IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 16-15175

ESTATE OF ANDY LOPEZ, by and through successors in interest, Rodrigo Lopez and Sujay Cruz, et al.,

Plaintiffs-Appellees

v.

ERICK GELHAUS and COUNTY OF SONOMA, et al.

Defendants-Appellants.

On Appeal from the United States District Court
For the Northern District of California

No. 4:13-CV-05124-PJH
The Honorable Phyllis J. Hamilton, Chief District Judge

AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

JENNIFER B. HENNING, SBN 193915
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814
jhenning@counties.org

Attorney for Amici Curiae
California State Association of Counties and
International Municipal Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. CORPORATE DISCLOSURE STATEMENT 1

II. AMICUS IDENTITY STATEMENT AND INTEREST IN THE CASE. 1

III. STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT 2

IV. STATEMENT CONCERNING CONSENT TO FILE 2

VI. INTRODUCTION 3

VII. ARGUMENT 7

A. This Court Should Grant Rehearing *En Banc* Because the Panel Opinion's Decision Conflicts with Decisions of the Supreme Court, this Circuit, and Five Other Circuits 7

B. This Court Should Grant Rehearing En Banc to Reconcile the Discrepancies between the Panel Opinion's Analysis on the Clearly Established Law Prong of the Qualified Immunity Analysis 13

1. The Panel Misapplied and Radically Expanded the Scope of what was Clearly Established at the time of the Incident 14

C. This Court Should Grant Rehearing En Banc Because This Case Raises Questions of Exceptional Importance 17

VIII. CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

TABLE OF AUTHORITIES

Cases

Anderson v. Creighton, 483 U. S. 635 (1987) 11, 14

Bell v. City of E. Cleveland, 1997 U.S. App. LEXIS 28738
(6th Cir. Oct. 14, 1997) 7, 8

Berube v. Conley, 506 F.3d 79 (1st Cir. 2007).. 10, 11

City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) 4

Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991)......................... 16

Daugherty v. Campbell, 935 F.2d 780 (6th Cir. 1991).................................. 16

Dooley v. Tharp, 856 F.3d 1177 (8th Cir. 2017)... 8, 9

Estate of Lopez v. Gelhaus, 871 F.3d 998 (9th Cir. 2017) .... passim

George v. Morris, 736 F.3d 829 (9th Cir. 2013) 16

Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997) 16

Hill v. Carroll County, Miss., 587 F.3d 230 (5th Cir. 2009)........................ 17

Hope v. Pelzer, 536 U.S. 730 (2002).. 15

Hughes v. City of N. Olmsted, 93 F.3d 238, 241 (6th Cir. 1999) 16

Loch v. City of Litchfield, 689 F.3d 961 (8th Cir. 2012) 9

Malley v. Briggs, 475 U.S. 335, 343 (1986)... 10

Mattos v. Agarano, 661 F.3d 433 (9th Cir. 2011) 15

Njang v. Montgomery County, 279 Fed. Appx. 209
(4th Cir. May 14, 2008).. 11, 12

Penley v. Eslinger, 605 F.3d 843 (11th Cir. 2010) 9, 10

Sonnleitner v. York, 304 F.3d 704 (7th Cir. 2002) 17

Sorrels v. McKee, 290 F.3d 965, 969 (9th Cir. 2002) 16

Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999) 13

White v. Pauley, 137 S. Ct. 548 (2017) .... passim

Workman v. Jordan, 32 F.3d 475 (10th Cir. 1994) 17

Articles

John Wilkens, *Police embrace 'de-escalation' to reduce shootings, but some officers remain skeptical*, Oct. 1, 2016, L.A. Times 18

Mitch Smith, *Chicago Police Adopt New Limits on Use of Force*, N.Y. Times, May 17, 2017 19

Tricia Naldony, *Fatal police shooting of Temple student highlights deadly force debate*, Philadelphia Inquirer, Oct. 10, 2017 19

I. CORPORATE DISCLOSURE STATEMENT [F.R.A.P., Rule 29(b), 20(a)(4)(A), 26.1]

Amici Curiae California State Association of Counties ("CSAC") and International Municipal Lawyers Association ("IMLA") are both non-profit corporations. Neither CSAC nor IMLA has a parent corporation or any publicly held corporation that owns 10% or more of its stock.

II. AMICUS IDENTITY STATEMENT AND INTEREST IN THE CASE [F.R.A.P. Rule 29(b), 29(a)(4)(D)]

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

IMLA is a non-profit organization dedicated to advancing the interests and education of local government lawyers. Based in the Washington D.C. area, IMLA offers more than 2,500 members across the United States and Canada continuing legal education courses, research services, membership in substantive law sections, and litigation assistance in the form of amicus briefs.

CSAC and IMLA are interested in this case because the issues presented have a profound impact on all California counties, government agencies across this Circuit, and many of their employees and citizens. The issues presented for review and resolution by this Court go directly to the prevalent issue of public safety and the safety of law enforcement, particularly as related to the qualified immunity of county employees statewide and throughout this Circuit.

III. STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT [F.R.A.P. Rule 29(b), 29 (a)(4)(E)]

No party's counsel authored this amicus brief in whole or in part. No party or party's counsel contributed money intended to fund preparation or submission of this amicus brief. No one other than amici and their counsel contributed money intended to fund preparation or submission of this amicus brief.

IV. STATEMENT CONCERNING CONSENT TO FILE [Circuit Rule 29-2(a), 29-3]

All parties have consented to the filing of this brief.

V. STATEMENT OF FACTS

Amici join in and refer to Appellants' Statement of Facts found in Appellants' Petition for Panel Rehearing and Rehearing En Banc brief ("Appellants' Brief" at 5-6).

VI. INTRODUCTION

Like the parties and the panel in this matter, Amici agree that the facts of this case are heartbreaking. This tragedy, however, does not rationalize the panel's decision, which essentially eviscerates law enforcement's objective and reasonable perspective when facing an apparent threat posed by a suspect with a weapon. On September 22, 2017, a split panel of this Court ruled that Deputy Gelhaus was not entitled to qualified immunity because legal precedent clearly established that the use of deadly force under the circumstances was not only a triable issue of fact, but also objectively unreasonable. The panel held that qualified immunity did not apply and the conduct of Deputy Gelhaus violated the Fourth Amendment's right to be free from excessive use of force.

The panel's misapplication and misinterpretation of the Fourth Amendment's qualified immunity analysis not only lacks legal support, but also contradicts decisions of the Supreme Court, this Circuit, and at least five other circuits (the First, Fourth, Sixth, Eight, and Eleventh). This decision has profound and far-sweeping implications for public safety, government agencies, and law enforcement in this Circuit, and should therefore be reviewed by this Court en banc.

The panel's holding effectively requires that officers must delay their use of deadly force until a suspect turns his/her weapon on them to the point that the officers or others are at risk of being harmed, even if a suspect manipulates and/or begins to manipulate his/her weapon in any way. To be clear, the panel determined that an officer is not entitled to qualified immunity when using deadly force until a weapon rises to a position that poses a threat to an officer. *See Estate of Lopez v. Gelhaus* ("*Lopez*"), 871 F.3d 998, 1020 (9th Cir. 2017). Moreover, the panel's decision also invalidates this Circuit's recognition that a *plaintiff* (and to a certain extent, the district court at the summary judgment phase) bears the burden of showing that the right at issue was "clearly established" under the second prong of the Fourth Amendment qualified immunity analysis. Here, the panel not only took it upon itself to carry that burden after the plaintiff failed to do so, but also applied three cases whose facts and holdings are inapposite to the instant case.

Finally, inconsistent with the recent United States Supreme Court decisions of *White v. Pauley*, 137 S. Ct. 548 (2017) and *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), decisions from this Circuit, and decisions from several other circuits, the panel expanded the scope of what is considered unreasonable conduct and improperly altered the

analysis of what is clearly established law. These actions by the panel resulted in a holding that advocates law enforcement bear unmanageable risks and exercise indecision when determining whether and/or if to use deadly force in similar circumstances when a suspect possesses a weapon that he/she manipulates. The panel's opinion now requires that an officer wait until the point that the weapon poses an actual danger of immediate harm to the officer or others before using deadly force. In short, the panel decision's replaces an officer's objective and reasonable perspective with an analysis of the court that is guided by second-guessing and hindsight, precisely what the Supreme Court has admonished courts not to do.

Accordingly, Amici respectfully ask that this Court grant Appellants' request and rehear this matter en banc for the following reasons:

(1) The analytical methods the panel's opinion employs are in conflict with those prescribed by the Supreme Court, the Ninth Circuit, and other circuits. Specifically, the panel, counter to Supreme Court and this Circuit's precedent, disregards the novel circumstances of the case and instead, sua sponte, surmises and completes the clearly established law argument (that both the plaintiffs and district court failed to do) in finding that the Appellants are not entitled to qualified immunity. In doing so, the panel also misapplied the three cases it cited in support of its proposition.

(2) In effectively holding that the use of deadly force by an officer is not objectively reasonable such that the officer is entitled to qualified immunity (even when a suspect manipulates his/her weapon) until the weapon reaches the point in which it can pose actual danger of immediate harm to an officer, the opinion conflicts with decisions of the Supreme Court, this Circuit, and several other circuits.

(3) The panel's decision raises questions of critical importance and has far-reaching consequences for both public safety and law enforcement in this Circuit. For this reason and many others, other circuits and the Supreme Court have treaded carefully when denying an officer qualified immunity under the Fourth Amendment, especially because qualified immunity is important to "society as a whole" and protects "all but the plainly incompetent or those who knowingly violate the law." *See White*, 137 S. Ct. at 551 (citations omitted).

Because of the importance of this case to public safety, law enforcement, government agencies, and to the vigorous national debate surrounding the use of force by law enforcement, Amici respectfully request that this Court grant Appellants' request to rehear this case en banc.

VII. ARGUMENT

A. This Court Should Grant Rehearing *En Banc* Because the Panel Opinion's Decision Conflicts with Decisions of the Supreme Court, this Circuit, and Five Other Circuits.

The radical expansion of the qualified immunity analysis is in direct conflict with decisions of the Supreme Court and this Circuit. *See* Appellants' Brief at 7, 10-15; *see also Lopez*, 871 F.3d at 1024, 1028, 1031-32. As discussed below, the panel's decision is also in conflict with decisions from several different circuits.

In *Bell v. City of E. Cleveland*, 1997 U.S. App. LEXIS 28738 (6th Cir. Oct. 14, 1997), the Sixth Circuit addressed a case quite analogous to the instant matter. In *Bell*, the local police department received a report that a 14-year-old boy had been seen carrying a gun. *Id.* at *2-3. An officer pulled up behind the boy and commanded him to drop the gun, get on the ground, and show his hands. *Id.* at *3. Claiming that the boy turned and pointed the gun at him, the officer fired a single shot to the boy's chest and killed him. *Id.* at *3-4. The gun in the boy's possession was a toy BB gun. *Id.* at *4. On appeal of a finding of summary judgment in favor of the officer and city, the plaintiff raised factual issues it believed the district court did not properly consider including the officer changing his story regarding where the officer believed the gun was positioned in the hand of the victim and the

purported number of warnings that were given to drop the gun to the boy. *Id.* at *10-11. The plaintiff also asserted that the boy was likely trying to surrender when he turned around. *Id.* at *10.

Recognizing these arguments, the Sixth Circuit nonetheless agreed with the district court and found that the officer was entitled to qualified immunity. *Id.* at *11. The court noted that the intent of the victim is irrelevant for purposes of a qualified immunity analysis because what is dispositive is the appearance by and the perspective of the officer under the circumstances. *Id.* at *9-10. The court found that the factual inaccuracies were not enough to overcome qualified immunity because the disputed facts were not material enough "that a reasonable jury could find for the party contesting the summary judgment motion." *Id.* at *11.

In *Dooley*, the Eighth Circuit considered a factual situation where the victim was dressed in a military uniform, carrying a pellet gun, and making rude gestures to passing vehicles as he walked along a roadway. *See Dooley v. Tharp*, 856 F.3d 1177, 1179-80 (8th Cir. 2017). When the officer screamed a command to the victim to drop the gun, the victim spun around, raised his rifle, and pointed it such that the officer reasonably believed that he was at risk of serious harm when he shot the victim. *Id.* Even though video evidence appeared to contradict parts of the officer's story, the Eighth

Circuit affirmed summary judgment for the officer, reasoning the officer's "mistaken-perception action for objective reasonableness." *Id.* at 1182-83 (also noting that "law enforcement officers are not afforded the opportunity of viewing in slow motion what appears to them to constitute life-threatening action.").[1]

In *Penley v. Eslinger*, 605 F.3d 843, 846-47 (11th Cir. 2010), the Eleventh Circuit examined a case where a fifteen year old boy modified a plastic air pistol to look like a real weapon, brought it to school, briefly held a classmate hostage (before the classmate escaped), and the boy ultimately went into a bathroom. While one officer was negotiating with the boy, another officer ultimately shot and killed him. *Id.* Despite factual inaccuracies by the officer involved in the shooting, the Eleventh Circuit found that the officer was entitled to qualified immunity, observing that "[plaintiffs] have asked us to question with 20/20 hindsight vision the field decision of a twenty-year veteran of the police force. The relevant inquiry remains whether Lieutenant Weippert had probable cause to believe that [the boy] posed a threat of serious physical harm." *Id.* at 854. The court

[1] *See also Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012) (officer had a reasonable belief that the victim had a gun on his person (even though the victim had thrown the gun in the snow) and thus the officer was entitled to qualified immunity even after shooting the victim eight times after the victim turned and moved towards the officer).

ultimately found that it was objectively reasonable to believe that the boy appeared to be "gravely dangerous" to the officer under the circumstances, and therefore, the officer was entitled to qualified immunity. *Id.*

Berube v. Conley, 506 F.3d 79 (1st Cir. 2007), is also on point. In that matter, a victim was shot by police officers within two distinct timeframes of the same incident. *Id.* at 81-82. The first officer shot the victim in back of a police station upon encountering the victim after she heard some loud noises and saw that the victim had a shiny object in his hand. *Id.* at 81. After shooting the victim, two additional officers arrived on the scene and requested that the victim stop moving and show his hands. *Id.* at 82. When the victim continued to roll over on the ground towards the two new officers at the scene, they noticed a metal object in his hands. *Id.* After the victim continued roll over towards the two new officers and not show his hands, the officers fired at the victim until he stopped moving. *Id.*

The district court denied summary judgment, but the First Circuit reversed and remanded for entry of judgment for the defendant officers. *Id.* at 86. Recognizing that qualified immunity protects "mistaken judgments" (citing *Malley v. Briggs*, 475 U.S. 335, 343 (1986)), the court reasoned that all three officers were entitled to qualified immunity because "[f]aced with the necessity of making a split-second judgment on a rainy night about how

to neutralize the threat they perceived from [the victim], the officers' actions cannot be said to have been 'plainly incompetent.'"). *Id.* at 85 (citing *Anderson v. Creighton*, 483 U. S. 635, 638-39 (1987)).

Finally, the Fourth Circuit Court of Appeal's decision in *Njang v. Montgomery County*, 279 Fed. Appx. 209 (4th Cir. May 14, 2008) is instructive. In *Njang*, an officer on patrol noticed a man standing by the first floor window of an apartment complex where the officer knew there had been a string of burglaries around that time. *Id.* at 211. The officer approached the victim and asked him basic questions, including whether he had any identification upon him, in which the victim answered the officer in the negative. *Id.* Following this interaction, the officer attempted, but was ultimately unsuccessful in attempting a pat-down of the individual. *Id.* After the victim spun away from the officer, he took out and held what was ultimately discovered to be a box-cutter with a blade that was *not* exposed. *Id.* at 211-12. At this point, the officer drew her revolver and requested that the individual drop the weapon and get on the ground, both of which he refused to do. *Id.* at 212. The officer had pepper spray on her, but did not attempt to draw out the spray, and instead only drew out her firearm. *Id.* When the officer reached the point when she could no longer back up, and the victim kept approaching her despite her repeated demands, the officer

told the victim she was going to shoot, and ultimately fired one shot into the chest of the victim. *Id.*

The district court granted summary judgment to the officer, finding that she was entitled to qualified immunity. On appeal, the Fourth Circuit agreed, focusing its qualified immunity analysis on what the officer knew at the time of the incident, including her belief that the blade of the box-cutter was exposed. *Id.* at 213-14. Plaintiff's counsel argued that their client was attempting to handover the box-cutter to the officer, and that fact, taken in a light most favorable to the plaintiff, should have been considered by the district court. *Id.* at 214. The Fourth Circuit disagreed, noting that the intent and thought process of the victim is not relevant to a qualified immunity analysis and held that "[b]ecause Officer Marchone reasonably believed that Njang posed a threat of serious injury to her, we conclude that she did not employ excessive force in shooting Njang." *Id.* at 214.

In sum, what has consistently been held and recognized as a reasonable *belief* of danger from the perspective of an officer in order to be entitled to qualified immunity has been transformed by the panel to require officers to actually *be* in danger. Accordingly, this Court should grant a rehearing *en banc* to reconcile this conflict of authority.

B. This Court Should Grant Rehearing En Banc to Reconcile the Discrepancies between the Panel Opinion's Analysis on the Clearly Established Law Prong of the Qualified Immunity Analysis.

While Appellants' Brief identifies several reasons why this Court should rehear this matter en banc[2], the most blatant and telling reason why this Court should grant a rehearing en banc rests with the panel's analysis concerning the second prong of the qualified immunity test: whether the right was clearly established at the time of the incident. As explained by the Supreme Court in *White*, "qualified immunity is important to 'society as a whole,' [] because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.'" 137 S. Ct. at 551-52 (citation omitted) (reversing a decision by the Tenth Circuit where the circuit court "misunderstood" the clearly established analysis by failing to identify a case with similar circumstances that would have put the officer on notice); *see also* Appellants' Brief at 7-8. The Supreme Court has consistently held that clearly established law for purposes of qualified immunity must be "particularized to the facts of the case . . . [otherwise] [p]laintiffs would be able to convert the rule of qualified immunity . . . into a

---

[2] It is also worth noting the panel's decision to re-review and/or settle purported factual disputes that were either resolved by and/or not addressed at the district court level, put the panel's decision beyond the scope of *de novo* review. *See e.g.*, *Lopez*, 871 F.3d 998 (*compare* 1006-1012 *with* 1023-1027); *see also Tolbert v. Page*, 182 F.3d 677, 682-84 (9th Cir. 1999).

rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* at 552 (citing *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987)).

In the present case, the panel both misconstrued and misapplied the "clearly established" analysis because the panel not only improperly completed the legal analysis where both the plaintiffs and district court failed to do so, but the panel also failed to take into account the novel facts of the case and identify an analogous case at the time of the incident where an officer acting under similar circumstances as Deputy Gelhaus was not entitled to qualified immunity under the Fourth Amendment.

1. The Panel Misapplied and Radically Expanded the Scope of what was Clearly Established at the time of the Incident.

Though the panel acknowledges to some degree that the facts of this case are "novel" (*see Lopez*, 871 F.3d at 1017, n.16 ("this Court has [also] acknowledged that qualified immunity may be denied in *novel* circumstances") (citation omitted) (emphasis added)), the panel nonetheless determined that the law was clearly established "beyond debate" such that the Appellants should have been on notice. *Id.* at 1017 (citing *Anderson*, 483 U.S. at 640). In *White*, the Supreme Court noted that "unique" facts "alone should [be] an important indication to the [court] that [the officer's] conduct did not violate a 'clearly established' right." 137 S. Ct. at 552; *see*

also Mattos v. Agarano, 661 F.3d 433, 442 (9th Cir. 2011) (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (holding that qualified immunity may be denied in novel circumstances)).

Here, the panel all but ignored this "important indication" of the novel circumstances present, which, as noted in the Petition for Rehearing, include an officer confronted by an individual refusing a command to drop his weapon, and turning toward the officer with the barrel of the weapon rising. Instead, the panel (despite being under the restrictions of de novo review) completed its own analysis – something that both the plaintiffs and district court failed to do – and determined that the law was clearly established such that Appellants should have been on notice "beyond debate," notwithstanding the novel facts presented in this matter. *See Lopez*, 871 F.3d at 1021.[3] The panel did not – because it could not – explicitly hold that regardless of the novel facts in this matter it is beyond the debate that the law was clearly established at the time of the incident. Rather, the panel cited and analyzed three tangentially related Ninth Circuit cases and jumped to the holding that "there was no room for Gelhaus to have made 'a

[3] It is worth noting that the panel relies on and applies two cases (*Hughes* and *Deorle*) that involved suspects who had mental health issues – facts that are not present in the instant case. *See Lopez*, 871 F.3d at 1017, n.16. Deputy Gelhaus was not expected nor required to accommodate any mental health issues during the incident with Mr. Lopez based on the established facts.

reasonable mistake' as to what the law required." *Id.* The cases cited by the panel, however, leave more room for debate than consensus.

Both the dissent (*id.* at 1027-31) and the Appellants' Brief (at 8-10) thoroughly distinguish the panel's rationale and its reliance on *George v. Morris,* 736 F.3d 829 (9th Cir. 2013), *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), and *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991). What is even more telling, however, is that the panel decided to cite to those three cases when neither the plaintiffs nor the district court did so.

As noted by the dissent in the panel opinion, both the plaintiffs and the district court failed to conduct the requisite analysis to identify precedent that would have put the Appellants on notice that the conduct was unconstitutional. *See Lopez*, 871 F.3d at 1027-28. The dissent emphasized that the plaintiffs did not even cite any of the three cases noted above. *Id.* at 1028. This is critical because the plaintiffs "'bear[] the burden of showing that the right at issue was clearly established under the second prong' of the qualified immunity analysis." *Id.* at 1028 (citing *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002); *see also Hughes v. City of N. Olmsted*, 93 F.3d 238, 241 (6th Cir. 1999) ("Moreover, it is the plaintiff's burden to convince the court that the law was clearly established at the time of the offensive conduct."); *Daugherty v. Campbell*, 935 F.2d 780, 783 (6th Cir. 1991), cert.

denied, 502 U.S. 1060 (same); *Workman v. Jordan*, 32 F.3d 475, 479 (10th Cir. 1994) (holding that the plaintiff must demonstrate "both that the defendant[s'] alleged conduct violated the law and that that law was clearly established when the alleged violation occurred."); *Sonnleitner v. York*, 304 F.3d 704, 716-17 (7th Cir. 2002) ("[plaintiff] bears the burden of establishing the existence of a clearly established constitutional right."); *Hill v. Carroll County, Miss*., 587 F.3d 230, 235 (5th Cir. 2009) (noting that it is the plaintiff's "burden" to show that the law was clearly established at the time of the incident).

This omission by the plaintiffs requires reversal of the district court decision because the plaintiffs failed to meet their burden both at the district court level as well as on appeal before the panel. *See Lopez*, 871 F.3d at 1028. The panel, however, overlooked this omission completely in its analysis, and instead chose to meet the burden on behalf of the plaintiffs, thus exceeding their authority under de novo review and impermissibly allowing this case to go forward. *See e.g.*, *Lopez*, 871 F.3d at 1028, 1031-32. As such, this additional reason warrants review by this Court en banc.

C. This Court Should Grant Rehearing En Banc Because This Case Raises Questions of Exceptional Importance.

The panel's opinion illustrates the Supreme Court's concern with circuit courts rolling back the protections afforded by qualified immunity.

See White, 137 S. Ct. at 551. As noted by the Supreme Court in *White*, the perils of unnecessarily and impermissibly denying qualified immunity result in an officer wrongly being on trial. *Id.* The panel's opinion (as demonstrated above) not only conflicts with case law from across the country, but also creates a new standard for officers that is both untenable and extremely dangerous for law enforcement and the public. *See Lopez*, 871 F.3d at 1020; *see also* Appellants Brief at 9-10.

By casting more doubt and indecision concerning when an officer may use deadly force, the panel's decision creates more tension and offers less resolution to both law enforcement and the public, who in several cities are already attempting to work together to address use of force policies.[4] That is why the panel's decision – which disregards novel facts and creates a new standard for law enforcement – places both law enforcement and the public's safety in jeopardy because the panel's opinion mandates that threats become an actual danger before an officer may use deadly force.

---

[4] *See e.g.*, John Wilkens, *Police embrace 'de-escalation' to reduce shootings, but some officers remain skeptical*, Oct. 1, 2016, L.A. Times, http://www.latimes.com/local/california/la-me-elcajon-tactics-20161001-snap-story.html.

While the debate on use of force from a national perspective stretches from the public and media calling for a review of use of force policies,[5] to officers and victims advocating that officers be allowed to use deadly force to deter motorists who put civilians in peril[6], the courts have traditionally been an impartial and measured voice of reason, whose opinions and analysis add consistency to an emotional situation. Yet if the courts within this Circuit and the nation are in conflict, even more confusion, uncertainty, and inconsistencies shall be brought into an equation that already is highly volatile and passionate for all interested parties. Indeed, for this reason especially, the Supreme Court and circuit courts have regularly and continuously held that an officer is entitled to qualified immunity under similar circumstances as those that are present here. In contrast, the panel opinion summarily dismisses the idea of judicial deference to law enforcement and holds law enforcement to a higher standard. Accordingly, the Court should grant en banc review to put a fair balance back into play, seeking to protect the safety of both the public and law enforcement.

---

[5] *See e.g.*, Mitch Smith, *Chicago Police Adopt New Limits on Use of Force*, N.Y. Times, May 17, 2017, https://www.nytimes.com/2017/05/17/us/chicago-police-force-shooting.html.

[6] *See e.g.*, Tricia Naldony, *Fatal police shooting of Temple student highlights deadly force debate*, Philadelphia Inquirer, Oct. 10, 2017 http://www.philly.com /philly/news/crime/fatal-police-shooting-of-temple-student-highlights-deadly-force-debate-20171010.html.

VIII. CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court grant Appellants' request to rehear this case en banc.

Dated: November 13, 2017 Respectfully submitted,

By: /s/ Jennifer B. Henning

Jennifer B. Henning, SBN 193915

Counsel for Amici Curiae
California State Association of Counties and
International Municipal Lawyers Assoc.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPESTYLE REQUIREMENTS

I certify as follows:

1. The foregoing amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 29-2(c)(2) because it contains 3,808 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. The foregoing amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in font size 14, and font style Times New Roman.

Dated: November 13, 2017 Respectfully submitted,

By: /s/ Jennifer B. Henning

Jennifer B. Henning, SBN 193915

Counsel for Amici Curiae
California State Association of Counties and
International Municipal Lawyers Assoc.