UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 21-55994, 21-55995

ESTATE OF DANIEL HERNANDEZ, *et al.*,

Plaintiffs–Appellants,

v.

CITY OF LOS ANGELES, *et al.*,

Defendants–Appellees

On Appeal from the United States District Court
for the Central District of California
No. 20-cv-04477-SB-KS/No. 20-cv-05154-DMG-KS
Honorable Judge Stanley Blumenfeld, Jr.

BRIEF AMICUS CURIAE OF THE NATIONAL POLICE ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The National Police Association (NPA) is a nonprofit § 501(c)(3) corporation formed under the laws of Indiana. NPA does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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The National Police Association and its Interest

The National Police Association ("NPA") is an Indiana nonprofit corporation with a core mission to maintain the authority and discretion of law enforcement officers to respond lawfully to violent offenders and defend themselves. The NPA is not seeking to present any private interest of its own but to present its position as to the correct rules of law to be applied in cases involving police use of deadly force, including the question of qualified immunity protecting officer decision making.

In this case, the NPA seeks to support and defend the discretion of police officers to respond to the difficult and often life-threatening circumstances to which they are exposed in their line of duty, because rules of immunity and civil liability that do not provide sufficient deference to police decision making threaten not only the interests of law enforcement officials, but the rule of law itself. The growing complexity of constitutional rights for criminals created by the federal judiciary, which are imagined to attach in the midst of life-threatening criminal attacks, threatens to paralyze police response to the most dangerous criminals threatening public order.

Rule 29(a)(4)(E) & Circuit Rule 29-2(a) Statement

No party's counsel authored this brief in whole or in part, or contributed any monies intended to fund preparing or submitting this brief. Pursuant to Circuit Rule 29-2(a), no motion is required to file this brief because all parties have consented to its filing.

Summary of Argument

Giving effect to the original language adopted by Congress in the Civil Rights Act of 1871 (17 Stat. 13), does not destroy qualified immunity under § 1983 when compared to the present text of 42 U.S.C. § 1983. The omitted language, stating that liability attaches "any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding" is not a broad reference to common law immunities. It is a very specific reference back to the first portion of the statute referring to officials violating constitutional rights "under color of any statute, ordinance, regulation, custom or usage of any State". It says defendants may be held liable notwithstanding the laws they purport to be enforcing and says no more. The United States Supreme Court was well aware of the original statutory language in carrying forward common law official immunities, and this Court can easily reject Appellants' contentions that Professor Reinert's recent article is cause for any change in qualified immunity law.

That law supports upholding the trial court's holding both with respect to the reasonableness of Officer McBride's use of deadly force, and its alternative holding that qualified immunity was in any event available. The facts of this case, involving an officer confronted with an armed attacker and firing six shots in six seconds in a nine-second encounter to eliminate the threat, illustrate the complexity and difficulty of officer decision making. Sound science and policy support deference to both an officer's assessment of threats and the degree of force required to respond to them. Complex and evolving constitutional rules limiting the use of deadly force must take account of these realities.

The panel opinion's attempt to parse the encounter between Hernandez and Officer McBride shot by shot, concluding that "a reasonable jury could find that the force employed by McBride [in firing her fifth and sixth shots] at Hernandez was excessive" (slip op at 5), fails to take account of these complexities, and fails to accord adequate deference to the officer's decision making.

Rather, this Court should accept Justice Holmes's famous aphorism that "[d]etached reflection cannot be demanded in the presence of an uplifted knife". *Brown v. United States*, 256 U.S. 335, 343, 41 S. Ct. 501, 502 (1921). This Court arguably did just that in *Zion v. Cty. of Orange*, 874 F.3d 1072, 1077 (9th Cir. 2017), finding a constitutional right to be free from deadly force despite events

happening so fast that the officer had no time for "reflection" in the midst of a volley of shots (*id.* at 1077). This case is easily distinguished from *Zion*, and this case provides an opportunity for this Court to build upon the idea in *Zion* that a use of force not tethered to the immediate law enforcement purpose—in *Zion*, stomping on the head of the criminal after a short pause—is where a constitutional right should be invoked.

Finally, even were this Court to establish a constitutional right to a shot-by-shot reconsideration of a criminal attacker's status in a context where the entire officer encounter is over in a matter of seconds—and it should not—that right has not heretofore been "clearly established". This Court should decline to invoking constitutional rights in the midst of an armed attack by criminals when officers have no time to review in their minds the latest precedents specifying the use of deadly force. Rather, protection of rights should come from appropriate judicial scrutiny as to whether circumstances may permit a trial of fact to find something other than law enforcement going on—*i.e.,* a bad faith purpose to harm the individual for reasons other than maintaining public order—and provide more clearly established rules for qualified immunity.

Argument

I. APPELLANTS' HISTORICAL ATTACK ON QUALIFIED IMMUNITY SHOULD BE REJECTED.

Qualified immunity for police officers for liability for damages under § 1983 is a doctrine that with an existence quite apart from the language of statutes under which plaintiffs may seek to hold the officers liable. Two pillars support it. First, the Supreme Court has repeatedly involved the common law, a body of law in existence long before the 1871 Civil Rights Act, ancestor to § 1983, to justify this immunity. *See, e.g.*, *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). The second pillar supporting qualified immunity is a policy-based approach to statutory interpretation, through which Supreme Court has attempted to achieve a "balance between vindication of constitutional rights and government officials' effective performance of their duties". *Reichle v. Howards*, 566 U.S. 658, 664 (2012).[1]

A. The Recent Scholarship Cited by Appellants Provides No Reason to Disturb Longstanding Immunity Doctrines.

The Supreme Court's numerous qualified immunity precedents do not permit this Court to accept Appellants' invitation to set aside the entire concept of

[1] Policy preferences are commonly invoked when courts consider adding common law overlays to federal statutes. *See, e.g.*, *United States v. Gilman*, 347 U.S. 507, 511-12 (1954) (refusing to import common law indemnification rules into the Federal Tort Claims Act because of the policy implications).

qualified immunity as a mistake arising from a scrivener's error, as asserted in the law review article cited by the *Hernandez* appellants: A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023). Adding back the disputed language (in bold) from § 1 of the 1871 Act, § 1983 provides that:

> "Every person who, under color of *any statute, ordinance, regulation, custom, or usage of any State*, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, ***any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding***, be liable to the party injured in any action at law . . ."

42 U.S.C. § 1983 (emphasis added); 17 Stat. 13 (1871).

Professor Reinert in substance asserts that the bolded language means something entirely different than what it says, reading out the word "such" to make the language is all-inclusive—"any . . . law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding". 17 Stat. 13 (1871) (emphasis added). But the "any *such*" language manifestly refers to the first italicized sentence above with the same string of "statute, ordinance, regulation, custom, or usage" invoked to injure the plaintiff.

Simply put, the statute provides that an official acting under color of a law (or other authority) may be liable notwithstanding any colorable authorization from *that statute* (or other authority). The legislative history confirms this

interpretation. *See Congressional Globe*, 42nd Cong., 1st Sess. 416 (April 3, 1871) (Rep. Biggs describes section as providing "a civil remedy is to be by proceedings in the federal courts, State authorization in the premises notwithstanding"). The Reconstruction Congress' decision to provide federal jurisdiction refutes Professor Reinert's argument that it had any focus on misinterpretation of the common law by state court judges.

Another problem with Professor Reinert's interpretation is that common law is not straightforwardly described as law "of the State," but law common to all States. It is awkward and unreasonable to infer an intent to extinguish common law defenses by reference to laws "of the state". It is especially awkward because Congress drew an express distinction in the early federal civil rights laws between "common law" and law of the State.

In § 3 of the Federal Civil Rights Act of 1866, 14 Stat. 27, now 42 U.S.C. § 1988(a), Congress specified a continuing role for "the common law, as modified and changed by the constitution and statutes of the State" (42 U.S.C. § 1988(a))—a different formulation than laws "of the state". In other words, the Reconstruction Congress knew how to distinguish between common law and laws "of the State".

This language confirms that the Reconstruction Congress saw the jurisdiction of the federal courts for federal civil rights cases as resting not merely

on the text of the federal statute, but common law as well when federal statutes "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . .". 42 U.S.C. § 1988(a). This Court has interpreted § 1988(a) as requiring the federal judiciary to "resolve ambiguities in the federal civil rights laws by looking to the common law . . .". *Pony v. County of L.A.*, 433 F.3d 1138, 1143 (9th Cir. 2006).

The Reconstruction Congress expected that the bare words of the civil rights law, in providing a very general remedy for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," might not be fully "adapted to the object, or [might be] deficient in the provisions necessary to furnish suitable remedies . . . (§ 1988(a)), requiring judicial importation of the common law as needed—as for example in assessing official liabilities under doctrines distinct from the "statute, ordinance, regulation, custom, or usage" ostensibly supporting the official action. In short, there is explicit textual support for importing common law, and Professor Reinhart's objective of putting particular "state law immunities on the sideline where the Reconstruction Congress intended" (111 Calif. L. Rev. at 242) is flatly inconsistent with the textual evidence of what the Reconstruction Congress sought to achieve.

While it is clear that the "notwithstanding" language was omitted by the first Reviser of Federal Statutes in 1874, Professor Reiner's suggestion claim that the Supreme Court has not "grappled with" the missing language is also a little misleading in the sense that the Supreme Court has cited the version of the statute with the missing language, reprinting it in a footnote, but simply declined to interpret that language to set aside longstanding common law immunities. To the contrary, it held:

> Section 1 of the Civil Rights Act of 1871[29] -- the predecessor of § 1983 -- *said nothing about immunity for state officials*. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law. This Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from § 1983 liability in a variety of contexts.

Butz v. Economou, 438 U.S. 478, 502-503 (1978) (emphasis added; footnotes other than fn. 29 omitted; the original version of the statute is cited in footnote 29); *see also* A. Reiner, Flawed Foundations, 111 Calif. L. Rev. at 236 n. 233 (collecting Supreme Court cases referencing the original language). The Supreme Court has allowed common law immunity defenses even as it acknowledges that the plain language of § 1983 does not "on its face provide for *any* immunities". *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (emphasis added).

Finally, Congress has not objected to the longstanding interpretation of § 1983 to give effect to common law immunities. To the contrary, when the Supreme Court created narrow exceptions to judicial immunities, Congress overturned the holdings in the Federal Court Improvements Act of 1996, Pub. L. 104–317, complaining that the Court had "broke[n] with 400 years of common-law tradition and weakened judicial immunity protections," S. Rep. No. 104-366, 104th Cong., 2d Sess. 36 (Sept. 9, 1996). Professor Reinert's attacks upon qualified immunity for invocation of the canon of construction disfavoring implied repeal of the common law thus lack foundation—the legislative history confirms that Congress expects this particular statutory canon of construction to be followed in the interpretation of § 1983.

In short, the ancient and well-established nature of immunity doctrine has moved the Supreme Court to require Congress to act "specifically" if it were to desire to abolish it. *Pierson*, 386 U.S. at 555; *see also Buckley v. Fitzsimmons*, 509 U. S. 259, 268 (1993) ("Certain immunities were so well established in 1871 . . . that 'we presume that Congress would have specifically so provided had it wished to abolish' them"); *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951) (declining to assume legislative immunities were destroyed "by covert conclusion in the general language before us").

B. The Policy Considerations Behind Qualified Immunity Apply Irrespective of the Textual Issues.

As noted above, qualified immunity defenses arise "because it is thought that the societal benefit they confer outweighs whatever cost they create in terms of unremedied meritorious claims." *Crawford-El v. Britton*, 523 U.S. 574, 606 (1998) (Rehnquist, J., dissenting). Allowing civil suits by violent, weapon-wielding criminals who attack police and are shot dead has enormous societal costs and no appreciable benefits. Critics of this "freewheeling policy choice" supporting qualified immunity would prefer a return to the initial "good faith," common law defense set forth in *Pierson*,[2] but there is no support for the proposition that qualified immunity should be abolished entirely given the powerful policies supporting it.

A "good faith" approach would certainly protect Officer McBride in these circumstances. She manifestly acted in good faith to protect herself and the public, with the panel opinion's remand being based not on her subjective state of mind, but asserted factual questions concerning the objective reasonableness of her last shots. Below, we suggest that in brief officer encounters where the initial need for deadly force is clear, and the only possible dispute is continued use of it over the

[2] *E.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 159-60 (2017) (Thomas, J., concurring).

span of seconds, something on the order of “bad faith” must be shown to overcome qualified immunity.

II. THE DISTRICT COURT’S SUMMARY JUDGMENT RULING WAS CORRECT.

It is well established that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight”. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872 (1989). In *Graham*, the Supreme Court emphasized that “[T]he calculus of reasonableness must embody allowance for the fact that police 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.” *Id*. at 396-97; *see also Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994); *cf.* Cal. Pen. Code, § 835a(4).[3]

The circumstances of this police shooting were the subject of exhaustive investigation, including an official investigation by the California Department of

[3] Cal. Penal Code § 835a(4) provides:

> “That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.”

Justice,[4] and well-documented in multiple video recordings in the record before this Court. They show Officer McBride making every effort to protect herself and bystanders from an armed criminal perpetrator[5] who by all accounts was "crazed" and confrontational.

The overarching purpose of the qualified immunity doctrine is to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The trial court properly found that no reasonable trier of fact could conclude that Officer McBride fell into either one of these categories.

A. The Facts of the Case Illustrate Complex Deadly Force Decision Making Demanding Judicial Deference.

Officer McBride arrived at the scene of a motor vehicle accident with multiple severely damaged vehicles (4-ER840-45) and was immediately told upon exiting the patrol car that there was a "crazy guy with a knife" threatening to hurt himself and others (4-ER0849). There were multiple individuals in the area "screaming and yelling". (*Id.*)

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[4] Cal. Dept. of Justice, *Report on the Investigation into the Death of Daniel Hernandez on April 22, 2020* (Dec. 2022).

[5] As a matter of California law, decedent was engaging in very serious misconduct quite apart from the prior accident he caused. California law makes it a felony to draw or exhibit a deadly weapon with the intent to resist or prevent arrest or detention by a peace officer. Cal. Penal Code § 417.8; *see also id.* § 417(a).

At this juncture, Officer McBride had a duty to provide aid to injured motorists, to secure a crime scene, to attend to pedestrians in the area and keep them safe, and to locate an armed and dangerous individual. The situation was fraught with danger, and potential danger. Emergency medical personnel who were dispatched to the scene would soon arrive at the unsafe and uncontrolled area. Citizens who stood in the streets and on the sidewalk presented potential unforeseen dangers.

With limited information, the responding officers, including Officer McBride, had to draw inferences about potential threats in the environment and plan for them. For example, they would have to identify who was injured, assess the degree of those injuries for triage purposes, and determine who or what might cause further injuries. Assessing dangerous individuals or circumstances that had the propensity to cause more injuries, the officers would have to prioritize the threats and immediately take control of them. Treatment of injured persons could not effectively take place in the area, so long as a known or suspected threat remained uncontrolled.

The body-cam video shows Officer McBride getting out of her car into these chaotic circumstances at 1:47 (4-ER854 (time stamp to Exhibit A to McBride Decl.)) and illustrates the exigent nature of the circumstances and the multiple

assessments and judgments she was required to make. We emphasize the video record because it is well established that the high levels of stress associated with life-threatening interactions can lead to incomplete witness accounts by all involved.[6] Here, the audio track recording includes the following:

> **Motorist:** "He has a knife; he has a knife"
>
> **McBride:** "Why does he want to hurt himself?"
>
> **Motorist:** "We don't know, he's the one who caused the accident."
>
> **McBride:** [on the radio] "Give me a back-up"
>
> **McBride:** [Speaking to motorist] Hey if it's possible I need you to step out of your vehicle and go on the sidewalk. Right now.
>
> **McBride:** [on the radio] "Can I get a backup for a 415 with a knife?"
>
> **Motorist:** "Me?"
>
> **McBride:** "Yes, I need you to step out now."
>
> **Motorist:** "There, there."
>
> **McBride:** [speaking to another citizen] "Go…Go. Go, Go, right now!"
>
> **McBride:** [speaking on radio] "Hold on."

[6] *See generally* L. Hope, Evaluating the Effects of Stress and Fatigue on Police Officer Response and Recall: A Challenge for Research, Training, Practice and Policy, *J. Applied Research in Memory, and Cognition*, 5, 239-245 (2016).

> **McBride:** [speaking to her partner] “Partner right now we need to get cover!”
>
> **McBride:** [speaking to all onlookers in the area] All-everybody, go away!” “Que se meuva.”
>
> **Dispatcher:** “Newton unit’s responding, be advised, the suspect is armed with a knife, cutting himself. He’s inside his vehicle. He TC’d (traffic collision) against five vehicles off of 32nd Street.”

Here we see Officer McBride speaking to the motorist to gather more information while maintaining steady observation over the black truck in front of her. She realizes that the incident would best be resolved with more help and requests it. At the same time, she is appraising the not-yet-immediate threat posed by the decedent, she politely asks the motorist to exit the vehicle. Officer McBride’s demeanor is not panicked; she is level-headed and in control, reaching for the handle of the door to let the motorist out.

When another man approaches Officer McBride, she tells him to leave. She is focused on the most immediate threats. This was a tense, dangerous moment which would reasonably invoke elevated emotional response from anyone, including well-trained officers.

Officer McBride’s statement about “cover” shows that she was mindful about finding something that could protect her and the other officers from a sudden attack by the decedent. By cover, she was referring to some object placed between

the officers and potential attacker that could stop projectiles or edged weapons from penetrating.

Officer McBride also quickly responds to the onlookers within the zone of danger posed by decedent, telling everyone to go away. Mindful of the diverse language conditions in Los Angeles, she roughly repeated the order in Spanish, "Que se mueve".

The Court should consider this to be an impressive display of what is often called multi-tasking (task switching in psychology). Officer McBride masterfully switches from concerns about an unlocated armed assailant, to concerns about the public, to concerns about her fellow officers. However, task-switching has been shown to cut efficiency and raise risk during periods of human performance.[7] It can also result in slower reaction time due to mental overload,[8] but in complex

[7] Rogers, R., & Monsell, S., The Costs of a Predictable Switch Between Simple Cognitive Tasks, *Journal of Experimental Psychology*, 250-264 (1995).

[8] Rubinstein, J., Meyer, & Evans, J. E., Executive Control of Cognitive Processes in Task Switching. *Journal of Experimental Psychology: Human Perception and Performance*, 763-97 (2001).

environments the need to task switch remains critically important.[9]

Officer McBride's performance on video demonstrated her keen ability to manage multiple stimuli with poise and precision while under highly elevated stress. At this point Officer McBride had done everything within her power to make the scene as safe as possible for herself and members of the public. All of these techniques were expressions of an intent to preserve lives, including that of the decedent.

Less than a minute after exiting the patrol car (at about the 2:47 time stamp on the body cam video), Officer McBride has spotted the decedent in or behind the truck and yells, "hey man, let me see your hands, let me see your hands, man". Police officers are trained to understand that it is the suspect's hands that will kill you. They are trained to fixate on the hands above all other things, to identify if an object may be present and to identify with a reasonable degree of certainty what

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[9] Even under ideal circumstances, research in human factors demonstrates that there is a cognitive time gap between action and reaction of between 500 and 750 milliseconds. The findings show that it takes that much time to recognize a threat, analyze its meaning, formulate a response selection, and initiate motor response. Dror, Itiel E., Perception of risk and the Decision to Use Force, *Policing*, 1(3), 265-272 (2007); Godnig, E., Body Alarm Reaction and Sports Vision, *Journal of Behavioral Optometry*, 12(1), 3-6 (2001); Hillman, M., Physical lag times and their impact on the use of deadly force, *The Tactical Edge*, 25-29 (1995); Lewinski, W. L., & Hudson, B., The impact of visual complexity, decision making and anticipation: The Temple study, experiments 3 and 5, *Police Marksman*, 28(6), 24-27 (2003); Siddle B., *Sharpening the Warriors Edge* (PPCT Research Pubs. 1995).

that object is. Hands kept hidden from officers can create a tremendous amount of anxiety due to the speed with which a weapon can suddenly be displayed and used against an officer.

The decedent appeared from behind the truck at approximately the 2:53 on the body cam video, advancing directly toward Officer McBride. With each step he increased the time/pressure constraints that govern decision making. McBride tried to keep the reactionary distance between herself and Hernandez to give her more time to plan, negotiate, issue commands, and watch for compliance. Officer McBride held her firearm in her right hand as a show of force, an unambiguous threat designed to warn any reasonable person that continued forward movement would be countered, if necessary, with the use of lethal force. She also placed her support hand up in the universal "stop" motion and commanded, "stay right there," but the decedent continued to approach rapidly.

At approximately 2:54, Officer McBride told the decedent to drop the knife, but he continued to approach rapidly. At approximately 2:57, she told him again to drop the knife (commands repeated at 2:58 and 2:59), but he continued to approach rapidly. She lifted her pistol from a low-ready position and pointed it directly at the decedent, center mass. This was a final warning. Officers are trained to fire center mass. Center mass firing assures (1) aiming at the largest available target

area to increase hit accuracy, (2) that bullets strike the thickest part of the target and do not pass through to harm innocent citizens and, (3) that the bullets strike vital areas of the body most likely to stop the person.

The decedent strode towards her without pause, continuing to close the distance. He spread his arms confrontationally, making himself seem larger and more threatening. One may reasonably interpret his body language as suggesting that he was daring McBride to shoot him. Indeed, one may reasonably infer that the decedent was engaged in conduct known as "suicide by cop".[10] The rising

[10] "Suicide-by-cop" is a term used to describe law enforcement assisted suicide in which a person exhibits behaviors to intentionally engage in dangerous, life-threatening, and perceived criminal behavior towards law enforcement officers or others while law enforcing officers are present. Hutson, H., Anglin, D., Yarbough, Hardaway, K., Russell, M., Strote, J., *et al.*, Suicide by Cop, *Annuals of Emergency Medicine*, 32, 665-669 (1998). The Police Executive Research Forum (PERF) lists the following criteria to establish the occurrence of suicide-by-cop:

> "- Threatens the life of the officer or another person, or
> "- Attempts to make the officer believe he poses such a threat,
> "- In order to give the officer no choice but to use lethal force to stop the threat."

In a study of the phenomena in Los Angeles County between the years 1987 to 1997, suicide-by-cop accounted for 11% of all officer-involved shootings (OIS) and 13% of all officers' justifiable homicides. The median time from arrival of officers at the scene to the time of the shooting was 15 minutes with 70% of shootings occurring within 30 minutes of arrival of officers. "Suicide by Cop" is surprisingly common, and the numbers of incidents are rising. Another study of 419 "Suicide-by-Cop" incidents from 1994-2014 revealed that 4% had a replica or fake firearm, 5% kept their hands in their pockets or otherwise appeared to have a weapon as they approached the officer and refused commands, while 16% were

incidence of this phenomenon, and its potential application here, militates in favor of greater deference to officers' decisions concerning deadly use of force, as the very purpose of the decedent's behavior appeared to be to create the circumstances requiring Officer McBride to use deadly force.

A bystander's video offers what is perhaps the sharpest view of the decedent walking rapidly toward Officer McBride. There, he emerges from behind the truck at approximately 0.09 (4-ER838; time stamp on Smith Decl. Ex. C.) and by the time Officer McBride fires the first shot, he appears to have already closed more than half the distance towards her. In the bodycam video, one can observe that Officer McBride is retreating almost the entire length of the car on her right side as the decedent advances.

The two shots are fired at approximately 3:02 (body cam video time stamp), or less than nine seconds after the decedent appeared from behind the truck. This is an extraordinarily short period of time for decision making, putting this case in a category unlike many other cases where police officers have the luxury of much longer interactions with potential threats. The Court should bear in mind that within these nine seconds, Officer McBride was required to assess the threat,

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armed with a knife. Patton C., & Fremouw, W., Examining 'Suicide by Cop': A Critical Review of the Literature, *Aggression and Violent Behavior*, 27, 107-20 (March-April 2016).

decide on the response, and then initiate the response—the latter involving complex motor responses required to make ready and fire a weapon[11]—all while paying attention as well to bystanders, fellow police and other circumstances.

In assessing reasonability, it is also important to understand that Officer McBride and other witnesses perceived the decedent to be much closer. (*E.g.*, 2-ER172 (Bystander testifies officer was twenty feet away from decedent at time of first shot).) Visual perceptual distortions are common during periods of high arousal, when activation of the sympathetic nervous system (SNS) causes changes in optics including narrowed periphery, loss of near vision, loss of depth perception, loss of night vision, and loss of monocular vision.[12] The perception of time is also distorted.[13]

After the first two shots, the decedent got up almost immediately, and while not fully erect, was off his knees and poised to continue his advance when Officer

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[11] *See generally* C. Burrows, Critical Decision Making by Police Firearms Officers: A Review of Officer Perception, Response and Reaction, *Policing: A Journal of Policy and Practice*, 1(3), 273-283 (2007).

[12]Godnig, E. C., Body Alarm Reaction and Sports Vision, *Journal of Optometry*, 12(1), 3-6 (2001); Siddle, B. K., & Breedlove, H., How stress affects vision and shooting stance, *Police Marksman*, 16-20 (May-June 1995).

[13] Pitel, M., *et al.*, Giving Voice to Officers Who Experienced Life-Threatening Situations in the Line of Duty: Lessons Learned About Police Survival, *SAGE Open [Access Journal]*, 1-13 (July-September 2018).

McBride fired what was in substance a sustained volley of four shots from 3:05 to 3:08 (time stamps on body cam video), killing the decedent.

It is clear that Officer McBride utilized the pauses between shots to analyze what she was seeing and, to the best of her ability, determine if more lethal force is needed to end the threat. Officers are trained to look for signs and indications of the threat ending, for example a person dropping their weapon, or lying completely still and submissive on the ground with their hands showing. They listen for compliant statements—or the absence of them. Officer McBride could detect none of this, instead seeing decedent in "a crouched position that appeared to be a sprinter's stance while screaming in rage". (4-ER0851.)

It was only after the second, longer volley of four shots that decedent no longer posed an overt, active, and continuing threat. Until the very last shot, Hernandez appeared to be attempting to get up and close the distance to attack Officer McBride. In total, McBride fired six times and struck the decedent six times in approximately six seconds, an extraordinary feat of marksmanship under extremely stressful circumstances.

The panel opinion focused upon a gap of a little longer than a second

dividing the third and fourth shot from the fifth and sixth shot,[14] recognizing that "the one-second gap between McBride's second and third volleys . . . constitutes . . . insufficient time to reflect". (Slip op. at 21.) This reflection included the need to assess the decedent's continuing conduct, assess the position of bystanders, and aim and shoot accurately. Although he had been shot four times by that point, there was no observable information to confirm that the decedent had ceased his efforts to get up and close the distance with Officer McBride or had become compliant with her commands.

B. The Trial Court Correctly Upheld Officer McBride's Use of Force as Reasonable.

The trial court's opinion properly adopted the perspective of a reasonable police officer in the circumstances, explaining that:

> A judicial description of a shooting as involving "volleys" is analytically useful so long as it is not used—wittingly or unwittingly—to distort the split-second reality unfolding before the officer who has to make life-and-death decisions with imperfect information and without much time to reflect.

(1-ER12.) The trial court noted that after the fourth shot, "Decedent hits the ground, and still holding the knife, rolls over from his back and still appears to try

[14] The California Department of Justice report (*see supra* n.4) has a useful table showing the exact time interval for each shot (at p. 44), judicial notice of which may be taken pursuant to Fed. R. Evid. 201 given the undisputable recorded evidence of the encounter.

to get up . . .” (*id*.) The trial court properly concluded within this short time, it was not reasonable to determine that the “threat had ended”. (*See id.*)

The panel opinion, however, found the “final volley of shots—*i.e.*, shots five and six—[to] present a much closer question”. (Slip op. at 14.) The panel held that “a reasonable trier of fact would find that, at the time McBride fired these two additional shots, the threat from Hernandez . . . had sufficiently halted to warrant ‘reassess[ing] the situation rather than continuing shooting’”. (*Id.*) There is no dispute that the initial use of deadly force was manifestly reasonable, the attacker disobeyed repeated commands to drop the weapon, and the attacker was still holding the weapon when the challenged shots were fired.

No precedent of this Court requires creation of a constitutional right in between Officer McBride’s fourth and fifth shots. In the most analogous case, *Zion*, the officer testified that the attacker was trying to get up after the first volley of shots, but the court reviewing video saw “no signs of getting up,” creating an issue of fact. *Zion*, 874 F.3d at 1076. Similarly, *Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017) involves no video evidence, thereby involving issues of fact concerning inconsistencies in the testimony concerning the incident.

Here, by contrast, even the panel found that the attacker “continued to roll over, so that he was again facing McBride. His bent left knee was pressed against

the ground and he placed his left elbow on the street as if to push himself upwards . . .". (Slip op. at 8.) In short, there were "signs of getting up". By contrast, in *Zion*, after two volleys of shots "the video shows Higgins walking around in a circle for several seconds before returning for the head strikes. He even takes a running start before each strike." *Zion*, 874 F.3d at 1077. This case is utterly devoid of any such conduct.

While *Zion* panel considered the head stomping dispositive of the Fourteenth Amendment issue, explaining that the two volleys of shots "[w]hether excessive or not, served the legitimate purpose of stopping a dangerous subject", it declined to grant qualified immunity for the Fourth Amendment claim based on the stomping *and* the second of two volleys of shots—even though "[t]he two volleys came in rapid succession, without time for reflection". *Id.* The National Police Association respectfully suggests that this was error: when presented with a deadly threat, a police response measured in seconds, should not be parsed into time intervals so small that no reflective decision could be made.

The facts here illustrate the need to avoid the "benefit of hindsight" (Cal. Penal Code § 835a(4)) in assessing the circumstances here. After the first five shots, after giving signs of getting up yet again "Hernandez started to collapse to the ground, and just as he did so, McBride fired a sixth shot". (Slip op. at 8.) The

"just as he did so" establishes that Officer McBride reasonably interpreted him as getting up and posing an immediate threat, and within the time required to react and process that information, while firing the last volley, Hernandez collapsed.

The National Police Association urges this Court to hold that a shot-by-shot analysis within a six second interval is not realistic and not adequately deferential to officer decision making. The creation of judicial rules creating constitutional rights whenever an officer hesitates, even for an instant, to assess continuing risk in the presence of an armed criminal who will not drop his weapon and submit to police control could even be counterproductive. Officers may be given an incentive to eliminate the initial threat completely with a sustained and deadly volley rather than taking the careful approach of Officer McBride.

III. THE FEDERAL JUDICIARY SHOULD NOT MAKE "CLEARLY ESTABLISHED" RULES MICROMANAGING SPLIT-SECOND OFFICER DECISION MAKING WHEN ARMED CRIMINALS ATTACK.

The panel invoked qualified immunity because it found no violation of "*clearly established* statutory or constitutional rights of which a reasonable person would have known". (Slip op at 15; emphasis in original; quoting *City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021).) Following *Kisela v. Hughes*, 504 U.S. 100, 104 (2018), the panel noted "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue". (Slip op

at 16.) It is not just "squarely governing"—the Supreme Court has repeatedly emphasized that any judicial precedent invoked in an attempt to demonstrate a clearly established constitutional right must make it clear "beyond debate" that the official acted unreasonably in the particular circumstances. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *City and County of San Francisco v. Sheehan* 135 S. Ct. 1765, 1774, n. 3 (2015); *Mullenix v. Luna*, 577 U.S. 7, 14 (2015); *Kisela v. Hughes*, 584 U.S. 100, 104 (2018).

The National Police Association has continuing concern with the evolving direction of qualified immunity law insofar as it charges every patrol officer with knowing the details of the latest appellate use of force decisions. In other contexts, the approach of requiring precise legal knowledge by government officials is uniformly rejected. *Cf., e.g.*, Cal. Gov't Code § 822.2 ("A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation . . ."). There is an inherent tension between the Supreme Court's command that constitutional rights must be clearly established in a specific way rather than "a high level of generality" (*al-Kidd*, 563 U.S. at 742) and the degree to which specificity and resulting complexity of judicial decision making render the entire qualified immunity apparatus unworkable for rank-and-file officers.

The National Police Association perspective is that this Court's very attempts to refine the general constitutional rule—officers must have probable cause to fear "that the suspect poses a significant threat of death or serious injury to the officer or others" before using deadly force (*Tennessee v. Garner*, 471 U.S. 1, 3 (1985))—are at the root of the evolving difficulties. The Supreme Court has held 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". *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014) (15 shots fired in ten second span). That should not be construed as an invitation to engage in shot-by-shot parsing to see when a constitutional right may be created; reasonable triers of act will always differ as to the necessary length of a volley of gunfire.

Absent some sort of a pause that constitutes a genuine opportunity for "detached reflection" while under attack with deadly weapons—an interval far longer than that present here—judgments made by the officer in the heat of armed attack require greater deference. In such circumstances, destruction of qualified immunity should require more.

The Fourteenth Amendment standard from *Zion*, 874 F.3d at 1077, looks for circumstances where a reasonable trier of fact might find "purpose to harm"—an officer "acting out of anger or emotion rather than any legitimate law enforcement

purpose". This Court should eschew attempts to create more and more specific rules of the use of deadly force and place greater weight, in the Fourth Amendment context, on the presence (or absence) of factual circumstances indicating that the use of force was for some reason other than maintaining public safety and order. This approach would represent a re-integration of the ancient common law "good faith" standard that can protect officers like Officer McBride,[15] while continuing to provide a remedy in cases involving conduct where there may be a disputed issue of fact as to whether the officer is "acting out of anger or emotion rather than any legitimate law enforcement purpose". *Zion*, 874 F.3d at 1077.

Finally, the question of qualified immunity for police officers arises in a wide variety of contexts, but no context demands greater deference to public order needs than the use of deadly force against those who attack police officers with deadly weapons. This case, involving the judicial review of the most difficult decision making police officers ever face, calls for this Court to fashion the most deferential standard of review.

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[15] Most generally, official immunity is to be available to public officials under § 1983 if it was "historically accorded the relevant official" in an analogous situation "at common law," *Imbler v. Pachtman*, 424 U. S. 409, 421 (1976). It defies credulity to suggest that a police official attacked with a deadly weapon would have suffered civil liability for damages in the era of common law under the circumstances here.

Conclusion

For the foregoing reasons, and the reason stated in the briefs of Appellees, the District Court's judgment should be upheld.

Dated: July 29, 2024.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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