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## Dead Men Tell No Tales: The Importance of the Summary Judgment Standard in the Deadly Force Case of *Gonzalez v. City of Anaheim*

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# DEAD MEN TELL NO TALES: THE IMPORTANCE OF THE SUMMARY JUDGMENT STANDARD IN THE DEADLY FORCE CASE OF *GONZALEZ v. CITY OF ANAHEIM*

NICHOLAS PISEGNA\*

**Abstract:** Anaheim police officer Daron Wyatt shot and killed Adolph Gonzalez following a traffic stop and physical confrontation among Gonzalez and officers Wyatt, and Matthew Ellis. Gonzalez’s successors brought a 42 U.S.C. § 1983 claim alleging, among other claims, a violation of Gonzalez’s Fourth Amendment right to be free from the use of unreasonable and excessive force. In *Gonzalez v. City of Anaheim*, the Ninth Circuit held that inconsistencies in the officers’ testimony regarding the physical confrontation raised a genuine dispute of material fact concerning the immediacy of the threat that Gonzalez posed to the officers and others. As a result, the court held that summary judgment was not proper. This Comment argues that the majority appropriately applied a strict summary judgment standard that more broadly considers what constitutes a dispute of material fact because the defendants were the cause of the defendant’s death and the only surviving eyewitnesses. By allowing such cases to reach the jury, this summary judgment standard protects the constitutional rights of the deceased and prevents courts from improperly relying on one-sided, potentially self-serving testimony by state actors.

## INTRODUCTION

On September 25, 2009, Adolph Anthony Sanchez Gonzalez was shot and killed during a dispute with two Anaheim police officers.<sup>1</sup> According to the testimony of officers Daron Wyatt and Matthew Ellis, Gonzalez failed to comply with the officers’ commands to show his hands and exit his vehicle during a traffic stop.<sup>2</sup> A physical skirmish ensued, and when Gonzalez “violently accelerated” the car, Officer Wyatt shot and killed him.<sup>3</sup>

*Gonzalez v. City of Anaheim* was the result of claims brought by Gonzalez’s father, mother, and daughter seeking damages under 42 U.S.C. § 1983 for

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<sup>1</sup> *Gonzalez v. City of Anaheim (Gonzalez III)*, 747 F.3d 789, 791–92 (9th Cir. 2014) (en banc).

<sup>2</sup> *Id.* at 792–93. Gonzalez was not accused or suspected of doing anything illegal at the time, and the officers did not recognize Gonzalez from any prior contacts. *Id.*

<sup>3</sup> *Id.*

violations of the family's Fourteenth Amendment right of familial association, as well as of Gonzalez's Fourth Amendment right to be free from the use of unreasonable and excessive force.<sup>4</sup> On July 11, 2011, the U.S. District Court for the Central District of California granted summary judgment for the defendants on both claims, concluding that the officers used reasonable force during their encounter with Gonzalez, and that the officers' conduct was related to legitimate law enforcement objectives.<sup>5</sup>

On appeal, a panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment on both claims.<sup>6</sup> Upon rehearing en banc, however, the Ninth Circuit reversed the grant of summary judgment with regard to Gonzalez's Fourth Amendment claim.<sup>7</sup> In the face of

<sup>4</sup> See *Gonzalez v. City of Anaheim (Gonzalez II)*, 715 F.3d 766, 769 (9th Cir. 2013) (2-1 decision), *aff'd in part, rev'd in part en banc*, 747 F.3d 789 (9th Cir. 2014); *Gonzalez v. City of Anaheim (Gonzalez I)*, No. CV 10-4660 PA (SHx), at 3 (C.D. Cal. July 11, 2011), *aff'd*, 715 F.3d 766 (9th Cir. 2013), *aff'd in part, rev'd in part en banc*, 747 F.3d 789 (9th Cir. 2014); see also U.S. CONST. amends. IV, XIV; 42 U.S.C. § 1983 (2012). Section 1983 establishes a right of action against any person who, acting under color of state law, abridges rights created by the Constitution. 42 U.S.C. § 1983; see *Gonzalez I*, No. CV 10-4660 PA (SHx), at 4-5. To state a § 1983 claim, a plaintiff must show that the defendant deprived the plaintiff of a constitutional or federal statutory right and that the defendant acted under color of state law. 42 U.S.C. § 1983; see *Gonzalez I*, No. CV 10-4660 PA (SHx), at 4-5. To bring a successful Fourth Amendment claim for excessive force under § 1983, an individual must prove that (1) law enforcement officials in some way restrained the liberty of a citizen, resulting in a seizure, and (2) the official's exercise of force was unreasonable. See U.S. CONST. amend. IV; *Graham v. Connor*, 490 U.S. 386, 395 (1989). Following an incident involving the death of an individual at the hands of law enforcement officials, the family of the deceased may also bring a claim under § 1983 and the Fourteenth Amendment, alleging that the law enforcement officials violated the decedent's, as well as the family's, due process rights to be free from unwarranted interference with their familial relationship. See U.S. CONST. amend. XIV; *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998). To successfully state such a Fourteenth Amendment claim, the family members must prove that the actions of the law enforcement officials "shock[] the conscience" and were unrelated to legitimate law enforcement objectives. See U.S. CONST. amend. XIV; *Lewis*, 523 U.S. at 846-47. The Supreme Court has defined this "shocks-the-conscience" test as referring to behavior that is "conscience shocking, in a constitutional sense." *Lewis*, 523 U.S. at 847 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992)). Elaborating on the standard, the Court characterized behavior that "shocks the conscience" as that which "violates the 'decencies of civilized conduct.'" *Lewis*, 523 U.S. at 846 (quoting *Rochin v. California* 342 U.S. 165, 172-73 (1952)) (internal quotations omitted); *United States v. Salerno*, 481 U.S. 739, 746 (1987) (analyzing how Court derives "shocks the conscience" test from an individual's Due Process rights); *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (physician drawing blood for a blood test from a suspect who was unconscious after a suspected drunk driving accident not enough to offend due process); *Rochin*, 342 U.S. at 172-73 (forced pumping of a suspect's stomach enough to offend due process).

<sup>5</sup> *Gonzalez I*, No. CV 10-4660 PA (SHx), at 6-8.

<sup>6</sup> *Gonzalez II*, 715 F.3d at 769, 772-73. The panel also affirmed the district court's grant of summary judgment with regard to the plaintiffs' Fourteenth Amendment claim because the officers' actions did not "shock the conscience." See *id.* at 772-73. The panel reasoned that the plaintiffs presented "no evidence" that the officers had a "purpose to harm" the decedent for reasons unrelated to legitimate law enforcement objectives. *Id.*

<sup>7</sup> *Gonzalez III*, 747 F.3d at 791-92.

two strong dissents,<sup>8</sup> the en banc majority reasoned that, because the officers were the only witnesses able to testify about the events that led to Gonzalez's death, a significant inconsistency in the officers' testimony pertaining to the immediacy of the threat they faced raised a genuine issue of material fact that precluded a grant of summary judgment regarding the Fourth Amendment unreasonable and excessive force claim.<sup>9</sup>

Part I of this Comment discusses the facts of the encounter between the officers and Adolph Gonzalez as well as the procedural history of the case. Part II discusses the Ninth Circuit's en banc reversal in part of the district court's and Ninth Circuit panel's grant of summary judgment. Finally, Part III analyzes and agrees with the Ninth Circuit's holding and application of a strict summary judgment standard. This Comment argues that in cases involving summary judgment in which police officers use deadly force and are the only surviving eyewitnesses, courts must consider more broadly what constitutes a "genuine issue of material fact."<sup>10</sup> This stricter summary judgment standard avoids improper judicial reliance on one-sided, potentially self-serving or inaccurate testimony by state actors, and protects the constitutional rights of the deceased by allowing these cases to survive summary judgment.<sup>11</sup>

### I. THE FACTS, THE SUCCESSORS' CLAIM, AND FINDING A "GENUINE ISSUE OF MATERIAL FACT"

On September 25, 2009, at around 2:00 AM, officers Daron Wyatt and Matthew Ellis first noticed Gonzalez when a Mazda minivan cut off the officers as they were responding in their patrol car to an unrelated call.<sup>12</sup> After responding to the unrelated call, the officers returned a few minutes later to the location where they had encountered the minivan, noticed the same minivan, and saw Gonzalez get into the driver's side of the vehicle.<sup>13</sup> The officers followed the car as it drove away and, after observing the minivan weaving within a lane, pulled Gonzalez over.<sup>14</sup> The officers did not recognize Gonzalez

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<sup>8</sup> See *id.* at 798–814 (Trott, J., dissenting in part and concurring in part); *id.* at 814 (Kozinski, J., dissenting). Judge Trott argued that a combination of many factors, including the seriousness of Gonzalez's crimes, the immediacy of the threat to Officer Ellis in particular, and the fact that Gonzalez was actively resisting arrest, clearly supported the conclusion that the officers used reasonable force during their encounter with him. See *id.* at 809 (Trott, J., dissenting in part and concurring in part). Judge Kozinski succinctly agreed, concluding that the officers' actions were objectively reasonable. *Id.* at 814 (Kozinski, J., dissenting).

<sup>9</sup> See *id.* at 797 (majority opinion).

<sup>10</sup> See, e.g., *id.* at 796–97.

<sup>11</sup> See *id.* at 795–97.

<sup>12</sup> *Gonzalez v. City of Anaheim (Gonzalez III)*, 747 F.3d 789, 792 (9th Cir. 2014) (en banc).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

from any prior contacts, were not aware of any criminal behavior related to the minivan, and at no point saw a weapon in the vehicle.<sup>15</sup>

### A. The Shooting

After stopping the minivan, both officers exited the patrol car and approached Gonzalez's vehicle—Officer Ellis on the driver's side and Officer Wyatt on the passenger's side.<sup>16</sup> Officer Wyatt drew his gun when he thought he saw Gonzalez reach for something between the driver's and passenger's seats, and he warned Gonzalez that he would open fire if Gonzalez reached down again.<sup>17</sup> Gonzalez complied with Officer Wyatt's commands and held his clenched fists in his lap.<sup>18</sup> The officers then opened the driver's and passenger's side doors, and Officer Ellis observed Gonzalez pull a plastic bag out of another bag located within the car.<sup>19</sup> At that point, Officer Ellis told Gonzalez to turn off the vehicle and show the officers his hands.<sup>20</sup> Gonzalez did not respond to the officer's command.<sup>21</sup>

When Gonzalez failed to comply with Officer Ellis's commands, Officer Wyatt reached into the car, struck Gonzalez's elbow with his flashlight, and repeated the command that Gonzalez open his hands.<sup>22</sup> Gonzalez then raised his hand up to his mouth, suggesting that he was going to swallow what he had in his hand.<sup>23</sup> In response, Officer Ellis grabbed Gonzalez and testified that he wrestled with Gonzalez in an attempt to gain control of Gonzalez's hands.<sup>24</sup> Wyatt testified that he could not help Ellis restrain Gonzalez from the driver's side of the vehicle, so he entered the car through the passenger's side and began punching Gonzalez in the head.<sup>25</sup>

Despite the officers' efforts, Gonzalez was able to shift the minivan into drive during the altercation.<sup>26</sup> Officer Ellis testified that Gonzalez "stomp[ed]" on the accelerator, while Officer Wyatt claimed that Gonzalez "floored the accelerator" and that the vehicle "violently accelerated."<sup>27</sup> As the vehicle began to move, Officer Ellis withdrew from the driver's side of the vehicle.<sup>28</sup> Mean-

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 792–93.

<sup>27</sup> *Id.* at 793.

<sup>28</sup> *Id.* at 792–93.

while, Officer Wyatt, still in the passenger's seat of the vehicle, yelled at Gonzalez to stop the car while trying to turn off the ignition or shift the car into neutral or park.<sup>29</sup> Officer Wyatt testified that Gonzalez repeatedly swatted Officer Wyatt's hands away from the ignition and the gearshift, and refused to comply with Wyatt's commands.<sup>30</sup> At this point, Officer Wyatt drew his weapon and shot Gonzalez in the head from a distance of less than six inches, killing Gonzalez.<sup>31</sup> Following the shooting, the minivan struck a parked car and stopped.<sup>32</sup> Wyatt testified that he shot Gonzalez less than ten seconds after the car started moving, but noted that it could have been less than five seconds.<sup>33</sup> He testified that the car traveled approximately fifty feet in that time period; he also testified that the car was going fifty miles per hour at the time of the shot.<sup>34</sup>

### *B. The District Court and the Ninth Circuit Confront the Successors' Claims*

Gonzalez's successors brought 42 U.S.C. § 1983 claims against the officers and the City of Anaheim, alleging that the officers used excessive force in their encounter with Gonzalez in violation of the Fourth Amendment, and that the officers' actions denied the family a familial relationship with Gonzalez in violation of the Fourteenth Amendment.<sup>35</sup> The family argued that under the Fourth Amendment, the physical force that the two officers used during their encounter, including but not limited to when Officer Wyatt fatally shot the decedent in the head, was objectively unreasonable and excessive.<sup>36</sup> In particular,

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<sup>29</sup> *Id.* at 793.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* This discrepancy would become the focus of the appeal. *See, e.g., id.* at 795–97; *Gonzalez v. City of Anaheim (Gonzalez II)*, 715 F.3d 766, 771–72 (9th Cir. 2013) (2-1 decision), *aff'd in part, rev'd in part en banc*, 747 F.3d 789 (9th Cir. 2014). The Ninth Circuit en banc majority held that this issue of fact—whether the van was going fifty miles per hour at the time of the shot, or whether it had traveled fifty feet in five seconds, putting the speed closer to seven miles per hour—was material and in genuine dispute, and therefore it must go to a jury to decide. *Gonzalez III*, 747 F.3d at 796–97.

<sup>35</sup> *Gonzalez III*, 747 F.3d at 793.

<sup>36</sup> *Gonzalez v. City of Anaheim (Gonzalez I)*, No. CV 10-4660 PA (SHx), at 5 (C.D. Cal. July 11, 2011), *aff'd*, 715 F.3d 766 (9th Cir. 2013), *aff'd in part, rev'd in part en banc*, 747 F.3d 789 (9th Cir. 2014); *see supra* note 4 (discussing the standard for a Fourth Amendment excessive force claim under 42 U.S.C. § 1983). The family also argued that the officers acted unreasonably when Officer Wyatt used his flashlight to hit the decedent on the arm, when Officer Ellis placed the decedent in a carotid restraint, when Officer Wyatt punched the decedent on the head and face while he was being restrained by Officer Ellis, and when Officer Ellis used his flashlight to hit the decedent on the back of the head while he was restraining the decedent. *Gonzalez I*, No. CV 10-4660 PA (SHx), at 5. The Ninth Circuit implicitly affirmed the district court's finding that these exercises of force were reasonable. *See Gonzalez III*, 747 F.3d at 797; *Gonzalez I*, No. CV 10-4660 PA (SHx), at 5–7.

the plaintiffs argued that the officers' use of deadly force was unreasonable and excessive because the decedent was not combative, assaultive, or threatening to either officer, did not pose an immediate threat to the safety of the officers or others, and because he only fled as an act of self-defense against the officers' violent acts.<sup>37</sup> With regard to the excessive force claim, the court ruled that the officers' conduct did not violate the Fourth Amendment because the force that the officers used during the encounter was objectively reasonable.<sup>38</sup> Gonzalez's mother and daughter appealed.<sup>39</sup>

A panel of the Ninth Circuit affirmed the district court's grant of summary judgment, agreeing with the lower court that all of the force the officers used during their encounter with Gonzalez was objectively reasonable.<sup>40</sup> After ordering that the case be reheard en banc, the Ninth Circuit reversed the district court's grant of summary judgment with regard to the successors' Fourth Amendment claim alleging the use of unreasonable deadly force, and affirmed the grant of summary judgment with regard to the successors' Fourteenth Amendment familial relationship claim.<sup>41</sup>

## II. THE MAJORITY'S RECOGNITION OF THE POWER OF SUMMARY JUDGMENT IN THE FACE OF DEADLY FORCE

On rehearing, the Ninth Circuit en banc majority concluded that the case presented a genuine issue of material fact with regard to whether Gonzalez posed an immediate threat to the safety of the officers or others, and therefore summary judgment concerning the plaintiffs' Fourth Amendment claim was inappropriate.<sup>42</sup> The majority reasoned that because the officers were facing an

<sup>37</sup> See Appellant's Opening Brief at 24–26, *Gonzalez v. City of Anaheim (Gonzalez II)*, 715 F.3d 766 (9th Cir. 2013) (No. 11-56360), *aff'd in part, rev'd in part en banc*, 747 F.3d 789 (9th Cir. 2014) [hereinafter Appellant's Opening Brief]; *Gonzalez I*, No. CV 10-4660 PA (SHx) at 5, 7. The family also alleged that the officers acted with a purpose to harm the decedent unrelated to legitimate law enforcement objectives, and therefore "shocks the conscience" in violation of the Fourteenth Amendment. See *Gonzalez I*, No. CV 10-4660 PA (SHx), at 8 (citing *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)); Appellant's Opening Brief at 30–32.

<sup>38</sup> *Gonzalez I*, No. CV 10-4660 PA (SHx), at 5, 7. The court also concluded that the officers' conduct did not "shock the conscience," and therefore did not violate the Fourteenth Amendment, a ruling that the Ninth Circuit affirmed. See *Gonzalez I*, No. CV 10-4660 PA (SHx), at 8; see also *Gonzalez III*, 747 F.3d at 797–98.

<sup>39</sup> *Gonzalez III*, 747 F.3d at 793.

<sup>40</sup> *Gonzalez II*, 715 F.3d at 773. The panel also affirmed the district court's ruling that the officers' conduct did not violate the Gonzalez successors' Fourteenth Amendment right of familial association, as the plaintiffs presented no evidence that the officers had a "purpose to harm" Gonzalez for reasons unrelated to legitimate law enforcement objectives, and therefore the officers' behavior did not "shock[] the conscience." *Id.* at 772–73 (quoting *Porter*, 546 F.3d at 1137).

<sup>41</sup> *Gonzalez III*, 747 F.3d at 791–92.

<sup>42</sup> *Gonzalez v. City of Anaheim (Gonzalez III)*, 747 F.3d 789, 796–97 (9th Cir. 2014) (en banc). The majority also affirmed the district court's grant of summary judgment with regard to the Gonzalez successors' familial relationship claim because a reasonable jury could not find that the officers' use of

excessive force claim and were the only witnesses able to testify regarding the events that led to Gonzalez's death, "summary judgment should be granted sparingly . . ." <sup>43</sup> Taking that strict summary judgment standard into consideration, the majority concluded that a significant inconsistency in the officers' testimony regarding the circumstances that led to Officer Wyatt's use of deadly force raised a genuine issue of material fact that precluded a grant of summary judgment. <sup>44</sup>

The majority concluded that the record raised a genuine dispute of material fact because a reasonable jury could find that Gonzalez did not pose a sufficiently immediate threat to the officers or others to justify the use of deadly force. <sup>45</sup> The Ninth Circuit focused its analysis on the Supreme Court's standard for determining whether a law enforcement official's use of force is objectively reasonable, which hinges on the immediacy of the threat facing the law enforcement officials. <sup>46</sup> In *Graham v. Connor*, the Supreme Court concluded that to assess whether a police officer's use of force is unreasonable or excessive under the Fourth Amendment, courts should weigh the gravity of the type and amount of force inflicted against the government interest at stake by evaluating: (1) the severity of the crime at issue; (2) whether the suspect posed an

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force "shock[ed] the conscience." *Gonzalez III*, 747 F.3d at 797–98 (quoting *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)).

<sup>43</sup> *Gonzalez III*, 747 F.3d at 795. The court reasoned that because the officer defendants were the only surviving eyewitnesses, the court should only sparingly grant summary judgment in order to "ensure that the officer[s] are not taking advantage of the fact that the witness most likely to contradict [their] story—the person shot dead—is unable to testify." *Id.* (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). The majority based its reasoning and conclusion on the summary judgment standard: whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine disputes of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.* at 793; see FED. R. CIV. P. 56(a). The Supreme Court has interpreted this standard to mean that there is a genuine dispute of material fact if a reasonable jury could return a verdict for the nonmoving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (concluding that only issues of "material fact" can defeat a motion for summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (concluding that material facts are those that might affect the outcome of the suit, and defining a "genuine" dispute of material fact to mean that the evidence is such that a reasonable jury could return a verdict for the nonmoving party). Questions of fact are to be left to the jury. See U.S. CONST. amend. VII; *Gonzalez III*, 747 F.3d at 795.

<sup>44</sup> *Gonzalez III*, 747 F.3d at 797; see *Graham v. Connor*, 490 U.S. 386, 396 (1989). Specifically, the court pointed to Officer Wyatt's inconsistent testimony that the car traveled fifty feet in five to ten seconds, but also that the car was going fifty miles per hour at the time he shot Gonzalez. *Gonzalez III*, 747 F.3d at 793. In a critical footnote, the majority noted that although the question of whether a law enforcement officer's actions were objectively reasonable is a question of law, the question in this case concerns a dispute regarding the facts that inform the analysis of whether the officers' use of force was reasonable. *Id.* at 794 n.1.

<sup>45</sup> *Gonzalez III*, 747 F.3d at 797; see *Graham*, 490 U.S. at 396; see also *Liberty Lobby*, 477 U.S. at 247–48 (holding that when a reasonable jury could return a verdict for the nonmoving party, a genuine dispute of material fact exists).

<sup>46</sup> *Graham*, 490 U.S. at 396; see *Gonzalez III*, 747 F.3d at 793–94; *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (concluding that the immediacy of the threat posed by the suspect is the most important factor in the *Graham* analysis).

immediate threat to the safety of the officers or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.<sup>47</sup> Courts consider the immediacy of the threat posed by the suspect to be the most important factor.<sup>48</sup>

Based on the facts in the record as well as the officers' testimony, the majority concluded that, in contrast to testimony that the van was traveling fifty miles per hour at the time of the shot, a reasonable jury could believe Officer Wyatt's testimony that the minivan traveled about fifty feet in less than five or ten seconds before Wyatt fired the shot that killed Gonzalez.<sup>49</sup> Under those facts, the van would have been traveling at around three to seven miles per hour at the time of the shot, and the court concluded that a reasonable jury could decide that a van traveling with such minor acceleration and speed would not have posed enough of an immediate threat to the officers or others to justify the use of deadly force.<sup>50</sup>

The dissenting opinions emphatically disagreed with the majority's reversal of summary judgment, and agreed with the Ninth Circuit's earlier panel decision that because "all three *Graham* factors support the officers," Officer Wyatt's use of deadly force was objectively reasonable.<sup>51</sup> Based on the "threat of acceleration" of the van alone, both dissents concluded that the officers faced a significant, immediate threat to themselves and to the public that justi-

<sup>47</sup> *Graham*, 490 U.S. at 396.

<sup>48</sup> *See id.*; *Mattos*, 661 F.3d at 441.

<sup>49</sup> *Gonzalez III*, 747 F.3d at 793, 795.

<sup>50</sup> *Id.* at 794, 796. A car traveling fifty feet in ten seconds would travel an average speed of 3.4 miles per hour; a car traveling fifty feet in five seconds would travel an average speed of 6.8 miles per hour. *Id.* at 794. The defendants, on the other hand, argued that "[t]he undisputed evidence is that the decedent was speeding down the street going approximately 40 to 50 MPH with Officer Wyatt trapped inside the van." *See id.* at 796. The defendants maintained this position despite Officer Wyatt's unclear testimony regarding the speed of the van. *See id.* at 794–96.

<sup>51</sup> *Gonzalez II*, 715 F.3d 766, 771 (9th Cir. 2013) (2-1 decision), *aff'd in part, rev'd in part en banc*, 747 F.3d 789 (9th Cir. 2014); *see Gonzalez III*, 747 F.3d at 809–10 (Trott, J., dissenting in part and concurring in part); *Gonzalez III*, 747 F.3d at 814 (Kozinski, J., dissenting); *see also Graham*, 490 U.S. at 396. Judge Trott dissented at length, while Judge Kozinski's dissent added a paragraph that was concerned with the policy ramifications of the majority's holding, worrying that the majority's decision will "give plaintiffs a bludgeon with which to extort a hefty settlement." *Gonzalez III*, 747 F.3d at 814 (Kozinski, J., dissenting); *see id.* at 798–814 (Trott, J., dissenting in part and concurring in part). In his dissent, Judge Trott reasoned that the *Graham* test supported Officer Wyatt's use of deadly force because the officers were confronted with (1) multiple serious crimes; (2) an "uncooperative, suspicious, and menacing" suspect who, when he "stomped" down on the gas pedal of the van, posed an immediate threat to the officers and the public; and (3) an "uncooperative" suspect who was clearly resisting arrest and attempting to flee. *Id.* at 807 (Trott, J., dissenting in part and concurring in part) (internal quotations omitted). Further, Judge Trott argued that the majority discounted precedent that implored courts to consider a police officer's actions from the perspective of an officer in the field who is forced to make a split-second decision in the face of danger. *See id.* at 813.

fied the use of deadly force, particularly given that the officers had only seconds to react.<sup>52</sup>

### III. THE DELICATE BALANCE OF SUMMARY JUDGMENT AND DEADLY FORCE

In summary judgment cases like Gonzalez’s in which police officers use deadly force and are the only surviving eyewitnesses, courts should more broadly consider what constitutes a “genuine dispute of material fact”—that is, they should more broadly characterize the types of questions of fact that might affect the outcome of the suit and, accordingly, should be left to the jury.<sup>53</sup> A broader view of the facts in the record in excessive force cases will help to preserve the constitutional rights of the deceased and to prevent the courts from endorsing one-sided and potentially self-serving or inaccurate accounts from the eyewitness police officers.<sup>54</sup>

Given the use of deadly force in this case and the fact that Officers Wyatt and Ellis were the only surviving eyewitnesses of their encounter with the decedent, the majority appropriately applied a strict summary judgment standard in reversing the district court’s and Ninth Circuit panel’s grant of summary judgment.<sup>55</sup> The majority rightly pinpointed a critical detail in analyzing this excessive force case: the decedent, the individual most likely to contradict the story of the officers, was unable to testify because of the actions of the offic-

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<sup>52</sup> See *id.* at 809–10. In support of the second *Graham* factor, Judge Trott pointed out that the plaintiffs do not dispute that Gonzalez “stomped down on the accelerator” of the van. See *id.* at 811 (internal quotations omitted). Because Gonzalez indisputably “stomped down on the gas pedal,” he posed a significant threat to the officers, even viewing the evidence in the light most favorable to the decedent because of the “threat of acceleration” of the car. See *id.* at 809–11. The dissent concluded that the actual speed of the vehicle is not “material” because it has no effect on the outcome of the suit; the threat of acceleration was enough to conclude that Officer Wyatt’s use of deadly force was reasonable under the *Graham* analysis. See *id.*; *Graham*, 490 U.S. at 396.

<sup>53</sup> See *Gonzalez v. City of Anaheim (Gonzalez III)*, 747 F.3d 789, 797 (9th Cir. 2014) (en banc); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); FED. R. CIV. P. 56(a). The Ninth Circuit has repeatedly analyzed deadly force cases using this strict summary judgment standard that more broadly defines both what constitutes a material fact, as well as what constitutes a genuine dispute of material fact. See *Gonzalez III*, 747 F.3d at 797; *Glenn v. Washington Cnty.*, 673 F.3d 864, 871 (9th Cir. 2011); *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005); *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002).

<sup>54</sup> See *Gonzalez III*, 747 F.3d at 794–95; *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994); see also U.S. CONST. amends. IV, VII, XIV.

<sup>55</sup> See *Gonzalez III*, 747 F.3d at 794–95, 797; see also *Gonzalez v. City of Anaheim (Gonzalez II)*, 715 F.3d 766, 773 (9th Cir. 2013) (2-1 decision), *aff’d in part, rev’d in part en banc*, 747 F.3d 789 (9th Cir. 2014); *Gonzalez v. City of Anaheim (Gonzalez I)*, No. CV 10-4660 PA (SHx), at 7 (C.D. Cal. July 11, 2011), *aff’d*, 715 F.3d 766 (9th Cir. 2013), *aff’d in part, rev’d in part en banc*, 747 F.3d 789 (9th Cir. 2014).

ers.<sup>56</sup> Considering this context, the majority appropriately scoured the record for any inconsistencies that could raise issues of fact or witness credibility—issues that the decedent may have raised if given the opportunity—in order to view the facts in the light most favorable to Gonzalez.<sup>57</sup> The court’s holding that the inconsistencies in the officers’ testimony raised a genuine question regarding a material fact indicates that the majority understood the importance of applying a stricter summary judgment standard in these cases, and of leaving questions regarding critical facts and the credibility of the lone eyewitnesses to the jury.<sup>58</sup>

The court’s strict summary judgment analysis is appropriate in part because of how the Ninth Circuit has applied the Supreme Court’s *Graham v. Connor* analysis that governs excessive force cases.<sup>59</sup> The Ninth Circuit has repeatedly held that summary judgment in excessive force cases should be granted sparingly, and the court echoed that concern in its strict summary judgment analysis of Gonzalez’s case.<sup>60</sup> Noting the precedent in the Ninth Circuit that applied *Graham*, the majority emphasized the perspective and rights

<sup>56</sup> See *Gonzalez III*, 747 F.3d at 795; *Scott*, 39 F.3d at 915. Neither dissent raised the issue of the officers being the only surviving witnesses. See *Gonzalez III*, 747 F.3d at 798–814 (Trott, J., dissenting in part and concurring in part); *id.* at 814 (Kozinski, J., dissenting).

<sup>57</sup> See *Gonzalez III*, 747 F.3d at 794, 797; *Scott*, 39 F.3d at 915. The Ninth Circuit has stressed that courts in this kind of case should heavily scrutinize the record—including medical reports, contemporaneous statements by the officers, available physical evidence, and circumstantial evidence—for inconsistencies, as such inconsistencies can evidence disputes of fact that preclude a grant of summary judgment. See *Scott*, 39 F.3d at 915.

<sup>58</sup> See *Gonzalez III*, 747 F.3d at 795–97. Both questions of fact as well as questions of witness credibility fall within the “exclusive province of the [jury] . . .” *Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) (quoting *U.S. v. Archdale*, 229 F.3d 861, 867 (9th Cir. 2000)).

<sup>59</sup> See *Graham v. Connor*, 490 U.S. 386, 396 (1989); see also *Gonzalez III*, 747 F.3d at 795–97; *Glenn*, 673 F.3d at 871; *Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir. 2003).

<sup>60</sup> See, e.g., *Gonzalez III*, 747 F.3d at 794–97; *Glenn*, 673 F.3d 864 (reversing grant of summary judgment in deadly force case because, generously viewing facts in light most favorable to the victim, facts concerning immediacy of threat posed by the suspect suggested that decedent was likely trying to harm himself and not the officers or others, and therefore raised a genuine dispute of material fact under *Graham*); *Smith*, 394 F.3d 689 (reversing grant of summary judgment in excessive force case involving police’s response to domestic violence complaint, where victim of police use of force, the alleged male perpetrator, refused to comply with police commands, because, generously viewing facts in light most favorable to the victim, testimony of officers and victim raised genuine disputes of fact with regard to each of the three *Graham* factors); *Santos*, 287 F.3d 846 (reversing grant of summary judgment in excessive force case where, generously viewing facts in light most favorable to the victim, the facts—officers brought to the ground victim who appeared to be intoxicated in public and did not pose an immediate risk to the officers or others, breaking the victim’s back—created genuine disputes of material facts under *Graham*). The Seventh Circuit has similarly analyzed cases involving police officers’ use of deadly force when the police officers are the only surviving witnesses. See, e.g., *Abdullahi v. City of Madison*, 423 F.3d 763, 773 (7th Cir. 2005) (reversing grant of summary judgment in deadly force case where, generously viewing facts in light most favorable to the victim, medical expert testimony conflicted regarding cause of victim’s lethal injuries—allegedly caused by an officer kneeling on the victim’s shoulder during an arrest—and therefore raised genuine dispute of material fact under *Graham*).

of the deceased as an important part of weighing the *Graham* factors against the gravity of the officers' intrusion on the victim's Fourth Amendment interests.<sup>61</sup> This emphasis is appropriate given the Supreme Court's reasoning that the intrusiveness of an officer's actions that involve the use of deadly force is "unmatched."<sup>62</sup> Therefore, in order to counterbalance such an intrusion on an individual's Fourth Amendment interests to sufficiently justify a grant of summary judgment, a defendant must prove that the officer's actions are overwhelmingly reasonable under the *Graham* analysis.<sup>63</sup>

The majority's strict summary judgment standard is also appropriate because the inquiry under *Graham* is highly fact sensitive.<sup>64</sup> The majority notes that the *Graham* inquiry is so fact sensitive because the "immediate threat" that the suspect poses to the officers or others—the most important factor in determining whether the officers' actions were reasonable—can develop and unravel in mere seconds.<sup>65</sup> As a result, in cases where the officers are the only surviving eyewitnesses, many of the critical facts that inform the *Graham* analysis are only available from the perspective of the party moving for summary judgment.<sup>66</sup>

In situations where many of the critical facts come from the one-sided and potentially self-serving or inaccurate testimony of the officers, the court can only fairly gauge the reasonableness of the officers' actions under the fact-sensitive *Graham* test by more broadly considering what constitutes a material fact and a genuine dispute of material fact.<sup>67</sup> In such cases, the individual most likely to contradict the testimony of the officers—the victim—is unable to present his or her side of the story to protect his or her Fourth Amendment interests and also to inform the court's analysis of the officer's use of force.<sup>68</sup> The

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<sup>61</sup> See *Gonzalez III*, 747 F.3d at 794–95 (citing *Glenn*, 673 F.3d at 871; *Scott*, 39 F.3d at 914–15).

<sup>62</sup> *Tennessee v. Garner*, 471 U.S. 1, 9 (1985); see *Graham*, 490 U.S. at 396; *Gonzalez III*, 747 F.3d at 795.

<sup>63</sup> See *Gonzalez III*, 747 F.3d at 796–97; accord *Graham*, 490 U.S. at 396; see, e.g., *Scott*, 39 F.3d at 915 (holding summary judgment appropriate where facts, testimony, and circumstantial evidence showed no genuine dispute of fact, and where officers who applied deadly force "clearly" satisfied the *Graham* test, as suspect raised gun at officers when officers opened door and identified themselves as police officers).

<sup>64</sup> See *Gonzalez III*, 747 F.3d at 796–97; accord *Graham*, 490 U.S. at 396.

<sup>65</sup> See *Gonzalez III*, 747 F.3d at 792–95. Because the facts that inform the "immediacy of the threat" factor of the *Graham* analysis can result from circumstances that happen quickly as well as that are unique to the case before the court, the majority, as well as other decisions that apply *Graham*, implied that the analysis is highly fact sensitive. See *Gonzalez III*, 747 F.3d at 792–93, 796 (reasoning that in excessive force case where encounter that lasted mere seconds, the court should "emphasize[] the importance of considering all the facts"); *Glenn*, 673 F.3d at 869, 871 (reasoning that in excessive force case where encounter lasted less than four minutes, the court should emphasize the importance of considering all of the facts).

<sup>66</sup> See *Gonzalez III*, 747 F.3d at 795; accord *Graham*, 490 U.S. at 396.

<sup>67</sup> See *Gonzalez III*, 747 F.3d at 795–97; accord *Graham*, 490 U.S. at 396.

<sup>68</sup> See *Gonzalez III*, 747 F.3d at 795; *Scott*, 39 F.3d at 915; see also *Graham*, 490 U.S. at 396.

stricter summary judgment standard allows the court to protect the constitutional rights of the decedent, the individual most likely to contradict the testimony of the officers, and avoids relying on potentially self-serving or inaccurate testimony.<sup>69</sup> Therefore, the stricter standard, which the majority properly applied in this case, preserves the court's role as a neutral magistrate in cases involving a clash between executive power and constitutional rights.<sup>70</sup>

### CONCLUSION

By applying a strict summary judgment standard to Adolph Gonzalez's Fourth Amendment claim, the Ninth Circuit protected the constitutional rights of an individual who was killed by a questionable use of police force, and prevented the court from endorsing a one-sided, self-serving view of the circumstances that led to Gonzalez's death. Without a stricter summary judgment standard in such cases, courts will rely only on facts that exclusively come from the party moving for summary judgment. Courts cannot blindly endorse such an "unmatched" intrusion into the constitutional rights of a citizen by law enforcement officials.

Instead, the majority admirably stands up for the decedent—a victim of controversial police violence and an individual deserving proper legal consideration—by reversing the grant of summary judgment and propelling the case towards trial. Had he not died as a result of the police action, Gonzalez could have exercised his constitutional right to offer facts that contradicted the officers' account of the events. By broadly defining what constitutes a material fact and what constitutes a genuine issue of material fact in these cases, the majority protected the constitutional rights of the decedent. In addition, by using such a broad summary judgment standard, the court preserved the role of the jury to decide questions of material fact and witness credibility and avoided potentially endorsing a police officer's unreasonable use of excessive force.

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<sup>69</sup> See *Gonzalez III*, 747 F.3d at 794, 797. The preservation of such questions of fact and witness credibility also bolsters the appropriate balance between the court and the jury, as it is "the exclusive province of the [jury] to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts." *Long*, 736 F.3d at 896; *Santos*, 287 F.3d at 853; see also U.S. CONST. amend. VII; *Mayhew v. Thatcher*, 19 U.S. (1 Wheat.) 129, 129 (1821) (concluding that questions of fact in civil cases are to be tried by the jury if either party demands a jury).

<sup>70</sup> See *Gonzalez III*, 747 F.3d at 795–97; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 542–543 (2004) (Souter, J., concurring in part and dissenting in part) (stressing that judicial branch, as neutral branch of government, must protect against abuse of executive power); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stressing that "[i]t is emphatically the province and duty of the judicial department" to interpret the Constitution and "say what the law is"). In addition, by considering the appropriate allocation of power between the judge and jury, the court reinforces the neutral, fair judicial check on executive power in which the judge is to determine issues of law and the jury is to determine issues of fact and witness credibility. See *Gonzalez III*, 747 F.3d at 794 n.1; *Long*, 736 F.3d at 896.