation]. We acknowledge ... it turned out that [the suspect] was not armed with a deadly weapon. Nevertheless, we must view the situation from the perspective of a reasonable officer in [the officer's] position... [and] [the officer] had probable cause to believe [the suspect] posed a threat of serious physical harm to [the officer].

875 F.3d at 1051-1152

B. Applying Qualified Immunity To Cases Where An Officer Uses Deadly Force Under The Mistaken But Reasonable Belief That A Suspect Is Holding A Weapon Recognizes The Appropriate Balance Between Holding Government Officials Accountable For Irresponsibly Exercising Power And Protecting Them For Liability For Reasonable Behavior

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Law enforcement officers are people, and like all people they can make mistakes. While mistakes by law enforcement officers regarding the use of force can have significant consequences, public policy requires these consequences to be borne by our society because a well functioning society needs law enforcement. Accordingly, "[t]he protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' [Citation]." *Id.* Simply put,

"[q]ualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects 'all but the plainly incompetent ....' [Citation]." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012); *White v. Pauly*, 137 S.Ct. 548, 551 (2017) (per curium). What this means is that qualified immunity protects an officer from liability under the Fourth Amendment if the unreasonable use of force resulted from a reasonable mistake. *Pearson*, 555 U.S. at 231; *see Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) ("To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials.").

The suspect in this case was advancing on the officer in the dark in an alley while holding a shiny metallic object in his hand waist or chest high, and he ignored commands to stop and drop it. The officer had previously been told the suspect had threatened someone with a knife. Given what the officer had been told and what he observed, it was objectively reasonable for the officer to believe the suspect

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 came to a mistaken judgment; that is, the officer was factually mistaken about what the suspect had in his hand and mistakenly judged the threat the suspect posed.

Under the facts here, the officer's mistakes were reasonable and he most certainly was not "plainly incompetent." *Pearson*, 555 U.S. at 231; *White*, 137 S.Ct. at 551; *see Lamont v. New Jersey*, 637 F.3d 177, 183 (3d Cir.2011) ("[A]n officer who uses deadly force in the mistaken belief that a suspect is armed will be forgiven so long as the mistake is reasonable"); *Anderson v. Russell*, 247 F.3d 125, 132 (4th Cir. 2001) (holding that the officer was immune from liability because "split second decision to use deadly force … was reasonable in light of [officer's] well-founded, though mistaken, belief that [suspect] was reaching for a handgun.").

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 *Graham*. Proper application of *Graham* compels the conclusion that the district court correctly found no Fourth Amendment violation. And even assuming questions of facts prevent such a conclusion, there is no question that the officer's belief that deadly force was necessary was based on a reasonable mistake entitling him to qualified immunity.

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

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

CERTIFICATE OF SERVICE

Re: *S.R. Nehad, et al. v. Neal Browder, et al.*
United States District Court of Appeals for the Ninth Circuit No. 18-55035
USDC Case No. 15-cv-01386 WQH(NLS)

I hereby certify that I electronically filed the foregoing:

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

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on August 28, 2018.

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