No. 11-84

In The
Supreme Court of the United States

MICHELLE ALVIS, JOHN KEESOR, and PAUL MORGADO,
Petitioners,

v.

KATHLEEN ESPINOSA, Individually and as Personal Representative of the Estate of Decedent Asa Sullivan, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION, AND CALIFORNIA PEACE OFFICERS' ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Interests of Amici Curiae

Amici curiae are three nonprofit, professional associations working together in support of the Petitioners. The California State Sheriffs' Association (CSSA) is comprised of the fifty-eight elected sheriffs in California. The association was formed in 1894 for the purpose of giving elected sheriffs a single effective voice to enable them to improve the delivery of law enforcement services to the citizens of California. The CSSA functions as an advocate for the county sheriffs and sheriffs' personnel as well as for citizens on law enforcement issues. The California Police Chiefs' Association (CPCA) was established in 1966 to represent municipal law enforcement agencies in California. The CPCA's objectives are to promote and advance the science and art of police administration and crime prevention; and to develop and disseminate

professional administrative practices, and to promote their use in the police profession; to foster cooperation and the exchange of information and experience among and between law enforcement agencies throughout California. The California Peace Officers' Association (CPOA) serves the needs of professional law enforcement through issue exploration, resource development, educational opportunities, and advocacy. The CPOA has more than three thousand members of all ranks from municipal, county, state, and federal law enforcement agencies from throughout California. The CPOA is committed to developing progressive leadership for the California law enforcement community.[1]

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[1] No party or counsel for a party authored this brief in whole or in part, nor did any party or counsel for a party make any monetary contribution to the preparation or submission of this brief. No person or entity other than counsel for the amici made a monetary contribution to the preparation or submission of this brief.

The consent of the attorney for the petitioners, and the attorney for the respondents, has been obtained.

Amici urge the Court grant the petition for writ of certiorari because the issues presented will have a profound impact on the members of each organization, as well as all the peace officers in California, and the general public.

Summary of Argument

Amici curiae view the issue presented by this case as one of peace officer safety. Their unified position is that the Ninth Circuit Court of Appeals holding in this case puts peace officers at risk by confusing the standards applicable to uses of force. Amici fear that this confusion, coupled with the potential loss of qualified immunity and therefore the very real possibility of personal financial liability

for damages in tort will cause peace officers to hesitate or second-guess themselves at critical moments, and that any such hesitation will cost the lives of peace officers and members of the general public.

Certiorari is appropriate under Supreme Court Rule 10(a). The Ninth Circuit Court of Appeals in the case below, reported at *Espinosa v. City and County of San Francisco,* 598 F.3d 528 (9th Cir. 2010), is contrary to the long line of precedents established by this Court, *see e.g. Graham v. Conner,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 3d 443 (1989); *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *Tennessee v. Garner,* 47 U.S. 1, 105 S.Ct. 1694, 85 L.Ed. 2d 1 (1985); *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and a

majority of the other Courts of Appeals, *see e.g. Broadway v. Gonzales*, 26 F.3d 313 (2nd Cir. 1994); *Bodine v. Warwick*, 72 F.3d 393 (3rd Cir. 1993); *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997); *Irwin v. Bell*, 321 F.3d 637 (7th Cir. 2003); *Seiner v. Drenon*, 304 F.3d 810 (8th Cir. 2002); *Wood v City of Lakewood*, 203 F.3d 1288 (11th Cir. 2000); *Hundley v. District of Columbia*, 494 F.3d 1097 (D.C. Cir. 2007). The Ninth Circuit Court of Appeals' decision in the instant case even contradicts some of its own precedents, *compare Billington v. Smith*, 292 F.3d 117 (9th Cir. 2002), *Blanford v. Sacramento Co.* 406 F.3d 1110 (9th Cir. 2005), *Tekle v. United States*, 511 F.3d 839 (9th Cir. 2006) *with Espinosa*, 589 F.3d at 531-539 (Hug, J., for the majority), *but see id.* at 539-549 (Wu, J., dissenting and concurring).

The Ninth Circuit Court of Appeals' departure from established precedents on the

application of qualified immunity hampers law enforcement in many respects, and, worse, increases the danger to both peace officers and the public. The Ninth Circuit Court of Appeals' decision improperly transfers responsibility for deciding the question of qualified immunity from the trial judge to the jury, which, on its face, contradicts the meaning of immunity, because immunity means not having to face a jury in the first place, contrary to *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) and other cases. Further, the Ninth Circuit Court of Appeals' decision below substitutes the trial judge's or the jury's "20/20" hindsight for the professional judgment of a peace officer at the moment, on the scene, contrary to *Graham*, 490 U.S. at 396, and other cases. Further still, the Ninth Circuit Court of Appeals misapplied the

doctrine of superceding cause in the context of Title 42, United States Code section 1983 torts. Finally, the Ninth Circuit has also departed from the law of self-defense as established by the California Supreme Court in *People v. Minifie*, 13 Cal.4th 1055, 920 P.2d 1337, 56 Cal.Rptr.2d 133 (1996). The Ninth Circuit Court of Appeals' decision below, if permitted to stand, will undermine effective law enforcement in California, in the States which make up the Ninth Appellate Circuit, and, potentially, in the Nation as a whole, and will endanger the lives of peace officers and civilians.

Argument

A. The Ninth Circuit Court of Appeals Has Unjustifiably Departed From The Precedents Of The Supreme Court And A Majority Of The Courts of Appeal

The Supreme Court recently reaffirmed that "[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. ___, ___ (slip op. 3) (2011). The purpose of qualified immunity is to give "government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft*, 563 U.S. at ___ (slip. op. 12) (Citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (Quotation marks omitted.)); *see also, Brousseau v. Haugen*, 543 U.S. 194, 201, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). Qualified immunity is the norm.

Anderson v. Creighton, 483 U.S. 635, 642, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (Quoting *Malley*, 475 U.S. at 340, quoting *Harlow*, 457 U.S. at 807). Qualified immunity is not granted by the courts; it is "lost," *Ashcroft*, 563 U.S. at ___, slip. op. 3 (Kennedy, J., concurring), or "surrendered," *Wood*, 203 F.3d at 1291-1292, by the defendants through their actions. The Ninth Circuit admits that if "the officers violated such a [constitutional or statutory] right, but it is not clearly established, then they are entitled to immunity," *Espinosa*, 598 F.3d at 531 (Citing *Hoplins v. Bonvicino*, 573 F.3d 752, 762 (9th Cir. 2009)), and "regardless of whether the constitutional violation occurred, the [official] should prevail if the right asserted by the plaintiff was not 'clearly established' or the [official] could have reasonably believed that this particular conduct was lawful," *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir.

1991). It stands to reason that if existing precedent establishes that the statutory or constitutional right is debatable, or supports the officers' actions, then the officers are entitled to immunity as a matter of law. *See e.g. Ascroft*, 563 U.S. at ___ (slip.op. at 12).

In the instant case, the Petitioners, all of whom are San Francisco police officers, were in a dark, crowded, cramped attic facing an unknown, uncooperative suspect who may have been armed. The suspect refused to show the officers his hands and, throughout the entire twelve-minute stand-off, made threatening statements such as "When I make my move, you guys are gonna be sorry. You're gonna have to kill me." As discussed below, federal and California law permits police officers to use deadly force when confronted with a suspect that threatens to do harm to the police officers or to others. *See e.g. Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85

L.Ed.2d 1 (1985); *People v. Minifie*, 13 Cal.4th 1055, 920 P.2d 1337, 56 Cal.Rptr.2d 133 (1996). Thus, the Petitioners' actions were reasonable under the circumstances.

The Supreme Court and the Courts of Appeals apply an objective standard in determining Fourth Amendment reasonableness. *See e.g., Ashcroft*, 563 U.S. at ____, (slip. op. at 4); *Scott v. Harris*, 550 U.S. 372, 381, 127 S.Ct. 1769, 167 L.Ed. 2d 686 (2007); *Indianapolis v. Edmond*, 531 U.S. 32, 47, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). The subjective intent of the governmental officials, in the instant case police officers, is utterly irrelevant. *Whren* v. *United States*, 517 U. S. 806, 814, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). In *Graham*, 490 U.S. at 397, the Supreme Court held, "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an

officer's good intentions make an objectively unreasonably use of force constitutional." (Citation omitted.) Indeed, the Supreme Court has "uniformly rejected invitations to probe subjective intent." *Ashcroft*, 563 U.S. at ___ (slip. op. at 7 (Citing *Brigham City* v. *Stuart*, 547 U. S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)).

In the instant case, the Ninth Circuit Court of Appeals completely misapplied the law. The Court of Appeals found that there are "unresolved issues of fact [that] are also material to a proper determination of the *reasonableness of the officers' belief* in the legality of their actions." *Espinosa*, 598 F.3d at 532 (Italics added for emphasis.). This inquiry is improper and a clear violation of the established precedents. Whatever the officers believed does not change the objective

reasonableness of the inquiry the trial judge alone must make.

B. The Ninth Circuit Court Of Appeal Improperly Abdicated Its Responsibility To Resolve The Legal Issues Presented By This Case

The issue of whether qualified immunity has been lost or surrendered ought to be resolved "at the earliest possible stage of the litigation," *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), preferably on a motion for summary judgment, *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Act Up! Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). In the instant case, the Ninth Circuit Court of Appeals, and the district court before it, erred immediately by abdicating their responsibility to resolve the issues of whether the defendants violated any constitutional rights, and whether or not,

notwithstanding a violation, those constitutional rights were clearly established.

In an action under Title 42, United States Code section 1983, the plaintiff has the burden of proving the existence of a clearly established statutory or constitutional right. *Saucer*, 533 U.S. at 202; *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000). Determining whether or not peace officers' conduct is reasonable under the circumstances is judged by an objective legal reasonableness standard, *Graham*, 490 U.S. at 397, and applying this standard is a question of law to be determined by judges rather than juries, *Bell v. Irwin*, 321 F.3d 637, 641 (7th Cir. 2003), *Pierce*, 117 F.3d at 871; *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1100 (9th Cir. 1995).

For a constitutional right to be clearly established, the courts "do not require a case directly

on point," *Ashcroft*, 563 U.S. ___, (slip op. at 9), but rather look "either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were lawful,'" *id.* at 3 (Kennedy, J., concurring.) (Quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)). In all cases, the constitutional or statutory right must be "beyond doubt." *Ashcroft*, 563 U.S. at ___, (slip op. at 9). Neither "the broad 'history and purposes'" of a constitutional provision, *Ashcroft*, 563 U.S. at ___, (slip. op. at 10), nor "[g]eneral rules, propositions, or abstractions, such as acting with probable cause," *Wood*, 203 F.3d at 291, are sufficient to define a "clearly established right." The court should consider only whether the conduct complained of, in the instant case the shooting, and not preseizure

conduct, was unreasonable. *Gardner v. Buerger*, 82 F.3d 248, 254 (8th Cir. 1996). The circumstances that confronted the peace officer must have been "materially similar" to prior precedent to constitute clearly established law because "public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." *Wood*, 203 F.3d at 1291 (Quoting *Anderson*, 483 U.S. at 640).

On summary judgment, all evidence is viewed in the light most favorable to the non-moving party, *see e.g. Saucier*, 533 U.S. at 201, and all well-pled facts are assumed to be true, *see e.g. Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993). Once a party has moved for summary judgment, the burden shifts to the opposing party to show "that a genuine dispute on a material issue of fact exists. ... Conclusory allegations ... or evidence setting forth

legal conclusions are insufficient to meet the plaintiff's burden." *Wood*, 302 F.3d at 1292. The Ninth Circuit's own precedents support this position:

> We [have] held that, even for summary judgment purposes, the fact that an expert disagrees with the officer's actions does not render the officer's actions unreasonable. Together, *Scott* [*v. Henrich*, 39 F.3d 912 (9th Cir. 1994)] and *Reynolds* [*v. County of San Diego*, 84 F.3d 1162 (9th Cir. 1996)] prevent a plaintiff from avoiding summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless. Rather, the court must decide as a matter of law whether a reasonable officer could have believed that his conduct was justified.

Billington, 292 F. 3d at 1189 (Internal quotation marks and footnote citations omitted.).

In the instant case, the "relevant discrete, historical facts," *see Piece v. Smith*, 117 F.3d 866, 871 (5th Cir. 1997), are well known and not disputed. Respondents in the instant case have manufactured

apparent factual disputes by raising issues what really happened, and the District Court and the Court of Appeals have unwisely agreed. The issues identified by the District Court and the Court of Appeals as "unresolved issues of fact," 598 F.3d at 523, are not historical facts showing what actually happened, but differences in the interpretation of the historical facts. For example, whether or not back-up officers could reasonably rely on information provided to them by the officer who was first on the scene is a legal question, or at most a mixed question of law and fact, and in no case is it a suitable question for a jury. In the instant case, by finding unresolved issues of fact where none actually exist, the District Court and the Court of Appeals have abdicated their responsibility to sit in judgment on the legal issues presented by the Petitioners' motion for summary judgment.

C. The Ninth Circuit Court of Appeals Has Improperly Substituted The "20/20" Hindsight Of The Jury For The On-The-Scene Judgment Of The Police Officers

The California Supreme Court once remarked "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Thing v. LaChusa,* 48 Cal.3d 644, 668, 257 Cal.Rptr. 865, 771 P.2d 814 (1989). In the instant case, the Ninth Circuit Court of Appeals seems to have had such a clear judicial day. Actually, the Court of Appeals' holding is a storm on the horizon that obscures much more than it clarifies.

In dealing with qualified immunity, the trial court must ask and answer whether the peace officer

"acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . years after the fact." *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). The Ninth Circuit Court of Appeals' decision in the instant case introduces an unacceptable level of uncertainty into police work by second-guessing the officers on the scene at the precise moment of crisis.

In *Billington*, 292 F.3d at 1191, the Ninth Circuit correctly observed, "The law does protect officers forced to make split-second decisions about how to deal with emergency situations even when the course of action they choose is, in hindsight, mistaken and results in a violent confrontation." Under these conditions, "when material facts (or enough of them to justify the conduct objectively) are undisputed,

then there would be nothing for a jury to do except second-guess the officers, which *Graham* [490 U.S. at 396-397] held must be prevented." *Bell,* 321 F.3d at, 640. The passage in *Graham* cited by *Bell* held

> 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. ... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The 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 amout of force that is necessary in a particular situation.

Graham, 490 U.S. at 396-397 (Citations omitted.). Yet, in the instant case, this is exactly what the Ninth Circuit Court of Appeals has decreed that 20/20 hindsight must be applied to an event that

happened five years ago in a dark, cramped attic. Here, police officers were engaged in a stand-off with an unknown suspect in a dark and crowded attic. The stand-off lasted for twelve minutes during which time the suspect repeatedly disobeyed orders to show his hands to the officers, and made statements such as "Shoot me! I'm not coming outta here. The only way I'm coming outta here is dead. I'm gonna kill you or you're gonna kill me," and "When I make my move, you guys are gonna be sorry. You're gonna have to kill me, you're gonna have to shoot me to get me outta here." The officers tried to persuade the decedent to surrender peacefully, but were unsccessful. The officers discussed and, for various reasons, rejected other options. Only the decedent's sudden movements consistent with drawing a weapon provoked the officers to fire their sidearms. The Ninth Circuit decision in the instant case is so

clearly wrong on the law that the Supreme Court must grant certiorari to correct the Ninth Circuit's errors.

D. The Ninth Circuit Court of Appeals Has Misapplied The Doctrine of Superceding Cause

In *Lamont v. State of New Jersey*, 637 F.3d 177, 186 (3rd Cir. 2011), the Third Circuit Court of Appeals observed, like a tort plaintiff, a § 1983 plaintiff must establish both causation in fact and proximate causation. A superseding cause breaks the chain of proximate causation." (Citations omitted.) In *Bodine*, 72 F.3d at 400, the Third Circuit Court of Appeals rejected a "'philosophic' or but-for sense" of causation. "Among other things," the Court continued, "they [the police officers] would not be liable for harm produced by a "'superseding cause.'" *Id.* The Court offered the following hypothetical to

illustrate the concept of superceding and proximate cause as applied to section 1983 actions:

> Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are placing him under arrest. The suspect, however, breaks away, shoots and kills two of the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him. Is the third officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is "no." The suspect's conduct would constitute a "superseding" cause that would limit the officer's liability.

Id. (Citations omitted.). In *Hector v. Watt,* 235 F.3d 154, 160 (3rd Cir. 2000), the Third Circuit summarized its doctrine,

> [I]f the officers' use of force was reasonable given the plaintiff 's acts,

> then despite the illegal entry, the plaintiff 's own conduct would be an intervening cause that limited the officers' liability. For the plaintiff to recover all the damages he sought, we said that he had to prove two torts--one for the illegal entry and a second for excessive force.

In *Lamont*, the Third Circuit recognized that the instant case, *Espinosa v. City and County of San Francisco,* is contrary to the law in its jurisdiction and also in the Fifth Circuit Court of Appeals. *Lamont*, 637 F.3d at 186. In *Lamont*, the Court of Appeals concluded that the decedent's "non-compliant, threatening conduct in the woods was a superseding cause that served to break the chain of causation between the entry and the shooting." *Id.*

In the instant case, there are two distinct acts, the entry of the police officers into the apartment, and the shooting of the decedent in the attic by the officers. In between, the decedent's actions were an intervening, superseding cause. Specifically, the

decedent made explicit threats, such as, "I'm gonna kill you or you're gonna kill me." In addition, the decedent refused to cooperate with the officers' reasonable requests to show his hands.[2] By not showing his hands to the police and not cooperating with the officers during the stand-off in the attic, and by making a sudden movement consistent with drawing a weapon, the decedent's actions broke the causal chain. Thus, the proximate cause of the decedent's death was his non-cooperation with the police. The Court of Appeals in the instant case erred by denying summary judgment, *see Espinosa*, 598 F.3d at 545-549 (Wu, J., dissenting.), the Supreme Court must grant certiorari to correct this error.

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[2] Obeying a request--or even an order--to show ones hands to a police officer is so simple and uninvasive that it cannot be considered unreasonable in any circumstances.

E. The Ninth Circuit Court of Appeals Misapplied The Law On Self-Defense

In the instant case, the Court of Appeals misapplied the law of self-defense. In *Garner,* 471 U.S. at 11, the Supreme Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." The reasonableness inquiry is objective, without regard to the officer's good or bad motivations or intentions. *See Billington,* 292 F.3d at 1184 (Citing *Graham,* 490 U.S. at 396.). The Courts "judge reasonableness 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' and allow '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.*

Under California law, the "justification of self-defense [is] not because the victim 'deserved' what he or she got, but because the defendant acted reasonably under the circumstances." *Minifie*, 13 Cal. 4th at 1068. "Reasonableness," the California Supreme Court continued, "is judged by how the situation appeared to the defendant, not the victim." *Id.* The court concluded, "If the defendant kills an innocent person, but circumstances made it reasonably appear that the killing was necessary in self-defense, that is tragedy, not murder." *Id.* The Court of Appeals utterly failed to apply this test when it denied summary judgment, *Espinosa*, 598 F.3d at 537-538.

In the instant case, the Court of Appeals erred by misapplying the law of self-defense under both

federal and California standards. Under both, the test is reasonableness from the defendant's point of view; in this case the police officers. The facts, as they appeared to the police officers on June 6, 2006, and which are not substantially in dispute, are that an appearently suicidal person hiding in a dark, cramped attic was threatening to kill himself and possibly the police officers as well. This person refused to show the police officers his hands which would have established that he was in fact unarmed but, rather, he made a sudden movement with his heretofore concealed right hand. Under these circumstances, at this critical moment, any reasonable peace officer, any reasonable person, would have feared that the decedent had a weapon and was about to fire at the police officers.

Further, that the police officers pointed their sidearms at the defendant during the stand-off was

reasonable under the circumstances. The police were confronted by a possibly armed, possibly dangerous individual in a cramped attic. To hold otherwise under these cricumstances, would place police officers and the public in great danger. It would also open up a slippery slope for the definition of "excessive force" under circumstances similar to those found in the instant case from merely pointing a firearm at the suspect to using a baton, taser, or other non-lethal weapon.

If the Ninth Circuit's rule is allowed to stand, police officers would be at the mercy of all whom they meet. Criminals would have the first shot. Only after surviving the initial onslaught, would peace officers have the right to return fire. Obviously, this situation puts both peace officers and the general public in grave danger. The Supreme Court should grant certiorari to correct this error.

Conclusion

Amici curiae are concerned that the Ninth Circuit Court of Appeals' decision in this case raises issues of extraordinary importance and conflicts with both this Court's precedent and established case law in other Courts of Appeals. Amici fear that if this decision is not overturned, peace officers and civilians will be at risk because of the uncertainty *Espinosa v. City and County of San Francisco* injects into the law. Amici curiae urge the Court to grant the petition.

Respectfully submitted,

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