APPEAL NO. 13-56141

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARA LOWRY,
Plaintiff-Appellant,

v.

CITY OF SAN DIEGO,
Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of California
The Honorable Michael M. Anello, Presiding
United States District Court No. 11cv949-MMA (WMc)

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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LEAGUE OF CALIFORNIA CITIES

Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-2, the League of California Cities (the "League") respectfully moves this Court for leave to file the brief submitted herewith, as *amicus curiae* in support of Petitioner-Appellee City of San Diego's Petition for Panel Rehearing and for Rehearing *En Banc*.

As explained more fully in the brief itself, the League is interested in the present case because it represents 474 cities in California, many of which operate police departments that use police dogs for safety when searching commercial buildings to find burglars and other criminals that are believed to be hiding within such properties. The opinion of the Panel in this matter, if allowed to stand, would allow for judicial and jury review using 20/20 hindsight of any police decision to use police dogs to search commercial buildings at night or when closed. There are tens of millions of square feet of commercial buildings in the League's member cities that could be occupied any night by a burglar or person with threatening intentions, but according to the *Lowry* majority, officers would be required to know rather than have reasonable cause to believe that a person is inside and is a threat. Without such knowledge, releasing a police dog would subject cities to liability even to armed burglars, if, in hindsight, the armed burglar did not have aggressive intentions.

The attorneys who have drafted the brief are familiar with the issues presented in this case. They have reviewed the relevant materials, including the Petition for Rehearing and for Rehearing *En Banc*, the District Court Order, and the Panel's Opinion. The brief submitted by the League does not repeat the arguments of Petitioners-Appellees. Instead, the brief expands upon the issue of judicial review of police decisions with 20/20 hindsight that was disavowed in *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (U.S. 1989) and other Supreme Court decisions, and expands on the evolution of Ninth Circuit decisions from releasing police dogs to pursue known suspects versus the instant decision criticizing release of police dogs to search commercial buildings for unknown suspects.

Prior to filing the instant motion, the moving attorneys attempted to obtain consent from Respondents for its filing. Having provided Respondent attorneys the opportunity to read the proposed brief, Respondent attorney Nathan Shaman informed the undersigned that Respondent would not consent to filing of this Brief.

Accordingly, the League respectfully moves this Court for leave to file the brief of *amicus curiae* submitted herewith.

Dated: May 26, 2016

LAW OFFICES OF VINCENT P. HURLEY
A Professional Corporation

By: /s/ VINCENT P. HURLEY
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LEAGUE OF CALIFORNIA CITIES

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BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* FILED BY DEFENDANT-APPELLEE CITY OF SAN DIEGO

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I.
INTRODUCTION

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Complying with F.R.A.P. 29(c) and 26.1, the League avers that it is a nonprofit corporation that does not issue stock and is not a subsidiary or affiliate of any publicly owned corporation. No party or their counsel authored any part of this brief or made any monetary contribution toward its preparation or submission, and no person other than *amicus curiae* or its counsel contributed any money intended to fund the preparation or submission of this brief.

The issues on appeal are of significant interest to all cities in California and in the Ninth Circuit. Many law enforcement agencies use police dogs to search for and find burglars and other criminals in commercial buildings. Such buildings include office complexes with all the generally known furniture, storage closets,

basements, attics and computer centers; school buildings at night or when closed containing many rooms with school desks, closets, coat rooms, counseling centers and other spaces; churches that can have hundreds of pews or benches, vestibules, side altars and statuary; transit tunnels and closed stations such as BART, Los Angeles Metro, San Diego Metro, and the Santa Clara County VTA, all with miles of tunnels, service rooms, and crawl spaces; warehouses with trucking centers, storage racks, conveyors and all the equipment necessary for storage or shipping; and, shipping docks and piers with a myriad of obstacles, and equipment as listed for warehouses. There are tens of millions of square feet of such properties. These are but a few common examples that any person can envision in which thieves and other persons with criminal intent can be lurking at night or when the facilities are closed.

Because on one night a woman decided to "sleep it off" in a commercial office building, the majority of the Panel in this case would find that any use of police dogs to search commercial buildings can be reviewed using hindsight that would expose cities and police officers to liability if their search resulted in the discovery of someone who did not belong there at night, but who was not a burglar. No city can operate with police dogs that search out and find burglars if the result of the search, not the decision-making process, is the measure of reasonableness.

The League concurrently files pursuant to F.R.A.P. 29 and Circuit Rule 29-2 its Motion for Leave to File this *Amicus* Brief in Support of the Petition of Petitioner, City of San Diego, for Panel Rehearing or Rehearing *En Banc*.

II.
FACTS TAKEN FROM THE DECISION

Amicus recounts the facts, including some already recited in the Petition, to summarize the totality of the circumstances that the officers considered, and to highlight the effect of the Panel's reliance on 20/20 hindsight.

A. The Incident.

It only took three minutes for the three San Diego Police officers to arrive at the building. (Opinion at 5; Dissent at 32). Therefore, an officer would know that there was little time for a burglar to flee. The burglar alarm was sounding with sufficient volume that the officers could hear it from the parking lot. (Dissent at 33). The building was dark. (Opinion at 5; Dissent at 32). The officers had to climb over the ground floor gate, then looked around the second story for any indication that the building might be occupied by someone who belonged there. (Dissent at 32). The alarm had been triggered in Suite 200, and the officers found a propped open door leading to Suite 201. (Opinion at 5, Dissent at 32). The officers knew that the circumstances indicated signs of a break in. (Dissent at 33). The only light inside the building was ambient light emitting through the propped open door from the parking lot lights (Opinion at 5) and the officers could not see

inside the suite (Opinion at 6). The officers' entry would have to be blind (Dissent at 36), but it was the officers' job to enter the building and investigate the circumstances with which they were confronted. (Dissent at 36).

The officers entering the darkened commercial office building did not know if anyone was inside, intent on doing them harm. They did not know who inside might be armed or pose an immediate threat. (Opinion at 6). We now know, using 20/20 hindsight, that Lowry was asleep under a blanket and did not "engage in any threatening behavior". (Opinion at 15)

B. Additional Facts From the Dissent.

The officers' decisions, after no one responded, were aided by the following assumptions: 1) Doors do not generally open of their own accord in an empty commercial office building, 2) people do not often come to an office for legitimate purposes late at night without turning on the lights, and 3) people who do enter a commercial office building for legitimate purpose at such a late hour would usually notice that they had set off a burglar alarm loud enough to be heard from the parking lot of the commercial building. (Dissent at 30). There was no reason obvious to the police officers why someone with legitimate purposes in a darkened commercial building would fail to respond to the police command warning the individual to come out because a dog was coming in. (Dissent at 33).

C. The Court's Reliance on 20/20 Hindsight about Lowry's Presence.

Applying fact tests from *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994), and *Miller v. Clark County*, 340 F.3d 959, 965 (9th Cir. 2003), the Panel included in its review of the totality of circumstances facts that were gleaned only from hindsight:

> [A] reasonable jury could find that the officers would not have been justified in believing that Lowry posed a threat to their safety …. Throughout the encounter, … Lowry remained fast asleep on the couch", and "… did not 'engage in any threatening behavior' … nor do 'anything other than lie quietly'…. [T]he officers … had no reason to believe that Lowry was armed, dangerous, or intent on inflicting harm… [There is no] articulable basis for believing that Lowry was armed or that she posed an immediate threat to anyone's safety. (14-15).

Relying on fact tests from *Deorle v. Rutherford,* 272 F.3d 1272, 1281 (9th Cir. 2001), the *Lowry* majority concluded that "[A] reasonable juror could conclude that the 'objective factors' did not suggest that Lowry posed a threat to the safety of the officers or others." (Opinion at 17).

Using fact tests from *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005), the Panel found "It is undisputed that Lowry did not physically resist arrest, 'did not attack the officers' or anyone else, and did not attempt to flee from the officers." (Opinion at 17). And, finally, the majority found that Lowry "… did not hear [the police] warnings…". (Opinion at 22).

III.
POINTS AND AUTHORITIES

A. The Cases Relied on by the Panel Do Not Apply to Unseen, Unknown, Hidden Suspects.

The Panel points out "We have repeatedly held that deploying a police dog to effectuate an arrest is a 'severe' use of force." (Opinion at 10) (relying on *Chew, supra at* 1436; *Miller, supra at* 964; and *Smith, supra at* 701-02). However, the authorities relied on demonstrate the evolution of the Court's decisions about deployment of police dogs in *known* circumstances—where the police officers know who the person is, the severity of the crime, and whether the person constitutes an immediate threat to the officers or others. These authorities are distinguishable from the instant case.

In *Chew*, a wanted felon who the police had identified and whose driver's license the police had, ran and hid in a fenced junkyard for over two hours, leading the police to use a helicopter and three police dogs to search for him. Based on the officers' knowledge before the decision to release dogs, the Court sent the question to the jury to decide if use of a dog was unreasonable. *Chew, supra* at 1436.

In *Miller*, a possible auto theft suspect fled in a car to his own house, then ran into the woods. The officers knew who he was, where he lived, what he was wanted for, and that he would be a threat to the officers if captured in the woods.

Based on what the officers knew before the decision, the Court found no material dispute whether it was reasonable to release the dog. *Miller, supra* at 960-961.

In *Smith*, the police claimed that Smith refused to obey orders at a domestic violence call, so, in addition to employing pepper spray, batons, and hand-to-hand combat, the officers released a dog not once, but three times. Based on what the officers knew at the time they released the dog, the Court sent the question of unreasonable force to a jury. *Smith, supra* at 694.

In *Chew, Miller* and *Smith,* the courts did not need to know what would be later discovered. Similar to its misapplication of the *Chew, Miller,* and *Smith* trilogy, the Panel majority misapplies the holding of *Tennessee v. Garner*, 471 U.S. 1, 21, 105 S. Ct 1694, 85 L. Ed. 2d 1 (1985). The decedent in *Garner* was not an unseen person skulking in the rooms or hiding under a blanket inside a commercial building. The officers shot a boy in the back of his head when they knew he was a teenage boy fleeing over fences from a residential burglary and, since he was fleeing, he was not threatening anyone. The officer even concluded that the boy was not armed. *Garner*, *supra* at 3-4. The officer acted based on Tennessee law, which permitted the use of force to stop any flight. *Garner*, *supra* at 4-5. The holding of *Garner* is a far cry from a circumstance of using a dog that might bite to search for unidentified burglars in a non-residential building.

In this case, the Panel's decision goes several steps beyond *Chew, Miller, Smith* and *Garner*. In each of those cases, all the necessary facts were known to the officers. In this case, the officers were confronted by facts that would lead anyone to believe there was probably a burglar hiding inside, but, by allowing use of 20/20 hindsight, the *Lowry* Panel has held that when the officers do not know who is inside a building or the person's motives, the jury can look to what was learned in hindsight to determine if the decision to release a dog to search for a burglar or burglars was unreasonable.

B. The Panel's Decision Contradicts U.S. Supreme Court and Ninth Circuit Precedent Which Makes Clear that Hindsight Cannot Be Used to Judge the Reasonableness of Force.

The *Lowry* Panel majority spun an analysis of the *Graham* factors *(Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (U.S. 1989)) to support the pre-conceived result. The factors include generally the severity of the crime, whether the suspect poses an immediate threat to the officers or others, and whether he or she is actively resisting arrest or attempting to evade arrest. *Id*. However, "[t]he '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, 104 L. Ed. 2d 443 (U.S. 1989). In this case, the Panel majority did not consider the "particular use of force" from the perspective of the officers. Rather

than consider what the officers knew before making their decision, the Panel majority collected a totality of the circumstances from Lowry's (not the officers') perspective, i.e. she was in her employer's office suite (Opinion at 4), she opened the wrong door, accidentally tripped the alarm, was sleeping off a night of drinking (Opinion at 4), did not hear the alarm, did not hear multiple shouted warnings and commands (Opinion at 6), and was not a threat.

Ninth Circuit precedent similarly prohibits consideration of facts gleaned in hindsight. In *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005), deputies were confronted by Blanford who was carrying a sword, and wearing a ski mask and earphones. After walking around the street for a while, Blanford started to enter a private residence and seemed to ignore commands to stop and drop the sword, so deputies shot him. Deputies found out later that Blanford was trying to enter his parents' home, and he did not hear commands because he was wearing headphones. *Blanford*, *supra* at 1113-1114. Blanford had not committed a felony, had not threatened the deputies, and was entering his parents' home, though the deputies did not know who owned the home. The Ninth Circuit held correctly that the use of force must be judged from the perspective of the officers on scene and not by what was learned later in 20/20 hindsight.

A federal court cannot impose its judgment of police officer tactics using 20/20 hindsight. *City and County of San Francisco v. Sheehan,* 135 S. Ct. 1765,

1777, 191 L. Ed. 856 (2015). Even when, with the benefit of hindsight, officers may have made "mistakes," the court may not rely on hindsight. *Sheehan*, *supra*, 1775. Officers' use of force must not be judged with the benefit of hindsight and calm deliberation, but from the perspective of a reasonable officer at the scene. *Ryburn v. Huff*, 132 S. Ct 987, 991-992, 181 L. Ed. 966 (2012).

C. If Allowed to Stand, the Panel's Decision Will Have Negative Practical Impacts for Cities and Police Officers.

The Panel has held that police officers may be determined to have acted unreasonably if they assume that a person lurking in a closed, darkened commercial building might pose an immediate threat or might be armed. (Opinion at 10). But police will seldom be able to see and articulate in advance that a burglar is hiding within or is an immediate threat.

Drilling into the holding shows the practical effect of the decision if allowed to stand. If officers decide to release a dog into a commercial building at night where there are suspicious circumstances leading a reasonable police officer to conclude that there is a burglar inside, but they have not seen or detected anyone in advance, what is discovered afterwards will be part of the totality of circumstances analysis of whether the release (use of force) was reasonable.

Using 20/20 hindsight, the Court focuses on Lowry's perspective that she did not hear the police commands and did not resist arrest, so force was unwarranted. (Opinion at 17-18).[1]

The Panel decided that, since Lowry was just sleeping and was not a threat, the decision to release a dog before that information was known could be unreasonable. Following the Court's use of 20/20 hindsight, an unarmed burglar would have the same claim to a jury trial as Lowry. If the dog found and bit a burglar hiding under a blanket on the couch, the burglar would be able to argue that he or she was not armed and did not have aggressive intentions, or only wanted to hide rather than flee, so in hindsight release of a dog was unreasonable.

Use of 20/20 hindsight would also provide a jury trial to an armed burglar. Assume officers arrived and found the same circumstances of the sounding alarm and open door, but this time the officers saw a burglar inside headed away from them to the room containing the couch. The officers released the dog, the burglar was apprehended under the blanket and suffered the same injury as Lowry, but

[1] The Panel discounts her failure to hear, relying on *Nelson v. City of Davis*, 685 F.3d 867, 882-883 (9th Cir. 2012). (Opinion at 22). The real issue in *Nelson* was not about hearing warnings, it was about whether officers ever gave adequate warnings to disperse students. *Id*., 873. In *Nelson*, officers fired pepper balls to disperse partying students because officers claimed that the students did not comply with orders, but the students said later that they did not or could not hear the orders. *Id.,* 873-874. A police reaction to boisterous, known students is hardly equivalent to officers confronting a potential cornered burglar hiding in a commercial building.

when he was apprehended the officers discovered that the burglar had a gun. Under the holding of *Lowry*, the officers would still be subject to a civil rights trial for unreasonable force because they did not know when the dog was released that the burglar was an immediate threat. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010) (must be objective factors to justify a concern.) Even if the burglar was armed, if the officers found out about the immediate threat after the armed burglar was secured, their decision to "use force" was made when there was no known immediate threat.

The *Lowry* decision would establish a new standard for use of police dogs to search non-residential structures or areas. The Panel majority's over-extension of *Chew, Miller, Smith* and *Garner,* by using hindsight, and the unsubstantiated conclusion that burglary is not inherently dangerous (discussed by Petitioner, City of San Diego, City's Petition for Panel Rehearing and Rehearing *En Banc*, Page 8) renders every deployment into a non-residential property *per se* unreasonable unless the police know first that there is serious criminal conduct in progress, and second, that the perpetrator is an immediate threat to officers or others. This is an incorrect extension of Supreme Court and Ninth Circuit law that would allow judges and juries to decide whether force was reasonable using the hindsight of what was discovered afterwards, rather than the facts presented to the police officers at the scene.

Amicus Curiae, the League of California Cities, urges the Panel to rehear the matter, or that the Ninth Circuit grant the Petition for Rehearing *En Banc*.

Dated: May 26, 2016

LAW OFFICES OF VINCENT P. HURLEY
A Professional Corporation

By: /s/ VINCENT P. HURLEY
Attorney for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32, and Circuit Rule 29-3, the undersigned hereby certifies that:

1. This brief is accompanied by a motion for leave to file amicus curiae brief pursuant to Rule 29, Federal Rules of Appellate Procedure, and Ninth Circuit Rule 29-3.

2. This brief complies with the type size and typeface requirements of Federal Rule of Appellate Procedure 32. The brief has been prepared in proportionally spaced typeface 14 point Times New Roman font. This brief contains 2,971 words, exclusive of tables, cover sheet and certificates. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: May 26, 2016

LAW OFFICES OF VINCENT P. HURLEY
A Professional Corporation

By: /s/ VINCENT P. HURLEY
Attorney for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

9th Circuit Case Number 13-56141

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 26, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Marcy Brenkwitz