No. 15-58

In the Supreme Court of the United States

CITY OF LOS ANGELES, JULIO BENAVIDES, and MARIO FLORES,

Petitioners,

v.

ROBERT CONTRERAS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

REASONS WHY THE PETITION SHOULD BE GRANTED

I. There Was No Basis In Fact Or Law For The Panel To Ignore The Critical And Undisputed Fact That Just Before He Was Shot, Contreras Committed An Undeniably Serious And Violent Felony, Threatening The Safety Of The Officer and The Public, And Attempted To Evade Arrest By Flight.

Contreras acknowledges, as he must, a proper application of the test of reasonableness under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Brief in Opposition, pp. 10-11, quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1983). Yet here, Contreras contends the critical facts and circumstances Officers Benavides and Flores confronted, namely that Contreras had just committed a drive-by-shooting, an undeniably violent felony; and was attempting to evade arrest by flight should be ignored. Contreras insists the panel's refusal to consider the *Graham* factors does not provide grounds to grant this Petition.

Contreras bases his argument on the mistaken notion that Petitioners waived their right to have the Court consider the severity of the crime at issue and whether he was attempting to evade arrest by flight; the very facts a proper application of the Fourth Amendment reasonableness test calls for.

Contreras pegs the supposed "waiver" on two things: a single sentence in the pretrial conference order – "Mr. Contreras was not shot because he was a fleeing felon" – and his erroneous assertion "Petitioners took the position at trial that the *only* reason they shot Mr. Contreras was that he pointed a gun at them." Brief in Opposition, p. 5, italics in the original.

The "'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confront them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. *If* Petitioners did take the position that the *only* circumstance the law or their training permitted deadly force was if Contreras pointed a gun at them, their subjective understanding is both wrong and irrelevant.

Besides, the supposed "waiver" is contradicted by the record. The sentence Contreras isolates is taken out of context and Petitioners did *not* testify the gun pointing was the *only* justification for the use of deadly force. The fact Contreras just committed a violent felony and was fleeing was always a motivating factor in Petitioners' decision to use deadly force to apprehend him.

In the pretrial conference order, Petitioners stated:

> Based upon the circumstances which were rapidly unfolding . . . it was reasonable to believe that Mr. Contreras, who was fleeing from officers who were attempting to make an arrest . . . to perceive he was armed with a handgun. *Mr. Contreras was not shot because he was a*

> *"fleeing felon."* The officers discharged their weapons at him on four occasions because his actions led reasonably trained and seasoned officers to believe he was armed and presented an immediate danger to the lives of the pursing officers. These actions included: flight, exhibiting a gun, turning and pointing in the direction of the officers [,] the nature of the crime having been committed (ADW/drive by shooting), potential gang members who commit such crimes, who are armed when the[y] commit such crimes and the continued observations of him with a dark item in his hands that appeared to be a gun. (2 ER 256-257, italics added.)

The italicized sentence could more accurately have read: "Mr. Contreras was not shot *simply* because he was a 'fleeing felon,'" but the following two sentences make clear they based their decision to use deadly force on the totality of Contreras's actions, including that he had just committed a particularly violent felony and was fleeing the police.

Although Officer Benavides's observation of Contreras repeatedly turning and pointing a gun during the chase was an important factor, he never said it was the *only* reason he shot him. The drive-by-shooting and Contreras's refusal to surrender were important factors in his decision to use deadly force. Officer Benavides explained why he fired the first two rounds during the foot pursuit:

> Mr. Contreras's actions from the moment that he stepped out of the van with a handgun in his right hand, and his face covered, and me believing that he was possibly an attempt

> murder suspect [sic]. His actions when he turned counterclockwise, failing to comply with my orders to drop the gun, failing to surrender, pointing the gun in my direction, me fearing for my life, my partner's life, I fired two rounds in his direction to stop the threat. (4 ER 523.)

When Contreras refused to surrender after this first volley of shots and continued to run, Benavides said

> [It] indicated to me that I still had a dangerous, fleeing felon that was armed with a gun that had just committed a very violent felony and was still a threat to me, my partner, and citizens in the area in the direction he was running. (4 ER 524.)

Officer Benavides testified his decision to fire the final shots was based on the totality of his observations:

> I had people involved in the drive-by-shooting in the known gang area, which at the time had been extremely – extremely active with a gang war between two specific gangs, a Crip gang and a Mexican gang, and I observed this vehicle speeding away. I had additional units with me. I activated my police lights. The vehicle continued to speed away. Once the vehicle came to a stop, I observed Robert Contreras exit the driver's seat of this van with a gun in his hand and his face covered with a bandanna. And the two times that he had failed to comply with my commands and turned in my direction with what I perceived to be a firearm, and in the alley, after me continuing to give him commands to

> drop the gun, he failed to comply with my commands and continued to point what I perceived to be a gun in my direction, I felt that it was, based on the totality of the circumstances, an immediate defense of my life and my partner's life. (4 ER 526-27.)

The panel's refusal to consider the *Graham* factors and its determination of "reasonableness" under the Fourth Amendment based on facts only apparent through impermissible "20/20 vision of hindsight" was clear error. (*Graham, supra,* 471 U. S. at 393, 396.) This is precisely why Petitioners seek certiorari. A proper application of the Fourth Amendment reasonableness test compelled the conclusion Petitioners' use of force was reasonable under bedrock cases like *Graham v. Connor*, 471 U. S. 386, *Tennessee v. Garner*, 471 U. S. 1 (1985), and their progeny.

II. Viewing The Totality Of Circumstances From the Officers' On-Scene Perspective, Not With 20-20 Hindsight, Their Use of Force Was Entirely Reasonable Under the Fourth Amendment.

The panel's determination Petitioners' force was unreasonable and its denial of qualified immunity narrowly focused on the fact Contreras turned out to be unarmed and physically trapped when they fired the final rounds and ignored that Petitioners were trying to apprehend a fleeing felon. Petitioners are not trying to "rehash" the facts. Petitioners ask this Court to consider the very facts the panel declined to consider – the severity of the crime, the danger Contreras posed to the officers and others, and his flight from the police – and to not consider facts the officers could not

possibly have known until after the shooting was over and determine whether their use of force violated the Fourth Amendment, or alternatively whether they are entitled to qualified immunity.

The jury's rejection of Petitioners' testimony that Contreras pointed a gun at them was not dispositive. Under *Tennessee v. Garner*, 471 U.S. at 11-12, if there is "probable cause to believe [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." The undisputed evidence remains moments earlier Contreras had committed "a crime involving the infliction or threatened infliction of serious physical harm" *Ibid.* and was "attempting to evade arrest by flight." *Graham v. Connor, supra*, 490 U.S. at 396.

Contreras minimizes the severity of his crime and the serious threat a fleeing gunman poses to pursuing officers and others: "there was no probable cause that Mr. Contreras committed a serious crime or wielded a weapon; the only evidence of such was anonymous witness descriptions of a shooting involving the van in which respondent was riding with others." Brief in Opposition, p. 14. A drive-by-shooting is undeniably a "serious crime" and Contreras conceded there was probable cause to believe he participated in the drive-by-shooting. Contreras's sole claim was Petitioners used excessive force to affect the seizure, not that the seizure was unsupported by probable cause. In closing arguments, Contreras's counsel all but conceded probable cause:

> The officers were responding to a serious situation. That is true. They heard shots. They didn't know who was shooting. They claim they got some information from a person saying that somehow the van was involved. Okay. That person may be right; they may be wrong. Someone could be shooting at the van, one person shooting out of the van. They don't know. And clearly, they have a right to follow the van to see whether they were involved in what was going on. We don't question that. (3 ER 438.)

It was uncontested that seconds after Petitioners heard the gunshots, they saw a van speeding away from the direction the shots came from, and witnesses directed the officers to the only vehicle that was speeding away and told them the gunshots came from the van. The reasonable inference is the occupants in the van had just committed a drive-by shooting. Petitioners' familiarity with the area and the recent high incidence of gang-related drive-by shootings further buttressed the reasonable inference the shots they heard were in fact a drive-by-shooting and the occupants in the van were the participants.

The van's evasive driving provided further strong evidence upon which any reasonable officer could believe the occupants of the van were involved in the drive-by-shooting. It is immaterial whether Contreras

was the driver – he fully admitted he was an occupant in the van.[1] A reasonable officer would have considered all of the occupants in the van as suspects. When Contreras leapt from the van and took off running as fast as he could, this further supported the reasonable inference he was a participant in the drive-by shooting, and not an innocent passenger. From an officer's perspective, a suspect who has just opened fire on a public street and is fleeing the scene poses a serious risk to the pursuing officers and to the public. In a matter of seconds, the suspect could fire at the police or a member of the public to continue his escape.

Contreras admitted he knew the police were chasing him and he kept reaching into his pocket and grabbing for something, until he eventually pulled something out of his pocket and ran with it in his hand. Fully crediting his testimony that he was grabbing for his cell phone and not a gun, it was still entirely reasonable, in light of all the other circumstances, for the officers to mistakenly believe he was reaching for

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[1] Contreras says he impeached Petitioners' testimony that they saw him exit the driver's side door with a gun in his hand and a bandana over his face, by playing "surveillance footage showing him exit the passenger side of the van without a bandana or gun to impeach Petitioners' testimony." Brief in Opposition, p. 3. Petitioners maintain it is immaterial whether Contreras was the driver or a passenger, but must correct another misstatement. Contreras introduced grainy still frames made from the surveillance footage at the Jack-in-the-Box. These still frames depicted a pair of legs and feet emerging from the sliding passenger door of the van. Contreras identified the legs and feet, clothed in grey sweat pants and white K-Swiss tennis shoes, as his legs and feet. The still frames did not depict anyone's face or hands, with or without a gun or a bandana.

a gun, that he was armed and dangerous and posed a threat to the safety of the officers and the community. Contreras testified he was reaching for his cell phone in his pocket and when it kept inching its way, he pulled it out and ran with it in his hand. In light of the totality of circumstances, his cell phone could easily have been mistaken for a gun.[2]

Contreras says neither Officer Flores nor Officer Savedra recalled Officer Benavides warning him to drop his gun or stop. Brief in Opposition, p. 5. Savedra was lagging 15 to 20 feet behind and Officer Flores repeatedly testified he *did hear* Officer Benavides shouting warnings before Benavides fired the initial two volleys of shots: "Q: Did anybody say anything to Mr. Contreras between the first group do shots and the second group of shots? A: I recall my partner [Benavides] yelling commands to Mr. Contreras, "Stop. Police. Stop. Drop the gun." (3 ER 360-361.) And, "Q: Did you hear, as you were running east on Florence, Officer Benavides saying anything to Mr. Contreras? A: Yes, I did . . . I heard Officer Benavides yell to Mr. Contreras, 'Stop, stop,' at least, 'Drop the gun.'" (3 ER 373-371.) And, "Q: As you are running eastbound Florence, do you hear Officer Benavides say anything to Mr. Contreras? A: I recall Officer Benavides yelling "Stop. Police. Drop the gun." (3 ER 380.)

Contreras, testified that due to the sound of the approaching sirens and the whirl of the police

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[2] Photographs of Contreras's phone were introduced at trial as Exhibit 309. His phone was not a sleek IPhone. It was an older model, black, non-flip Nokia-style phone, approximately 5 to 6 inches long, with a 1 to 2 inch antenna.

helicopters, he was unable to *hear* any warnings, not that warnings were not given. The absence of a warning, however, does not negate the objective reasonableness of the officers' use of deadly force. "Some warning" should be given "where feasible." *Tennessee v. Garner, supra,* 471 U.S. at 11-12. Contreras's own testimony was the sound of the police sirens and helicopters was so loud it was impossible to "hear voices." (3 ER 422-424) Thus, under Contreras's version, verbal warnings would not have been feasible.

The purpose of the "warning where feasible" is self-evident. Shouting a warning like "stop, police" provides notice to the suspect the police are attempting to apprehend him, and thus provides the suspect the opportunity to voluntarily surrender and avoid the use of force to capture him. Contreras admitted he knew the police were pursuing him, so he could have surrendered. He said he fled because he was "panicked and scared." Contreras's subjective reason for not surrendering is irrelevant. "Reasonableness" is analyzed "from the perspective of a reasonable officer on the scene." *Graham*, 490 U. S, at 396. From a reasonable officer's perspective, Contreras remained an armed and dangerous suspect who had no intention of surrendering.

If Contreras was "physically trapped" and ready to surrender just before Petitioners fired the final shots, Petitioners had no way of knowing this. Nothing about Contreras's actions provided objective evidence he intended to surrender. He did not raise his hands in a surrender position. By his own testimony he was facing away from the officers towards the gate and Petitioners reasonably believed he was navigating his

escape. Petitioners had no reason to know Contreras had been shot in the ankle – Contreras said after he was shot in the ankle, he started "skipping real fast." Petitioners had no reason to know the gate was locked – Contreras testified even he had no idea it was locked. Petitioners could not know whether Contreras was armed or unarmed. All of these facts only became apparent with the impermissible benefit of hindsight vision. *Graham*, 490 U.S. at 396. From Petitioners' on scene perspective, Contreras remained armed and dangerous and there was no objective basis to believe he was ready to surrender.

It was error for the panel to disregard the facts Petitioners *did know* when they were forced to make their split-second decision regarding force, namely he had just committed a serious felony and was fleeing the police. The panel's error was compounded by its determination their use of force was unreasonable based on facts Petitioners' *could not have known* until after the shooting was over, namely that a gun was not recovered from the scene, he was injured, and the gate was locked. As fully set forth in the Petition, a proper application of the Fourth Amendment reasonableness test and application of long-established precedent from cases like *Tennessee v. Garner* and its progeny, compels the conclusion Petitioners' use of force was reasonable under the Fourth Amendment, or at a minimum, entitles them to qualified immunity.

CONCLUSION

Petitioners respectfully request this Court grant their Petition for Writ of Certiorari to correct the panel's clearly erroneous determination their use of force was unreasonable and denial of qualified immunity.

Respectfully submitted,

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