No. 14-108

In The Supreme Court of the United States

DARON WYATT,

Petitioner,

v.

F.E.V., a Minor, Individually and as Successor in Interest to Adolph Anthony Sanchez Gonzalez, By and Through Her Guardian ad Litem David Vasquez, et al.,

Respondents.

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

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California Counties.*

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

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AMICUS CURIAE SUBMIT THIS BRIEF IN SUPPORT OF PETITIONER

The California State Association of Counties (CSAC) respectfully submits this brief as *amicus curiae* in support of Petitioner.

INTERESTS OF THE *AMICUS CURIAE*[1]

Amicus curiae CSAC is an association of all 58 of the California counties. When courts conclude that juries must resolve a material factual dispute, when in fact the matter is one that should be resolved on the law by the court, it significantly impacts counties and their law enforcement functions by: (1) creating a legal framework that is nearly impossible for law enforcement to train for, jeopardizing the safety of law enforcement and the public; (2) requiring taxpayers resources to be used to try cases to juries that should be resolved on summary judgment; and (3) requiring law enforcement officers to spend time in civil litigation that should be spent protecting and serving the public. CSAC therefore has a significant interest in this case.

[1] The parties have consented to the filing of this brief. The parties were notified more than ten days prior to the due date of this brief of the intention to file. This brief was not authored in whole or in part by counsel for any party. No person or entity other than *amicus curiae* made a monetary contribution to this brief's preparation or submission.

STATEMENT OF THE CASE

Amicus curiae adopts the Statement of the Case set forth in the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENTS

This case presents a significant constitutional question: Whether the Fourth Amendment requires that a vehicle in which an officer is trapped with a fleeing suspect must be traveling at a minimum speed before an officer may use force to end the threat to public safety.

This Court has previously found that a fleeing suspect in a moving vehicle inherently creates risk of injury to the public. And yet, in this case, the en banc majority of the Ninth Circuit concluded that if an officer is being kidnapped[2] within that same vehicle, the speed at which the vehicle is traveling is material in determining whether force can be used to end the inherent risk. The majority went on to invite a jury to then second guess the particular type of force used, noting that if a jury found that the car was moving slowly, it could have also found that alternative methods of force should have been used instead.

[2] Judge Trott noted in dissent that trapping Officer Wyatt within the vehicle is felonious kidnapping in violation of California Penal Code section 207. *Gonzalez v. Wyatt*, 747 F.3d 789, 807 (9th Cir. 2014) (Trott, J., dissenting).

These conclusions directly conflict with this Court's guidance on these issues, as well as decisions from other circuits and within the Ninth Circuit. This Court has already concluded that an officer is not liable for a violation of the Fourth Amendment for excessive force unless the officer acts unreasonably, with reasonableness determined by: the severity of the crime at issue, whether the suspect posed an immediate threat to others, and if the suspect was actively resisting or fleeing from arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Gonzalez was pulled over for erratic driving and did not comply with any subsequent commands during the traffic stop. He failed to turn off his vehicle, physically struggled with the officers, and tried to ingest a baggie filled with suspected narcotics. Officer Wyatt entered the vehicle through the passenger side in order to aid Officer Ellis as he struggled with Gonzalez. Then Gonzalez stomped on the accelerator with such force that the passenger-side door closed, trapping Officer Wyatt inside the vehicle. Officer Wyatt tried to shut off the ignition but Gonzalez hit his hands away and ignored commands to stop the car. Fearing for his safety, Officer Wyatt shot Gonzalez to end the chase. Under these facts, guiding precedent renders the speed of the vehicle, even if in dispute, immaterial to the Fourth Amendment claim. This Court should therefore grant the petition for certiorari and correct the Ninth Circuit's erroneous, and potentially dangerous, conclusions.

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ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THERE IS NO GENUINE DISPUTE AS TO A MATERIAL FACT, AND WYATT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The en banc majority opinion views the record as being internally inconsistent as to a material fact and therefore ineligible for summary judgment. The court found inconsistent testimony concerning the speed of the van as Gonzalez was shot when he defiantly evaded police with Officer Wyatt trapped inside. Wyatt estimated the vehicle was travelling between 40-50 miles per hour when Gonzalez was shot. On the other hand, Wyatt estimated the vehicle travelled 50 feet in a period between 5-10 seconds. According to the majority's calculation, under the latter set of facts, the van could have been only travelling an average speed of 3 to 7 miles per hour. *Gonzalez v. Wyatt,* 747 F.3d 789, 794 (9th Cir. 2014).

Disregarding the fact that Officer Wyatt's rough estimate was given over a year after the incident occurred, the majority interpreted the estimate to be fully precise. They went on to conclude "the math did not add up" and there was a genuine dispute as to a material fact. The majority opined that if the vehicle was travelling "only" 3 to 7 miles per hour, then Officer Wyatt was not in immediate danger and use of deadly force was unreasonable. *Gonzalez*, 747 F.3d at 795. The majority opinion, however, erroneously focuses on this factual dispute because under this

Court's rulings, the speed of the van as Gonzalez was shot is immaterial to the Fourth Amendment claim, and Wyatt is entitled to judgment as a matter of law.

A. The speed of the van as Gonzalez was shot is not a material fact because there was a reasonable belief of an immediate threat to Officer Wyatt and the public, no matter the vehicle's speed.

This Court provided a three-part test as a framework for analyzing the reasonableness of an officer's use of force. *Graham*, 490 U.S. at 396. Under that test, reasonableness is determined by evaluating the severity of the crime at issue, whether the suspect posed an immediate threat to others, and if the suspect was actively resisting or fleeing from arrest. *Id.* at 36. The most important factor is the second, which asks whether the suspect posed an immediate threat to the officer or others. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011). The majority opinion erroneously focuses on the van's speed at the moment Gonzalez was shot, when the true issue ought to be whether Gonzalez posed an imminent threat to Wyatt or others. Nothing stopped Gonzalez from continuing to accelerate, or from hitting pedestrians, or from injuring Officer Wyatt – who was trapped in the passenger seat without a seat belt – all of which illustrates the immediate threat posed by the situation. *Wilkinson v. Torres*, 610 F.3d 546, 552 (9th Cir. 2010) (deadly force was objectively reasonable even

though "the vehicle was moving at a slow rate of speed," and "it could have gained traction at any time, resulting in a sudden acceleration. . . ."). It was reasonable for Wyatt to conclude that Gonzalez posed an imminent threat despite the speed of the vehicle.

The majority opinion mischaracterizes the definition of threat. As Judge Trott noted in his dissent, "The operative word in the second factor is 'threat.' The word 'threat' denotes an *indication of impending danger* or harm. The law does not require an officer who immediately faces physical harm to wait before defending himself until the indication of impending harm ripens into the onslaught of actual physical injury." *Gonzalez*, 747 F.3d at 799 (Trott, J., dissenting) (emphasis in original).

The majority opinion implies a defiant suspect who is driving a vehicle with an officer trapped inside is not an immediate threat unless some unspecified (but apparently high) rate of speed has already been reached. Regardless of the speed of the van, Gonzalez posed a threat to Officer Wyatt and the public by his reckless attempt to evade arrest. It would be perverse to penalize Officer Wyatt merely because he successfully prevented Gonzalez from causing serious injury or death. Under any objective analysis, the risk already existed when Officer Wyatt pulled the trigger.

Further, the Ninth Circuit's ruling is inconsistent with Supreme Court guidance. This Court addressed vehicular speed of a fleeing suspect and the inherent threat it creates for others in *Sykes v. United States*,

131 S. Ct. 2267 (2011). While the *Sykes* decision focused on whether vehicular flight is an inherently dangerous felony under the categorical approach, its analysis is instructive. "Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. His indifference to these collateral consequences has violent – even lethal – potential for others." *Sykes,* 131 S. Ct. at 2269 (emphasis in original).

The Ninth Circuit opinion cannot be squared with this ruling. The lower court's ruling suggests a suspect fleeing in a vehicle is not a threat unless travelling at some presumably-high (but unspecified) rate of speed. On the contrary, *Sykes* points out that the act of fleeing itself creates the possibility of harm to officers and the public, regardless of the speed of the vehicle.

An officer is permitted to use a reasonable amount of force to subdue a fleeing suspect that poses an immediate and substantial risk to others. In *Scott v. Harris*, the Court decided whether using a precision intervention technique ("PIT") maneuver on a fleeing suspect constituted an unreasonable level of force. In that case, a motorist was fleeing police at speeds exceeding 85 miles per hour on a two-lane road. In the midst of the chase, the motorist pulled into the parking lot of a shopping center and was almost boxed in by police cruisers. The motorist

evaded the trap by ramming into one of the police cars and resuming the chase on a busy highway. Officer Scott ended the ordeal by performing a "PIT" maneuver on the fleeing vehicle that rendered the suspect a quadriplegic. This Court ruled that Officer Scott's actions were reasonable because the chase created an immediate threat to the safety of others. *Scott v. Harris*, 550 U.S. 372, 386 (2007).

In the present case, the undisputed record shows Gonzalez: failed to turn off his car when asked, battered an officer, and kidnapped Officer Wyatt in the van as he attempted to escape arrest. This is similar to the *Scott* case, where the driver led police on a high speed chase, drove into a parking lot, and then rammed into a police cruiser in order to resume his flight on a busy highway. The en banc majority opinion should have applied *Scott* here because Gonzalez – despite the speed of the vehicle – posed a substantial and immediate threat to Officer Wyatt and others unless he was subdued. Therefore, Officer Wyatt's use of force was reasonable under the circumstances and the speed of the vehicle is not a material fact.

Chief Judge Kozinski makes the point succinctly in his dissent: "How fast the van was moving and how far it had traveled are beside the point. What matters is that Officer Wyatt was prisoner in a vehicle controlled by someone who had already committed several dangerous felonies. No sane officer in Wyatt's situation would have acted any differently, and no

reasonable jury will hold him liable." *Gonzalez*, 747 F.3d at 814 (Kozinski, C.J., dissenting).

B. Certiorari should be granted to clarify when "reasonableness" is a matter of law to be decided by the court, rather than an issue of fact for a jury.

The majority en banc opinion declares that a factual dispute about the speed Gonzalez's car was traveling is a material fact requiring resolution by a jury. This conclusion erroneously blurs the line between legal issues to be determined by the court and matters that must be tried to a jury.

1. Whether Officer Wyatt acted reasonably should be decided by the court as a matter of law.

In *Scott*, the Supreme Court addressed the judge's role at the summary judgment stage: "Justice Stevens incorrectly declares this to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.' At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of Scott's actions – or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' – is a pure question of law." *Scott*, 550 U.S. at 381, n.8 (citations omitted).

The majority below erroneously concluded it is for the jury to decide whether the fleeing vehicle posed a danger to the public or the police officers. They grounded their reasoning in the notion that if the vehicle was "only" going 3 to 7 miles per hour, then there would be little danger to either party and hence unreasonable use of deadly force. The proper focus is whether Gonzalez posed an imminent threat to Officer Wyatt and others. Even if the facts are viewed in the light most favorable to the nonmoving party and we assume the van was travelling between 3 to 7 miles per hour, Gonzalez still posed a threat to others, because he clearly disregarded officer warnings and commands, and was clearly capable of further increasing the van's speed. Therefore, the exact speed of the van is not a *material* fact, and this Court should grant certiorari to clarify that this is an issue for courts, not juries, to decide.

2. The use of deadly force by Officer Wyatt was objectively reasonable under the *Graham* analysis.

The real issue in this case is not what speed the vehicle ultimately attained, but whether Wyatt's actions were reasonable under the circumstances. Objective reasonableness is a legal question that the Court should resolve in Wyatt's favor.

As mentioned above, the three factors are relevant to assessing whether an officer's use of deadly force was reasonable: the severity of the crime at

issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. All three factors weigh in favor of concluding that Wyatt's actions were reasonable in this case.

As to the first factor, Gonzalez committed several serious crimes during the encounter. None of the facts underlying the criminal offenses are in dispute. Gonzalez failed to turn off the ignition as instructed when pulled over. He battered Officer Wyatt by hitting his hands away from the gear shift. And lastly, Gonzalez essentially kidnapped Officer Wyatt inside the vehicle as he attempted to escape arrest. This string of crimes occurred within a short period of time during a traffic stop, and constitutes serious offenses.

The second factor asks whether the suspect poses an immediate threat to the safety of the officer or others. Immediacy of the threat is the most important factor of the analysis. *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011). Gonzalez ignored various commands from both officers, hit Officer Wyatt's hand away when he tried to turn off the vehicle, and ignored a last warning to stop the vehicle. Officer Wyatt was in a dangerously precarious position as an unwilling, unrestrained passenger at the mercy of a defiant suspect who was driving. Based on Gonzalez's prior defiant actions, it was reasonable for Officer Wyatt to conclude that Gonzalez posed an imminent threat to himself and others by his brazen attempt to avoid arrest.

The Ninth Circuit's conclusion that the speed of the vehicle vitiates the impending danger in this situation contradicts this Court's recent pronouncement in *Plumhoff v. Rickard* that it is reasonable to use force against a suspect who would pose a grave public safety risk if allowed to flee. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014). In *Plumhoff*, the suspect evaded police on a busy freeway, maneuvered around a road block, then rammed into a police cruiser in a parking lot. The suspect was fatally shot as he evaded being cornered and drove out of the parking lot. Due to the suspect's repeated and flagrant acts of defiance, the Court reasoned he was certain to resume the chase if unabated. For these reasons, the Court held that the use of force was reasonable.

The facts of the present case are strikingly similar. Gonzalez was actively resisting up until his death and posed a deadly threat to others if he was not subdued. He refused to turn off the car when pulled over, ignored commands to stop the vehicle, and struck Wyatt when he attempted to turn off the car as he tried to evade arrest. To make matters even more dangerous, Wyatt was trapped inside the suspect's vehicle as he fled the scene. These defiant acts are similar to *Plumhoff*, and the reasoning of *Plumhoff* should have been applied here.

The third factor, whether the suspect is actively resisting arrest or attempting to flee, is also in Wyatt's favor. Gonzalez was resisting from the beginning of the traffic stop: he did not turn off the vehicle when

commanded to do so, refused to unclench his fists with suspected narcotics inside them, and attempted to escape arrest by driving away from the scene. All of these acts are undisputed by the record and show Gonzalez resisted arrest at every step of the encounter.

3. Certiorari should be granted to resolve conflicting opinions about whether the Fourth Amendment requires a specific warning before using force, or use of the least intrusive means of capture.

In general, courts recognize that an officer must give a warning before using deadly force "whenever practicable." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997) (citing *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985)). However, in evaluating whether a warning is practical, and the proximity in which the warning must be given to the use of force, most courts have afforded *Garner* a narrow reading. For example, in *Krueger v. Fuhr,* the Eighth Circuit addressed the question of how close the warning must be to the use of force. That court's holding suggests a narrow reading of *Garner* is appropriate:

> Finally, *Garner* requires the officer to give a warning "where feasible." Officer Fuhr ordered Krueger to freeze when he first encountered Krueger lying between two cars on East Walnut Street, and several times during the pursuit. There is no evidence that he gave a warning immediately prior to the shooting. However, we are satisfied that

> under the urgent circumstances facing Officer Fuhr, the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable.

Krueger v. Fuhr, 991 F.2d 435, 440 (8th Cir. 1998).

In *Krueger*, the officer drew his revolver and ordered the suspect to freeze; instead, the suspect ran away. The officer had been warned by dispatch that the suspect may have a knife. The officer pursued on foot for about 200 feet and ordered the suspect to freeze several more times. The officer never told the suspect to freeze *or he would be shot*. When the officer got close to the suspect it appeared he was pulling a knife from his waistband. The officer feared the suspect would turn around and stab him before he could stop and avoid the attack. The officer slowed down and fired three shots at the suspect, the last of which was fatal. The court held, due to the urgent circumstances facing Officer Fuhr, the absence of a warning immediately preceding the shooting did not render his use of deadly force unreasonable. *Krueger*, 991 F.2d at 440.

Similarly in this case, Officer Wyatt was acting under urgent circumstances as a captive in Gonzalez's car, and warned Gonzalez several times prior to using force. Officer Wyatt told Gonzalez at the beginning of the traffic stop, "If you reach back there again I will shoot you." Additionally, Wyatt told Gonzalez to stop when he was trapped inside the vehicle and tried to turn off the vehicle's ignition. Gonzalez ignored these orders and even hit Officer Wyatt's hands away

from turning off the car. Considering the urgent nature of the situation, Officer Wyatt's warnings appear sufficient and would not require another warning under *Krueger*.

The Eleventh Circuit has also addressed the question of whether *Garner* commands a warning of deadly force, and has also concluded that a narrow reading of *Garner* is appropriate:

> Pruitt argues that summary judgment is required on this third element because Kidd should have warned "halt, or I'll shoot" instead of "halt, police," indicating both that a warning was feasible and that the warning actually used did not advise of "the possible use of deadly force." We note that *Garner* refers to "some warning" rather than "some warning regarding the possible use of deadly force."

Pruitt v. Montgomery, 771 F.2d 1475, 1484, n.18 (11th Cir. 1985).

Nothing in *Garner* suggests that a specific warning of deadly force is required. To presume such a heightened requirement for police officers would extend beyond the ruling. To require Officer Wyatt to give an additional warning is not feasible, and is inconsistent with the holding of *Garner*. The warnings given by Officer Wyatt were sufficient and he was not required to give a warning of deadly force.

Also relevant to reasonableness for purposes of Fourth Amendment liability are the "alternative methods of capturing or subduing a suspect" available to the officers. *Smith v. City of Hemet*, 394 F.3d

689, 703 (9th Cir. 2005) (en banc). However, "[a] reasonable use of deadly force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable." *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010). Ultimately, the inquiry is whether the use of force by Officer Wyatt was reasonable under the circumstances. *Id*. The law does not require use of less-intrusive alternatives so long as the use of force is reasonable. *Id*.

These opinions, which directly conflict with the en banc majority opinion here, require this Court's review in order to clarify the specific requirements of a warning before use of force, and the relevance of alternative methods of capture in Fourth Amendment analysis.

II. THE LOWER COURT'S DECISION WILL CONFUSE POLICE OFFICER TRAINING AND MAY INCREASE DANGER BY FORCING OFFICERS TO WAIT UNTIL THREATS HAVE RIPENED INTO INJURY BEFORE THEY CAN USE DEADLY FORCE.

As the dissenting opinion below made clear, the en banc majority opinion will have far reaching implications for police officers and suspects.

"This case perforce is not just about how officers handle criminal suspects, but also what the judiciary has consistently said is constitutionally permissible when those suspects endanger peace officers' lives or safety. Accordingly, the ramifications of our decision

radiate far beyond this particular lawsuit." *Gonzalez*, 747 F.3d at 799 (Trott, J., dissenting).

Indeed, the majority opinion creates adverse impacts to police officer training. Officers will struggle to align their decisions made in the field under urgent circumstances with the rulings of judges from the safety of their chambers.

> Their opinion, rendered "with the benefit of hindsight and calm deliberation," will become the subject of confusing law enforcement training and can only impede and endanger all law enforcement officers in the discharge of their sworn duties with respect to patrolling our streets and keeping the peace in our neighborhoods.

Gonzalez, 747 F.3d at 813 (Trott, J., dissenting).

In particular, trying to implement this opinion will force law enforcement officers to hesitate in urgent circumstances and wait until harm is virtually certain to occur before acting. This ruling suggests officers must now be able to assess, in the midst of the urgent circumstances of making an arrest, exactly how fast a suspect fleeing in a vehicle is travelling. Then, officers must wait until a "reasonable" speed is reached before they may use force to protect themselves and the public.

> The unmistakable message that comes from this case will cause officers inappropriately to hesitate in the face of danger in a confrontation with a combative suspect who refuses to obey lawful commands and warnings. The result in turn will endanger both the police

> and the public at large as officers worry that they may (this case) or may not (*Wilkinson*) end up in court for years.

Gonzalez, 747 F.3d at 813 (Trott, J., dissenting) [referencing *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), in which the Ninth Circuit rejected the argument that use of force against the driver of a van that was heading toward a police officer was not reasonable because the van was moving slowly].

CONCLUSION

This Court should grant certiorari to correct Ninth Circuit precedent that would deny a finding of reasonableness as a matter of law for reasons immaterial to the Fourth Amendment claims presented in this case. Requiring such cases to proceed to a jury not only wastes time and resources, but also significantly increases risk to officers and the public by reducing the effectiveness of training and requiring officers to focus on factors that make no difference to the reasonableness of their actions rather than the immediate risk before them. For these reasons, CSAC respectfully requests that the petition for certiorari be granted.

Dated: August 29, 2014

Respectfully submitted,

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