Docket No. 18-17404

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAN LAM, as Successor-in-Interest to decedent
Sonny Lam (aka Son Tung Lam),
Plaintiff-Appellee,

v.

CITY OF LOS BANOS, a Municipal Corporation,
Defendant,

and
JAIRO ACOSTA, Police Officer for
The City of Los Banos,
Defendant-Appellant

Appeal from a Decision of the United States District Court for the Eastern District of California, No. 2:15-cv-00531-MCE-KJN – Honorable Morrison C. England, Jr.

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANT BY THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES

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Under Federal Rule of Appellate Procedure 29, the California State Association of Counties (CSAC) and the League of California Cities (League) respectfully move this Court for leave to file an amicus brief in support of appellant. The proposed brief is submitted with this motion and attached as Exhibit 1.

Before filing this motion, CSAC and the League sought permission from the parties to file an amicus brief but appellee refused. 9th Cir. R. 29-3.

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 identified this case as one of interest to its members.

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.

CSAC, the League, and their counsel are familiar with the issues presented by this case, as well as the broader impact that the decision from this Court could have for future cases. CSAC and the League are interested in this case because the issues presented are of significant importance. In particular, the issues involve application of the Fourth Amendment reasonableness test and qualified immunity to a situation where an officer uses deadly force. As an example, resolution of this case against the appellant will impact how employers of law enforcement officers train officers on the use of deadly force. How the case is resolved by this Court accordingly could have a profound impact on

local governments and law enforcement officers throughout the Ninth Circuit and 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.

CSAC and the League have endeavored not to repeat arguments made by appellees and believe their brief will assist this Court.

Dated: June 14, 2019

Daley & Heft, LLP

By:

/s/ Lee H. Roistacher

Lee H. Roistacher
Attorneys for Amici Curiae, the California State Association of Counties and the League of California Cities

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 Motion for Leave to File Amicus Brief by the California State Association of Counties and the League of California Cities, is proportionately spaced, has a typeface of 14 points or more and contains 409 words.

Dated: June 14, 2019

Daley & Heft, LLP

By:

/s/ Lee H. Roistacher

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

EXHIBIT 1

Docket No. 18-17404

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Appeal from a Decision of the United States District Court for the Eastern District of California, No. 2:15-cv-00531-MCE-KJN – Honorable Morrison C. England, Jr.

BRIEF OF AMICI CURIAE THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CORPORATE DISCLOSURE STATEMENT

Amici curiae, the California State Association of Counties (CSAC) and the League of California Cities (League), 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.

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

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). Statistics bear out these observations.

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 the report, 544,443 law enforcement officers were assaulted while on duty between 2008 and 2017. *Id.* at table 85.[1] This number is staggering

[1] https://ucr.fbi.gov/leoka/2017/tables/resources-

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.*

In this case, Sonny Lam physically attacked his father. City of Los Banos police officer and appellant Jairo Acosta responded to the domestic dispute call. Domestic disputes are inherently dangerous. *See Mattos v. Agarano*, 661 F.3d 433, 450 (9th Cir. 2011) (en banc) ("We take very seriously the danger that domestic disputes pose to law enforcement officers ...."). This call turned out to be no exception. While investigating, Acosta used deadly force to protect himself from Lam. Acosta shot Lam twice in quick succession in a

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narrow hallway after Lam pushed him and stabbed him with a pair of scissors, shooting once initially and once after clearing his jammed gun while retreating down the hallway away from Lam. In post-verdict motions after the jury returned a verdict against Acosta for violating Lam's Fourth Amendment rights, the district court denied Acosta qualified immunity.

Amici believe the district court's qualified immunity analysis was flawed and diminishes the protection qualified immunity provides to law enforcement officers and employers. The district court improperly and artificially transformed Acosta's single use of deadly force into two discrete acts (i.e., the two shots), and examined each shot in isolation to determine whether qualified immunity would protect Acosta from liability.[2]

[2] The district court's order denying Acosta's motion for judgment as a matter of law provided, in relevant part: "[E]ven if the Court could determine that Officer Acosta was entitled to qualified immunity regarding the first gunshot, the jury found with respect to the second shot that Officer Acosta was retreating and was no longer being approached with scissors. There is simply no way given the factual determinations reached by the jury that the Court can determine Officer Acosta is entitled to immunity with regard to the second gunshot. Accordingly, the jury's verdict will

Because "[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 qualified immunity analysis – specifically in determining whether the officer violated the Fourth Amendment – must focus on the officer's initial decision to use deadly force and not on the number of shots fired. To further qualified immunity's purpose, the analysis cannot devolve into an isolated analysis of each shot encompassing a single use of deadly force. The proper question is whether the use of deadly force was reasonable under the totality of circumstances. *See District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) ("The 'totality of the circumstances' requires courts to consider 'the whole picture.' [Citation]. Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."). Any other analysis

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stand." Excerpts of Record, pages 3-4.

might obligate officers to reassess the threat level within a split-second to be afforded qualified immunity's protection. This type of reassessment is directly contrary to Supreme Court precedent, as well as precedent from this Court. *See Plumoff v. Rickard*, 572 U.S. 765, 777 (2014); *Wilkinson v. Torres*, 610 F.3d 546, 552–53 (9th Cir. 2010). It is also bad policy that will undoubtedly increase the risk of death or serious injury to officers, and expose officers and their employers to increasing liabilities. It will also require changing the training employers provide to officers, as officers all over the country are trained that "they need not stop shooting until the threat has ended." *Plumhoff*, 572 U.S. at 777.

OFFICER ACOSTA IS ENTITLED TO QUALIFIED IMMUNITY

"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); *see Morales v. Fry*, 873 F.3d 817, 822 (9th Cir. 2017). "Qualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments.'" *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (citation omitted); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curium). "When properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). It thus protects officers from liability for uses of force falling in the often "hazy border between excessive and acceptable force." *Brosseau v. Haugen*, 542 U.S. 194, 201 (2004) (per curium).

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In determining whether an officer is entitled to qualified immunity, [the Court]

considers (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Jessop v. City of Fresno*, 918 F.3d 1031, 1034 (9th Cir. 2019) (bracketed text in original). As this Court recognizes, the Supreme Court's qualified immunity precedents establish "demanding" and "exacting" standards that a plaintiff must affirmatively overcome. *Wesby*, 138 S. Ct. at 589 (qualified immunity is a "demanding standard"); *Kirkpatrick v. County of Washoe*, 843 F.3d 784, 792 (9th Cir. 2016) (en banc) (recognizing qualified immunity's "exacting standards"); *S. B. v. County of San Diego*, 864 F.3d 1010, 1015, 1017 (9th Cir. 2017) (hearing the Supreme Court "loud and clear" and recognizing qualified immunity's "exacting standards").

A. The Officer's Right To Use Deadly Force When Threatened With a Weapon Allows The Officer To Shoot Until The Officer Is Sure The Threat Is Over

The jury found Lam stabbed Acosta with a pair of scissors. Acosta's use of deadly force in response was accordingly reasonable as a matter of law. *See e.g.*, *Smith v.*

City of Hemet, 394 F.3d 689, 704 (9th Cir. 2005) ("[W]here a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force."); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996) (holding deadly force reasonable where an erratically acting suspect swung a knife at an officer); *see also Hayes v. County of San Diego*, 736 F.3d 1223, 1234 (9th Cir. 2013) ("[T]hreatening an officer with a weapon does justify the use of deadly force.").

Because Acosta's use of deadly force in response to being stabbed was reasonable as a matter of law, the district court erred by examining each shot in isolation to determine whether Acosta's second shot violated the Fourth Amendment, rather than analyzing the "totality of circumstances," creating the need for Acosta's use of deadly force in the first place. *Graham*, 490 U.S. at 397; *see* Wesby, 138 S. Ct. at 588 ("[T]he panel majority viewed each fact 'in isolation, rather than as a factor in the totality of the circumstances.' [Citation.] This was 'mistaken in light of our

precedents.' [Citation]. The 'totality of the circumstances' requires courts to consider 'the whole picture.' [Citation]. Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation. [Citation.] Instead of considering the facts as a whole, the panel majority took them one by one. . . The totality-of-the-circumstances test 'precludes this sort of divide-and-conquer analysis.' [Citation].").

Acosta's use of deadly force was reasonable after he was stabbed, even if Lam did not grab his gun. And his continued use of force was reasonable so long as Lam continued to pose a threat.[3] Indeed, the stabbing, first shot and second shot happened within seconds with no break or pause. In a proper analysis of whether Acosta's use of deadly force was reasonable, the number of shots is not relevant. The relevant question is whether Acosta's decision to use deadly force was reasonable because the suspect posed

[3] Importantly, the jury did not find that Lam no longer posed a threat when Acosta fired the second shot.

a threat to the officer under the totality of the circumstances. The Supreme Court made this clear in *Plumoff:*

> We now consider respondent's contention that, even if the use of deadly force was permissible, petitioners acted unreasonably in firing a total of 15 shots. We reject that argument. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. As petitioners noted below, 'if lethal force is justified, officers are taught to keep shooting until the threat is over.' 509 Fed.Appx., at 392.

572 U.S. at 777[4]; *see Gonzales v. City of Antioch*, 697 F. App'x 900, 902 (9th Cir. 2017) ("The Supreme Court has explained that 'if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.'

[4] The Supreme Court did acknowledge it "would be a different case if [the officers] had initiated a second round of shots after an initial round had clearly incapacitated [the suspect] and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened." *Plumhoff*, 572 U.S. at 777. It is also not what happened in this case, considering that here, the two shots were fired within a matter of seconds and the jury made no finding that the threat had ended.

Although the officers fired 50 to 52 shots at Gonzales, appellants do not present any evidence suggesting the officers continued to fire at Gonzales after they knew he was incapacitated or no longer posed a threat.") (quoting *Plumhoff,* 134 S. Ct. at 2022); *Corrales v. Impastato*, 650 F. App'x 540, 542 (9th Cir. 2016) ("Officer Impastato was also not required to cease firing 'until the threat [Corrales posed] ha[d] ended.' Officer Impastato reasonably believed the threat posed by Corrales had been eliminated only after Corrales was struck by his final bullet and fell to the ground. Officer Impastato's use of force was therefore reasonable.") (quoting *Plumhoff,* 134 S. Ct. at 2022); *see also Church v. Anderson*, 898 F.3d 830, 833 (8th Cir. 2018) ("And because deadly force was justified, [the officer] was not required to warn Church before each shot and was permitted to use force until the threat had ended."); *Shumpert v. City of Tupelo*, 905 F.3d 310, 324 fn. 58 (5th Cir. 2018) ("Even if Officer Cook fired one of the four shots from a distance, the use of deadly force was still justified, as an officer using

deadly force 'need not stop shooting until the threat has ended.' [Citation].").

Even before *Plumoff*, this Court recognized there is no Constitutional requirement that an officer reevaluate the threat between each shot, and the reasonable use of deadly force does not become unreasonable because more than one shot is fired. *Wilkinson*, 610 F.3d at 552–53 ("To the extent that *Cowan* requires an officer to reevaluate whether a deadly threat has been eliminated after each shot, we disagree that it should be applied in the circumstances of this case. Such a requirement places additional risk on the officer not required by the Constitution. Torres did not shoot mindlessly, but responded to the situation by ceasing fire after he perceived that the van had lost power and that the threat had been eliminated. *Cf. Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996) (concluding that the firing of multiple shots 'does not suggest the officers shot mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat'). Because we conclude as a

matter of law that deadly force was authorized to protect a fellow officer from harm, it makes no difference in this case whether Torres fired seven rounds or eleven.").

B. It Is Not Clearly Established That It Violates The Fourth Amendment For An Officer That Has Been Stabbed To Respond With Deadly Force

"While [the Supreme] Court's case law do[es] not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White,* 137 S. Ct. at 551 (quotation marks and citations omitted). The Supreme Court "'has repeatedly told courts ... not to define clearly established law at a high level of generality.'" *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (quoting *Kisela v. Hughes*, 584 U.S. 1148, 1153 (2018)). A proper "clearly established" analysis requires "defin[ing] the law at issue in a concrete, particularized manner." *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017); *see Emmons v. City of Escondido*, 921 F.3d 1172, 1174 (9th Cir. 2019) ("In this context, 'clearly established' means

that, 'at the time of the officer's conduct, the law was 'sufficiently clear that every reasonable official would understand that what he is doing' is unlawful.') (quoting *Wesby*, 138 S. Ct. at 589).

"[S]pecificity is especially important in the Fourth Amendment context" because "[u]se of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1152 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)); *City of Escondido*, 139 S. Ct. at 503; *see e.g., Emmons*, 921 F.3d at 1175 ("Given the Court's admonition, we are unable to find a case so precisely on point with this one as to satisfy the Court's demand for specificity. Officer Craig is therefore entitled to qualified immunity.").

The jury found Acosta's use of force violated the Fourth Amendment and made four specific factual findings: (1) Lam stabbed Acosta with a pair of scissors; (2) Lam did not grab

Acosta's gun before the first shot; (3) Acosta retreated from Lam after firing the first shot; and (4) Lam did not approach Acosta with scissors before the second shot. As set forth in Acosta's opening brief, at pages 28-30, the latter two findings are not supported by substantial evidence, and in fact, the physical evidence establishes the opposite. Regardless, Acosta is still entitled to qualified immunity under the totality of circumstances due to the absence of clearly established law.

No case has held an officer violates the Fourth Amendment by using deadly force in response to being stabbed simply because the suspect did not grab the officer's gun. Nor has any case held that an officer violates the Fourth Amendment by firing more than one shot within seconds of being stabbed. *See Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1039 (9th Cir. 2018) (Critically, Reese points to no case that considered the relevant question whether Deputy Rose, having come within striking distance of a suspect who had held a knife a fraction of a second before,

was objectively unreasonable in using deadly force before determining whether the suspect still possessed the knife.").

It is difficult to image that *all reasonable officers* in Acosta's position would know using deadly force in the specific circumstances Acosta faced was unconstitutional. *Wesby*, 138 S. Ct. at 589-90; *see Mullenix*, 136 S. Ct. at 308 ("A clearly established right is one that is 'sufficiently clear that *every reasonable official* would have understood that what he is doing violates that right.' [Citation].") (emphasis added); *Thompson v. Rahr*, 885 F.3d 582, 587 (9th Cir. 2018) ("For a right to be 'clearly established,' existing 'precedent must have placed the statutory or constitutional question beyond debate,' such that *'every' reasonable official, not just 'a' reasonable official*, would have understood that he was violating a clearly established right.") (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added). Indeed, amici are unaware of any case finding it unconstitutional for an officer to use deadly force after being stabbed. *See Kramer v. Cullinan*, 878 F.3d 1156, 1163 (9th Cir. 2018) ("So

long as existing case law 'did not preclude' an official from reasonably believing that his or her conduct was lawful, the official has a right to qualified immunity. [Citation]."). At the very least, Acosta's use of deadly force falls within "the hazy border between excessive and acceptable force." *Brosseau*, 543 U.S. at 201.

CONCLUSION

To properly give law enforcement officers the protection qualified immunity is designed to provide, this Court should find Acosta entitled to qualified immunity and reverse the judgment against Acosta. In doing so, this Court can articulate to lower courts that it is inappropriate in determining whether the use of deadly force was reasonable to divide and analyze the single use of deadly force into multiple uses of deadly force where more than one shot is

fired. Courts are required to analyze the use of force under the totality of the circumstances.

Dated: June 14, 2019

Daley & Heft, LLP

By:

/s/ Lee H. Roistacher

Lee H. Roistacher
Attorneys for Amici Curiae, the California State Association of Counties and the League of California Cities

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 of Amici Curiae by the California State Association of Counties and the League of California Cities in Support of Appellant is proportionately spaced, has a typeface of 14 points or more and contains 3,357 words.

Dated: June 14, 2019

Daley & Heft, LLP

By:

/s/ Lee H. Roistacher

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

CERTIFICATE OF SERVICE

Re: *Tan Lam, et al. v. City of Los Banos, et al.*
United States Court of Appeals for the Ninth Circuit No. 18-17404
USDC Case No. 2:15-cv-00531-MCE-KJN

I, Maria E. Kilcrease, certify and declare as follows:

1. I am over the age of 18 years and not a party to this action.

2. I caused to be served the following document(s) via CM/ECF:

BRIEF OF AMICI CURIAE THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANT

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I declare under the penalty of perjury that the foregoing is true and correct. Executed on June 14, 2019 in Solana Beach, California.

/s/ Maria E. Kilcrease
Maria E. Kilcrease