

In The
Supreme Court of the United States

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STEPHEN MARKGRAF,

Petitioner,

v.

A.D., a Minor, J.E., a Minor; and SUE CASEY,

Respondents.

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

—◆—
**MOTION OF CALIFORNIA STATE ASSOCIATION
OF COUNTIES FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF IN SUPPORT OF
GRANTING OF THE PETITION AND BRIEF
OF THE CALIFORNIA STATE ASSOCIATION
OF COUNTIES AS *AMICUS CURIAE* IN
SUPPORT OF GRANTING OF THE PETITION**

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**MOTION OF CALIFORNIA STATE
ASSOCIATION OF COUNTIES FOR LEAVE
TO FILE AN *AMICUS CURIAE* BRIEF IN
SUPPORT OF GRANTING OF THE PETITION**

Amicus curiae the California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. Law enforcement officers who work for California counties face unjustified civil litigation and potential liability under 42 U.S.C. Section 1983 resulting from the Ninth Circuit's April 3, 2013 opinion* misapplying the qualified immunity doctrine.

CSAC's *amicus curiae* brief in support of granting the petition will assist the Court in determining whether to grant certiorari, because *amicus curiae* is familiar with the issues commonly presented in death cases brought under 42 U.S.C. Section 1983 where death results from use of force by law enforcement officers employed by California counties.

DATED: October 21, 2013

Respectfully submitted,

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* *A.D. v. State of Cal. Highway Patrol*, 712 F.3d 446 (9th Cir. 2013).

CORPORATE DISCLOSURE STATEMENT

Amicus curiae is a non-profit corporation. Its 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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**BRIEF OF THE CALIFORNIA STATE
ASSOCIATION OF COUNTIES AS
AMICUS CURIAE IN SUPPORT OF
GRANTING OF THE PETITION
INTEREST OF *AMICUS CURIAE*¹**

The interest of *amicus curiae* the California State Association of Counties (CSAC) is partly set forth in the Motion for Leave to File an *Amicus Curiae* Petition which is being filed together with this brief.

In California, public entities such as counties have statutory obligations in connection with providing legal defense and paying compensatory damages on behalf of employees who are sued for actions performed in the scope of duty.² Regrettably, law enforcement officers (unlike any other civilian employees) sometimes intentionally inflict deadly injuries in performance of their duties. *Amicus curiae* is interested in preserving existing defenses which help protect California counties and their law enforcement

¹ This brief was not authored by any party's counsel, either in whole or in part. No person or entity other than *amicus curiae* CSAC made monetary contributions toward this brief or its preparation or submission. Petitioner has consented to CSAC's filing of an *amicus curiae* brief supporting the petition. Respondent, through respondent's counsel of record, has been asked in writing to consent to CSAC's filing of an *amicus curiae* brief supporting the petition. Respondent has not consented. The parties were notified ten days prior to the due date of this brief of the intention to file.

² See California Government Code Section 825.

officers from unjustified exposure to suit and liability under 42 U.S.C. Section 1983, including the qualified immunity doctrine.



STATEMENT OF THE CASE

Amicus curiae CSAC adopts the Statement of the Case set forth at page 2 through 6 of the Petition for Writ of Certiorari.



SUMMARY OF ARGUMENT

The qualified immunity doctrine is supposed to protect “all but the plainly incompetent or those who knowingly violate the law” from suits alleging federal constitutional liability under 42 U.S.C. Section 1983.³ Over three decades ago, this Court instructed lower-court judges to measure qualified immunity by the “objective legal reasonableness” of an officer’s actions.⁴

In the present case, the Ninth Circuit departed from “objective legal reasonableness” by instead measuring qualified immunity based on the defendant

³ *Malley v. Briggs*, 457 U.S. 335, 341 (1986).

⁴ *Harlow v. Fitzgerald*, 475 U.S. 800, 819 (1982).

officer's subjective purpose.⁵ That was accomplished by looking to the jury's verdict on the subjective issue of whether the officer "acted in a manner which shocks the conscience"⁶ and allowing that subjective determination to control qualified immunity, even though the constitutional right described to the jury was framed at too high a level of generality for qualified immunity.⁷

This Court should grant certiorari to clarify the proper respective roles of judge and jury in the qualified immunity context, and to reaffirm that the "objective legal reasonableness" test for qualified immunity controls in Section 1983 death cases.

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ARGUMENT

QUALIFIED IMMUNITY SHOULD BE DETERMINED OBJECTIVELY

Under current Ninth Circuit law, two inconsistent liability theories (one objective, one subjective) can simultaneously be asserted and maintained in a Section 1983 lawsuit against a law enforcement officer for using physical force that resulted in death:

⁵ *A.D. v. State of Cal. Highway Patrol*, 712 F.3d 446, 450 (9th Cir. 2013).

⁶ *A.D. v. State of Cal. Highway Patrol*, 712 F.3d at 456, fn.5.

⁷ See *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

1. The decedent's legal representative may assert the decedent's estate-type claim for unreasonable seizure under the Fourth Amendment,⁸ for which liability depends on the "objective reasonableness" of the officer's use of force.⁹

2. The decedent's survivors may assert their own substantive due process claim under the Fourteenth Amendment, for which liability depends on the officer's subjective "purpose to harm."¹⁰

The same persons – typically the decedent's offspring – are the real beneficiaries under both theories in virtually every death case. The ultimate harm (death) is the same under both liability theories. The objective and subjective tests are two roads leading the same beneficiaries to the same destination under Section 1983 – monetary damages for the decedent's death.

In addition to availability of both objective and subjective Section 1983 liability theories in death cases, federal plaintiffs can include supplemental state law claims for negligence,¹¹ even though this

⁸ In the present case, plaintiffs abandoned their Fourth Amendment claim before trial. *A.D. v. State of Cal. Highway Patrol*, 712 F.3d at 451.

⁹ *Graham v. Connor*, 490 U.S. 386, 398 (1989).

¹⁰ *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008).

¹¹ See *Hayes v. County of San Diego*, 57 Cal.4th 622, 639 (2013).

Court has held that “liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.”¹² Beyond that, such plaintiffs may ask jurors to award punitive damages under Section 1983 based upon the jury’s subjective determination that the officer acted oppressively.¹³

Qualified immunity is supposed to depend on the “objective legal reasonableness” of an officer’s actions.¹⁴ Qualified immunity is especially important when (as here) an officer’s only relationship with the decedent lasted a few seconds, and when (as here) the decedent had been using a motor vehicle both as a dangerous weapon, and as a means of escape.

A motor vehicle has the unique dual ability to be simultaneously used as a deadly weapon, and as a means of escape. That is exactly how the decedent had been using the stolen car in this case. Less lethal law enforcement tools (such as pain compliance holds, pepper spray, batons and the like) are useless against a motorist sitting securely in the driver’s seat of an enclosed automobile. The decedent in this case could have inflicted death and mayhem at split-second speed, while incurring little serious risk to her own safety.

¹² *County of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1988).

¹³ See *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005).

¹⁴ *Harlow v. Fitzgerald*, 457 U.S. at 819.

As this is written, a similar incident reportedly occurred in Washington, D.C. A motorist reportedly drove her car into a barrier near the White House, then led a wild motor vehicle pursuit to Capitol Hill, where law enforcement officers fatally shot her.¹⁵ Such situations, regrettably, recur from time to time in modern motorized society. Law enforcement officers generally lack reliable ways to stop such motorists without the risk of harming them while stopping them.

In this case, the trial jury was instructed that it “should” find that the defendant officer violated constitutional rights if he “acted in a manner which shocks the conscience,” meaning “act[ing] with a purpose to cause [Eklund’s] death unrelated to the legitimate law enforcement purposes of taking her into custody, self-defense, or the defense of others.”¹⁶ That question called for a purely subjective determination at a high level of legal generality. The Ninth Circuit then found that the officer was not entitled to the protection of qualified immunity based on the jury’s assessment of the officer’s subjective purpose,¹⁷ which

¹⁵ See http://articles.washingtonpost.com/2013-10-03/politics/42649836_1_car-chase-u-s-capitol-two-officers (accessed on October 7, 2013).

¹⁶ *A.D. v. State of Cal. Highway Patrol*, 712 F.3d at 456, fn.5.

¹⁷ *A.D. v. State of Cal. Highway Patrol*, 712 F.3d at 452-53.

(in this context) was indistinguishable from the officer's motive.

The present opinion is the latest example of the Ninth Circuit's resistance to the qualified immunity doctrine. The Ninth Circuit continues to refuse to uphold qualified immunity more than sparingly¹⁸ in force cases (even when plaintiffs are not physically injured), and continues to identify "obvious" constitutional rights¹⁹ in the context of clearly-established law on the basis of prior cases that "are far afield from the issues before us."²⁰

This Court should take the opportunity to clarify the proper roles of judge and jury in the qualified immunity determination, and to clarify the proper way for judges to apply the "objective legal reasonableness" qualified immunity test to a jury's subjective determination of the officer's purpose. In a case where (as here) qualified immunity was properly asserted by the officer, the proper role of juries should be to decide whether the party with the burden of proof has proved all material disputed *facts* – if any genuinely-disputed facts were presented at trial.

¹⁸ See *Maxwell v. County of San Diego*, 708 F.3d 1075, 1086 (9th Cir. 2013).

¹⁹ See *Maxwell*, 708 F.3d at 1083.

²⁰ See *Maxwell v. County of San Diego*, 708 F.3d at 1096-97 (Ikuta, J., dissenting).

In this case, the real dispute was about the officer’s subjective purpose. An officer’s subjective purpose can be in dispute, whether or not his actions are actually disputed. Subjective factors should not cloud a qualified immunity determination when the test is supposed to be “objective legal reasonableness.”

By looking to the officer’s subjective purpose – essentially identical to the officer’s motive in this context – the Ninth Circuit revived an approach to qualified immunity that this Court firmly discarded over three decades ago when it rejected an officer’s subjective motivation as part of the Section 1983 qualified immunity test.²¹ The present opinion effectively endorses a subjective test for qualified immunity in future Section 1983 death cases to the unfair detriment of *amicus curiae* CSAC, and thousands of law enforcement officers employed by California counties.



CONCLUSION

The present opinion has far-reaching consequences for California counties represented by *amicus curiae* CSAC and for law enforcement officers who are tasked with making split-second life-or-death emergency decisions without benefit of hindsight, who rely on the qualified immunity doctrine for protection

²¹ *Harlow v. Fitzgerald*, 457 U.S. at 819.

from unjust second-guessing. Accordingly, this Court should grant certiorari.

DATED: October 21, 2013

Respectfully submitted,

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