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)

BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES AFTER GRANT OF REHEARING *EN BANC* IN SUPPORT OF APPELLEE CITY OF SAN DIEGO FOR AFFIRMANCE OF THE DISTRICT COURT'S ORDER

All Parties have agreed to the filing of this *Amicus Curiae* brief.
(Fed. R. App. P. 29(a); Circuit Rule 29-3)

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I.
INTRODUCTION

The League of California Cities is an association of 475 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 Federal Rules of Appellate Procedure 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, Appellant argues 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.

II.
FACTS TAKEN FROM THE DECISION

Amicus recounts the facts to summarize the totality of the circumstances confronted and considered by the officers and to highlight the effect of the Appellant's reliance on 20/20 hindsight.

Three San Diego police officers with a police dog responded to a burglar alarm late at night and arrived within minutes. (District Court's Order ("Order"), 2:20-24). The building was dark. (Order, 3: 9-10). The officers had to climb over the ground floor gate, then they looked around the second story for any indication that the building might be occupied by someone who belonged there. (Order, 3:1-8). The alarm had been triggered in Suite 200 (Order, 2:10-13; 20-22), and the officers found a propped open door leading to Suite 201. (Order, 3:4-5). The officers believed that the circumstances indicated signs of a break-in and that the person was still inside. (Order, 3:13-15; 4:3-5). The only light inside the building was ambient light emitting through the propped open door from the parking lot lights (Order, 3:9-10), and the officers could not see inside the suite (Order, 3:15-16).

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. (Order, 4:4-6). The officer handling the police dog loudly yelled warnings to anyone inside to come out or the dog

would be sent in and the person could be bitten. (Order, 4:7-9). We now know, using 20/20 hindsight, that Lowry was asleep (Order, 2:16) under a cover on a sofa (Order 4:18-22) and did not respond to the shouted warnings (Order, 4:10-12).

In its Order the District Judge noted that: 1) The officers were investigating an apparent late-night burglary, which is a dangerous felony (Order, 10:19-25); 2) the officers did not know whether the suspect was armed (Order 11:5-6); and, 3) 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 (Order 11:15-19).

III.
ISSUE ADDRESSED BY THIS AMICUS BRIEF: 20/20 HINDSIGHT IS AN IMPROPER STANDARD FOR DECIDING WHETHER FORCE WAS REASONABLE

Relying primarily on the holding of *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), Appellant argues that officers confronted by facts and circumstances indicating a possible commercial burglary in progress late at night could not reasonably release a police dog that might bite to search, because in this instance 20/20 hindsight showed that there was no threat. (Appellant's Brief, Section VIII, B (Pg. 13)).[1]

[1] Appellant focuses on her failure to hear the officer's warnings, so she did not present a threat to the officers. (Appellant's Brief, Section III.B.3 (Pg. 17)). But, once again, whatever the reason for her non-response, her inability to hear was not known until after the officers released the dog to search.

IV.
POINTS AND AUTHORITIES

A. Prior Decisions About Use of Police Dogs Have Not Addressed Searching for Unseen, Unknown, Hidden Suspects.

Deploying a police dog to arrest someone in the presence of or being pursued by an officer is a severe use of force. *Chew, supra* at 1436; *Miller v. Clark County,* 340 F.3d 959*,* 964 (9th Cir. 2003); and *Smith v. City of Hemet,* 394 F.3d 689*,* 701-02 (9th Cir. 2005). *Chew*, *Miller* and *Smith* were all decided on facts involving *known* circumstances—where the police officers knew who the person was, the severity of the crime, and whether the person constituted an immediate threat to the officers or others. These authorities are distinguishable from the instant case.

In *Chew*, a wanted felon whom 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 the 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 and granted summary judgment. *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 during the entire use of force, 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. *Chew, Miller,* and *Smith* relied in part on *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. He was shot in the back of his head while running away even though the officer knew that he was an unarmed teenage boy fleeing over fences from a residential burglary and not threatening anyone. *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.

Much different than *Garner, Chew, Miller* and *Smith*, the San Diego officers in this case were confronted by facts and circumstances that would lead anyone to believe there was probably a burglar hiding inside. Contrary to Lowry's argument,

a judicial review cannot use 20/20 hindsight to determine that Lowry was not a threat.

B. Hindsight Cannot Be Used to Judge the Reasonableness of Force.

"[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). Relying on *Garner* (471 U.S. at 8-9, 105 S. Ct. at 1699-1700), *Graham* enumerated three general factors for examining use of force including 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. *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. In other words, Graham dealt with what the officer knew when force was used, not with what was discovered later.

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. An officer's 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).[2]

C. Finding that Releasing a Dog Under the Facts and Circumstances in This Case Could be Unreasonable Force Would Detrimentally Effect Safety of Law Enforcement Officers.

Considering the facts and circumstances of this case, there is no material dispute that it was reasonable for officers to release a dog to search the building. Officers must be allowed to reasonably use their training and experience when confronted with a situation where a person could very likely be lurking in a closed, darkened commercial building. Police will seldom be able to see and articulate in

[2] In this case the Court addresses a *Monell* claim only, but to prevail the Appellant must first establish that the force was unconstitutional. *Chew*, 27 F.3d at 1439.

advance that they knew there was a burglar hiding within or that they knew the person was an immediate threat.

To find otherwise would have a detrimental effect on the safety of those we employ to protect our cities and on the cities that employ the officers and tools like police dogs. If they are to be found liable for unreasonable force under these facts and circumstances for not knowing who is hiding, officers will have no choice but to search without the benefit or protection of a dog, and cities will have no choice but to prohibit the use of such tools.

Following Lowry's arguments for 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 likewise provide a jury trial to an armed burglar. Assume officers arrived and found the same circumstances of the triggered 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 when he was apprehended the officers discovered that the burglar had a gun. Following Lowry's argument, 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.

Lowry would have the Court establish a new standard for use of police dogs to search non-residential structures or areas. Such a decision under the facts and circumstances of this case would be an over-extension of *Chew, Miller, Smith* and *Garner,* by using hindsight, and Lowry's unsubstantiated conclusion that burglary is not inherently dangerous. Virtually every deployment of a dog into a non-residential property, and maintenance of a policy or training allowing such deployment, would be *per se* unreasonable unless the police on scene 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 Court to affirm the decision and Order of the District Court.

Dated: October 7, 2016

LAW OFFICES OF VINCENT P. HURLEY
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By: /s/ VINCENT P. HURLEY
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32, and Circuit Rule 29-3, the undersigned hereby certifies that 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 2,459 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: October 7, 2016

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9th Circuit Case Number 13-56141

CERTIFICATE OF SERVICE

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 October 7, 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