No. 17-1354

In The
Supreme Court of the United States

ERICK GELHAUS,

Petitioner,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS AMICI CURIAE IN SUPPORT OF PETITIONER

JENNIFER B. HENNING
Counsel of Record
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, California 95814
Telephone: (916) 327-7535
jhenning@counties.org

Attorney for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MOTION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Amici curiae International Municipal Lawyers Association and the California State Association of Counties respectfully move for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Counsel for Petitioner has consented to the filing of this brief. However, as of the time this brief was submitted to the printer for preparation, counsel for Respondent had not replied to the request for consent. The parties were notified more than ten days prior to the due date of this brief of the intention to file.

INTERESTS OF THE AMICI CURIAE[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's

[1] This brief was not authored in whole or in part by counsel for any party. No person or entity other than amici curiae made a monetary contribution to this brief's preparation or submission. Counsel for Petitioner has consented to the filing of this brief. However, as of the time this brief was submitted to the printer for preparation, counsel for Respondent had not replied to the request for consent. The parties were notified more than ten days prior to the due date of this brief of the intention to file.

mission is to advance 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.

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.

Amici are interested in this case because the issues presented have a profound impact on local governments and law enforcement officers throughout the country. The issues presented go directly to the prevalent issue of public safety and the safety of law enforcement, particularly as related to an officer's reasonable assessment of a threat to the public or to him or herself and that officer's ability to utilize deadly force in such a situation. Because the Ninth Circuit's decision creates a circuit conflict and puts law enforcement officers in danger, this Court should grant certiorari to harmonize the law and reaffirm the societal importance of qualified immunity.

For these reasons, amici curiae respectfully request that the Court grant leave to file this brief.

April 26, 2018

Respectfully submitted,

JENNIFER B. HENNING
Counsel of Record
CALIFORNIA STATE ASSOCIATION
OF COUNTIES
1100 K Street, Suite 101
Sacramento, California 95814
Telephone: (916) 327-7535
jhenning@counties.org

Attorney for Amici Curiae

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AMICI CURIAE SUBMIT THIS BRIEF IN SUPPORT OF PETITIONER

The California State Association of Counties ("CSAC") and the League of California Cities ("League") respectfully submit this brief as amici curiae in support of Petitioner.

Counsel for Petitioner has consented to the filing of this brief. However, as of the time this brief was submitted to the printer for preparation, counsel for Respondent had not replied to the request for consent. The parties were notified more than ten days prior to the due date of this brief of the intention to file.

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For these reasons, amici curiae respectfully request that the Court grant leave to file this brief.

STATEMENT OF THE CASE

Amici join in and refer to Appellants' Statement of Facts found in Petitioner's Petition for Writ of Certiorari ("Writ Petition" at 3-11).

SUMMARY OF THE ARGUMENTS

Like the parties and the Ninth Circuit in this matter, Amici agree that the facts of this case are heartbreaking. This tragedy, however, does not rationalize the lower court's decision, which eviscerates law enforcement's objective and reasonable perspective when facing a threat posed by a suspect with a deadly weapon. In *Kisela v. Hughes*, No. 17-467, 2018 U.S. LEXIS 2066 (Apr. 2, 2018), this Court issued a per curiam reversal of a denial of qualified immunity. The instant case is equally compelling and warrants this Court's attention. The Ninth Circuit's holding in this case 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 Ninth Circuit 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). The Ninth Circuit's misapplication and misinterpretation of the Fourth Amendment's qualified immunity analysis not only places law enforcement officers in an untenable and dangerous situation, but also directly contradicts decisions of this Court, its own Circuit Court opinions, and at least five other circuits (the First, Fourth, Sixth, Eighth, and Eleventh), underscoring that the law was not clearly established. This decision has profound and far-sweeping implications for public safety, government agencies, and law enforcement.

Finally, just as it did in *Kisela*, inconsistent with this Court's recent decisions of *White v. Pauley*, 137 S. Ct. 548 (2017) and *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), other decisions from the Ninth Circuit, and decisions from several other circuits, the decision expanded the scope of what is considered unreasonable conduct and improperly altered the analysis of what is clearly established law, which warrants summary reversal. These actions by the Ninth Circuit 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 decision 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 Ninth Circuit has replaced an officer's objective and reasonable perspective with an analysis that

is guided by second-guessing and hindsight, precisely what this Court has admonished lower courts not to do.

Accordingly, Amici respectfully ask that this Court grant the Petition for Writ of Certiorari.

ARGUMENT

I. This Court Should Grant the Petition Because the Ninth Circuit's Decision Conflicts with Decisions of this Court and Five Other Circuits.

The radical expansion of the qualified immunity analysis in cases where officers use deadly force to protect themselves or others is in direct conflict with decisions of this Court and is also in conflict with decisions from at least five other circuits. *See* Writ Petition at 17; *see also Lopez*, 871 F.3d at 1024, 1028, 1031-32. For example, in *Bell v. City of E. Cleveland*, No. 96-3801, 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 fourteen 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 similar to those considered by the Ninth Circuit in its analysis that 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 the boy to drop the gun. *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.

Similarly, 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. The court also pointedly noted that "law enforcement officers are not afforded the opportunity of viewing in slow motion what appears to them to constitute life-threatening action." *Id.*[2]

Likewise, 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

[2] *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).

that [the boy] posed a threat of serious physical harm." *Id.* at 854. The court 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), also conflicts with the Ninth Circuit on this issue. In *Berube*, 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 to 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 Ninth Circuit also departed from the Fourth Circuit's decision in *Njang v. Montgomery County*, 279 Fed. Appx. 209 (4th Cir. May 14, 2008), which 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, to which the victim answered the officer in the negative. *Id.* Following this interaction, the officer attempted to pat-down the individual, but was ultimately unsuccessful. *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 hand over 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.

These decisions are in stark contrast to the Ninth Circuit's decision in this case, which concluded that Deputy Gelhaus was not reasonable in his assessment that Andy posed a threat to him because the *panel* found that Andy's turn toward the officer was not "an aggressive gesture" and the gun had not risen to "a position that posed a threat to the officers." *Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1021 (9th Cir. 2017). 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 Ninth Circuit to require officers to actually *be* in danger. Accordingly, this Court

should grant the Petition to reconcile this conflict of authority.

II. The Ninth Circuit Conducted the "Clearly Established" Analysis at Too High a Level of Generality.

The Ninth Circuit's analysis concerning the second prong of the qualified immunity test: whether the right was clearly established at the time of the incident, is particularly troubling in light of this Court's repeated rebukes to the Ninth Circuit regarding that analysis and warrants review by this Court. As explained by this 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). 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 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)). Further, this Court recently reemphasized that "[s]pecificity is especially important in the Fourth Amendment context, where the

Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Kisela*, 2018 U.S. LEXIS 2066, at *6, quoting *Mullenix v. Luna*, 136 S. Ct. 305, 193 (2015) (per curiam).

In the present case, the Ninth Circuit both misconstrued and misapplied the "clearly established" analysis, just as it did in *Kisela v. Hughes*, because the court 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.

Specifically, the opinion acknowledges that the facts of this case are "novel" (*see Lopez*, 871 F.3d at 1017, n.16, citing *Kisela v. Hughes*, 841 F.3d 1081, 1088 (9th Cir. 2016), *rev'd*, No. 17-467, 2018 U.S. LEXIS 2066 (Apr. 2, 2018) ("this Court has [also] acknowledged that qualified immunity may be denied in *novel* circumstances") (emphasis added)), but the panel nonetheless determined that the law was clearly established "beyond debate" such that the officer should have been on notice. *Id.* at 1017 (citing *Anderson*, 483 U.S. at 640). In *White*, this 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.

Here, the Ninth Circuit all but ignored this "important indication" of the novel circumstances present,

which, as noted in the Petition, 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 Ninth Circuit determined that the law was clearly established such that the officer should have been on notice "beyond debate," notwithstanding the novel facts presented in this matter. *See Lopez*, 871 F.3d at 1021.[3] The court 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 majority cited and analyzed three Ninth Circuit cases that bear no relation to the facts of this case and jumped to the holding that "there was no room for Gelhaus to have made 'a 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 Petition (at 20-22) 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). The Ninth Circuit's failure to properly conduct the clearly established analysis in a case with

[3] It is worth noting that the Ninth Circuit 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.

admitted "novel" circumstances warrants this Court's review.

III. The Ninth Circuit's Decision Warrants Summary Reversal in Light of *Kisela v. Hughes*.

Although Amici believe the Petition presents important and recurring questions that warrant resolution on the merits, in light of the Court's intervening decision in *Kisela v. Hughes*, if the Court does not grant certiorari, it should at the very least summarily reverse the decision below. Summary reversal is appropriate because *Kisela* involved analogous facts as those confronted by officer Gelhaus and the panel below drew the same improper inferences from those facts and made the same mistakes regarding the clearly established analysis that this Court rebuffed in *Kisela*.

Further, this Court rejected the Ninth Circuit's reliance on *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997) in *Kisela*, and the panel below similarly relied on *Harris* to assert that the law was clearly established in officer Gelhaus' case, despite the factual differences that do not "pass the straight face test." *See Kisela*, 2018 U.S. LEXIS 2066, at *8. The Ninth Circuit should be afforded the opportunity to review its decision given this Court's intervening authority and that court's continued refusal to adhere to this Court's frequent admonishments regarding qualified immunity.

A. *Kisela v. Hughes* is Factually Analogous to this Case and Summary Reversal is therefore Warranted so that the Ninth Circuit has the Opportunity to Evaluate the Decision in Light of this Court's Intervening Authority.

The factual similarities between *Kisela* and the instant case are striking. Both cases involved tragic facts and difficult choices. Specifically, both involved a situation in which the officer on the scene was confronted with a choice to use deadly force or to risk the life of himself and his fellow officer, in the case of officer Gelhaus, or the life of an innocent bystander, in the case of officer Kisela. Compare Petition, at 3-4, with *Kisela*, 2018 U.S. LEXIS 2066, at *1-2. In either scenario, a police officer's use of deadly force to save his own life or the life of another is objectively reasonable under the Constitution. *See Tennessee v. Garner*, 471 U.S. 1 (1985). That it turned out that the bystander in *Kisela* was the knife-wielding individual's roommate and she was not in fear of her life is just as irrelevant that it turned out that the individual tragically shot and killed by officer Gehlaus was a young teen with a very real looking replica assault rifle.

In both cases, the Ninth Circuit came to its conclusion that the officers violated the Constitution and that qualified immunity should be denied through the use of some creative legal gymnastics without adhering to this Court's qualified immunity precedents. Both panels determined that the record did not support each officer's perception of an immediate threat. *See Lopez*,

871 F.3d at 1009-10; *Kisela v. Hughes*, 862 F.3d 775 (9th Cir. 2017). In *Kisela*, the Ninth Circuit concluded that Hughes "did not raise the knife and did not make any aggressive or threatening actions toward Ms. Chadwick" and therefore a rational jury could find that she "had a constitutional right to walk down her driveway holding a knife without being shot." *Id.* at 785. However, this Court rejected the Ninth Circuit's conclusion that the record did not support Kisela's perception that Hughes posed a threat and instead found that "even assuming a Fourth Amendment violation occurred – a proposition that is not at all evident – on these facts . . . this is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment." *Kisela*, 2018 U.S. LEXIS 2066, at *4.

In this case, the majority similarly attempted to couch the facts in a way so as to cast doubt on the perceived level of threat that Andy posed to the officers. As Judge Wallace explains in his dissent:

> I agree with the majority, therefore, that the precise angle at which Andy pointed the gun is a disputed fact, but as I explain below, that fact is not material to the qualified immunity analysis. *The majority attempts to discount the district court's finding that the gun barrel was beginning to rise*. For instance, in summarizing the facts in the light most favorable to the plaintiffs, the majority says that "[Deputy] Gelhaus deployed deadly force while Andy was merely standing on the sidewalk holding a gun that was pointed down at the ground."

> This description does not characterize fairly the situation that Deputy Gelhaus faced. A gun pointed at the ground and one that is rising are qualitatively different. By casting the latter as the former, the majority goes beyond viewing the facts in the light most favorable to the plaintiffs and ignores a critical fact that must be accepted as true and, as I will explain, bears directly on the question of whether it was clearly established that Deputy Gelhaus's use of deadly force was unreasonable under the circumstances.

See Lopez, 871 F.3d at 1023 (emphasis added).

As it did with *Kisela*, this Court should also reject the Ninth Circuit's mischaracterization of the threat officer Gelhaus faced. Suffice to say, the law the Ninth Circuit has established with this case will lead to extremely dangerous situations for law enforcement officers. As it stands now, if this case is not summarily reversed, police officers in the Ninth Circuit will be required to wait until an assault rifle is actually pointed at them before resorting to deadly force, or else risk Section 1983 liability. This cannot be the law. Given the factual similarities between *Kisela* and this case, as well as each panel's improper conclusion that the officer's perception of the threat was incorrect, summary reversal is warranted.

B. *Kisela v. Hughes* Demonstrates that the Law was not Clearly Established for Officer Gelhaus at the Time He Shot Andy Lopez.

As set forth in the Petition, the Ninth Circuit made additional errors in concluding that its own precedent clearly established that officer Gelhaus used excessive force. In support of its decision that the law was clearly established, the Ninth Circuit cited *George v. Morris*, 736 F.3d 829 (9th Cir. 2013); *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997); and *Curnow By and Through Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991). As this Court recently explained, "even if a controlling circuit precedent could constitute clearly established law in these circumstances, it does not do so here." *Kisela*, 2018 U.S. LEXIS 2066, at *6, quoting *Sheehan*, 135 S. Ct. at 176 (internal quotations omitted).

The Petition ably explains why these cases did not put officer Gelhaus on notice that his conduct would violate the Constitution where he was faced with an immediate threat to his life by the rising assault rifle. In addition to those points made in the Petition, the Court's decision in *Kisela* further illuminates why the *Harris* decision cannot be relied on for the purpose of determining whether the law was clearly established. In *Harris*, the Ninth Circuit determined that an FBI sniper, who was positioned safely away from the plaintiff on a hilltop, violated the plaintiff's Fourth Amendment rights when he shot him in the back while he was retreating to a cabin during a standoff known as "Ruby

Ridge." The differences between *Kisela* and *Harris* apply with equal force to this case. "Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge. . . ." versus the situation confronting officer Gelhaus where a suspect turned toward him, the barrel of an assault rifle was beginning to rise, and his position provided him with no reasonable cover from the deadly weapon. *See Kisela*, 2018 U.S. LEXIS 2066, at *8.

If anything, the differences in the instance case and *Harris* are even more striking than they were for officer Kisela. As Justice Sotomayor points out in her dissent, Hughes was holding the knife "down at her side with the blade facing away from Chadwick," whereas in this case, Lopez was turning toward the officers and it is undisputed that what officer Gelhaus reasonably perceived as an assault rifle barrel was "beginning to rise." *Compare Kisela*, 2018 U.S. LEXIS 2066, *12-13, with *Lopez*, 871 F.3d at 1008.

But the Ninth Circuit did not see it this way. Instead, the Ninth Circuit explained that the proposition from *Harris* that "[l]aw enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed . . . put Gelhaus on notice that his use of deadly force was constitutionally excessive." *Lopez*, 871 F.3d at 1019-1020, citing *Harris* (internal quotations omitted). However, even before this Court decided *Kisela*, the Ninth Circuit should have been on notice "not to define clearly established at a high level of generality." *See Sheehan*, 135 S. Ct. at 1776 (quoting

Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)); *see also Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004). But this Court's decision in *Kisela* tips the scale and the Ninth Circuit should be afforded the opportunity to rectify its failure to heed this Court's repeated admonishments. The dissent understood the majority's error in relying on *Harris* and summarized the issue thusly:

> We, of course, are not dealing with a situation in which Deputy Gelhaus shot Andy merely because he was armed. Knowing that he could not use deadly force just because Andy was holding a gun would not tell Deputy Gelhaus what the Constitution required when Andy, instead of following the command to drop the gun, turned to face Deputy Gelhaus and the barrel of the rifle began to rise. Harris did not address such a circumstance, or even a similar circumstance, and so could not have given Deputy Gelhaus notice one way or the other as to the reasonableness of his actions. It therefore is inapposite to the question we face in this case.

Lopez, 871 F.3d at 1030.

Without this Court's intervention, the safety of every police officer in the Ninth Circuit confronting an armed suspect who starts to point a gun at the officer is in jeopardy because officers will not know at what point deadly force is constitutionally warranted to save a life. Summary reversal is therefore warranted.

IV. This Court Should Grant the Petition Because This Case Raises Questions of Exceptional Importance.

The Ninth Circuit's opinion illustrates this Court's concern with circuit courts rolling back the protections afforded by qualified immunity. *See White*, 137 S. Ct. at 551. As noted in *White*, the perils of unnecessarily and impermissibly denying qualified immunity result in an officer wrongly being on trial. *Id.* The decision here 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.

By casting more doubt and indecision concerning when an officer may use deadly force, the panel's majority 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 opinion – 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.

While the debate on use of force from a national perspective stretches from the public and media

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

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 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 Ninth Circuit summarily dismisses the idea of judicial deference to law enforcement and holds law enforcement to a higher standard. Accordingly, the Court should grant the Petition 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.

CONCLUSION

Amici therefore respectfully request the Court grant the petition for writ of certiorari filed herein.

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Respectfully submitted,

JENNIFER B. HENNING
Counsel of Record
CALIFORNIA STATE ASSOCIATION OF COUNTIES
jhenning@counties.org

Attorney for Amici Curiae