June 16, 2020

To: Mayor Martin, Police Chief Steidle, City Manager Woodhouse,

It has come to our attention that the Pacifica Police Department has purchased and is relying on policy and training materials from the private company Lexipol concerning California's new law on police use of deadly force, Assembly Bill (AB) 392. Simply put, we believe that Lexipol's interpretation of AB 392 is flat out wrong, and its materials contain indefensible misstatements about the significant changes to California's use of force law that AB 392 made effective on January 1, 2020. We urge you to immediately discontinue your use of Lexipol's materials and implement a use of force policy that comports with current law as well as consistent clarifying training in order to avoid exposing your agency and officers to criminal and civil liability.[1]

The ACLU of California and Pacifica Social Justice were supporters (along with several other organizations) of AB 392 throughout the legislative process, and as such have both an intimate familiarity with the law and a strong interest in ensuring that the Department's use of force policies comply with the law. We reviewed Pacifica PD's Use of Force Policy, Lexipol Policy 300 ("the Policy"), focusing in particular on § 300.1.1 – Definitions; § 300.3 – Use of Force; § 300.3.2 – Factors Used to Determine the Reasonableness of Force; and § 300.4 – Deadly Force Applications. We also reviewed Lexipol communications to subscribing California law enforcement agencies claiming that the legal changes contained in AB 392 are negligible and that the updated policy Lexipol has provided to Pacifica PD and others adequately conforms to current California law regarding the use of deadly force by law enforcement officials. Upon review, we observed that (1) the Policy is not in compliance with AB 392, and (2) Lexipol has significantly misstated the significance of AB 392 to its customers, as described in further detail below.

I. Background on AB 392 and Lexipol

In an effort to address the number of deadly shootings by law enforcement officers in California, the California Legislature passed AB 392 in 2019, revising California's laws on the use of deadly force by law enforcement.

Prior to AB 392, California statutes on force by law enforcement mirrored the constitutional limitations set by the U.S. Supreme Court's decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985),

[1]Lexipol's terms and conditions specify that the company is not liable for its policies, and it will not indemnify customers, leaving you responsible for legal costs if the materials are challenged in court.

and *Graham v. Connor*, 490 U.S. 386 (1989). These decisions analyzed force by law enforcement under the Fourth Amendment using a "reasonableness" standard, balancing the government's interest in apprehending an individual against the "nature and quality of the intrusion on the individual's Fourth Amendment interests" to determine "whether the force used to effect a particular seizure is 'reasonable.'" *Graham*, 490 U.S. at 396. As the Supreme Court clarified in 2007, the constitutional standard for the use of deadly force by law enforcement is the same as for non-deadly force: "*Graham* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' . . . Whether or not [the officer's] actions constituted application of 'deadly force,' all that matters is whether [the officer's] actions were reasonable." *Scott v. Harris*, 550 U.S. 372, 382-83 (2007). In the past, California statutes set a similar "reasonable force" standard: Until 2020, Penal Code § 835a provided that peace officers "may use reasonable force to effect . . . arrest, to prevent escape or to overcome resistance."

AB 392, which went into effect on January 1, 2020, preserves the "reasonable force" standard for nondeadly force, but creates a separate, higher standard that authorizes the use of deadly force by law enforcement only when "necessary." Specifically, AB 392 provides that:

> A peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:
>
> (A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person.
>
> (B) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

Penal Code § 835a(c)(1) (as amended by AB 392, effective Jan. 1, 2020).

AB 392 made other modifications to California law, including by defining what constitutes an "imminent threat" and clarifying that the "totality of the circumstances" includes the conduct of the officer leading up to the use of force. Penal Code § 835a(e). AB 392 further requires that prior to using deadly force, "officers shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer," and clarifies that while officers have no duty to retreat from resistance, Pacifica PD's de-escalation tactics do not constitute "retreat." Penal Code § 835a(a)(2), (d). The bill clarifies that while the standard for deadly force has changed to a "necessary" standard, the *perspective* used for evaluating necessity remains the "reasonable officer," as consistent with state tort law and constitutional law. Penal Code § 835a(a)(4). Finally, the bill emphasizes the role physical and mental disability plays in the use of

deadly force by law enforcement, expressly prohibiting use of deadly force against a person solely based on the threat they pose to themselves. Penal Code § 835a(a)(5), (c)(2).

Lexipol opposed these and similar reforms – in particular, the "necessary" standard. In 2018, the company published an attack on AB 392's predecessor bill, AB 931, arguing that legislation limiting deadly force to "when such force is necessary" was "likely to result in large verdicts against law enforcement officers and their agencies."[2] It expressed concern that a "necessary" standard would unsettle legal precedent holding that officers using force "need not select the least intrusive or even most reasonable action." It concluded: "It is incumbent on law enforcement, from chief executives down to line officers, to educate the public about this ill-conceived and dangerous legislation and actively campaign for its defeat."

Lexipol similarly urged agencies not to make policy changes based on the National Consensus Policy on Use of Force, a model policy published by 11 law enforcement organizations including the Fraternal Order of Police and the International Association of Chiefs of Police, because it contained language instructing officers to use "the minimal amount of force necessary" and to "use de-escalation techniques whenever possible and appropriate."[3] In a 2017 white paper on use of force policies, Lexipol advised against policies holding officers to a higher standard than the one laid out in *Graham,* reasoning that "a use of force policy that boxes officers in is likely to create—not solve—legal issues for the agency," and policy language should be crafted to "protect officers . . . from all types of liability."

As experts have observed, Lexipol has "placed litigation risks above what a wide range of policy experts have declared is good policy to reduce police killings."[4] Now that AB 392 is law, however, Lexipol's continued resistance to limiting use of deadly force to when it is necessary to defend human life conflicts not only with the Legislature's goal of reducing police killings, but also the company's purported role of protecting law enforcement from legal risk. For the reasons discussed below, Pacifica PD's use of Lexipol's AB 392 materials exposes the department and its officers to liability.

II. Lexipol's Training Materials Fundamentally Misstate the Legal Impact of AB 392

Public records we received from agencies across the state indicate that Lexipol has widely distributed a video webinar presented by Lexipol co-founder Bruce Praet on the legal significance of AB 392 to many law enforcement agencies, including yours. Additionally, Lexipol subscribers apparently received a "Client Alert" from Praet's law firm that purports to describe how AB 392 changed the law. Both the webinar and the "Client Alert" are riddled with inaccuracies.

Most significantly, both the webinar and the "Client Alert" fundamentally misstate the central features of the new law, asserting that the legal standard for police use of force "is the exact same thing we've had for the last 50 years." They make these misstatements consistently and

[2] https://www.lexipol.com/resources/blog/police-use-force-legislation-unintended-consequences-ab931
[3] https://www.lexipol.com/resources/blog/use-caution-when-changing-use-of-force-policy-language/
[4] https://theappeal.org/lexipol-police-policy-company/

repeatedly, wrongly asserting that AB 392 codifies the prior constitutional "reasonable" force standard of *Graham v. Connor* and omitting mention of language from the statute that contradicts this characterization. In the webinar, Praet states several times that AB 392 did not establish a "necessary" standard, and he suggests that the language establishing a "necessary" standard was amended out of the bill. The "Client Alert" makes similar claims.

These assertions directly conflict with the plain language of the statutory provision that now defines and limits the authorization for law enforcement use of deadly force. *See* Penal Code § 835a(c)1) ("a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, *that such force is necessary*") (emphasis added). It also contradicts the legislative intent clearly codified into law. *See* Penal Code § 835a(a)(2) ("[I]t is the intent of the Legislature that peace officers use deadly force *only when necessary* in defense of human life.") (emphasis added). Moreover, the legislative record makes evident that the purpose and effect of AB 392 were to establish a new standard more restrictive than *Graham v. Connor*. *See* Senate Floor Analysis at 6 (Jun. 26, 2019) ("Unlike existing California statutory law, the provisions of this bill would exceed the standards articulated and set forth by the U.S. Supreme Court in *Graham*").

Criminal jury instructions revised by the California Judicial Council in light of AB 392 also incorporate the "necessary" standard. *See* CALCRIM 507 – Justifiable Homicide: By Peace Officer (revised April 2020) (instructing jurors to consider whether "the force was necessary to defend against an imminent threat of death or serious bodily injury to the defendant or another person"). By denying that AB 392 changed the legal standard for deadly force, therefore, Lexipol misadvises officers on their potential criminal liability.

Lexipol's materials also erroneously characterize the statutory provision that helps to define and operationalize the "necessary" standard, Penal Code § 835a(a)(2). In the webinar, Praet states:

> "[AB 392] requires officers to evaluate and use available resources and techniques. Would it be nice if you consider other resources and techniques? Of course, it would, but it's only if reasonable and feasible."

But the law does not merely require officers to *consider* other resources and techniques if "reasonable and feasible"; it requires them to *use* those alternatives *instead of deadly force* whenever *safe* and feasible. *See* Penal Code § 835a(a)(2). In other words, it is no longer legal for officers to use deadly force that is unnecessary because other resources and techniques were available, even if that force arguably falls within the range of what previously may have been considered "reasonable." Lexipol's materials obscure this important change in law.

Additionally, the Lexipol training materials incorrectly suggest that AB 392 did not change the law with respect to the "fleeing felon" rule set forth in *Tennessee v. Garner.*[5] In *Garner*, the U.S. Supreme Court held that the Fourth Amendment permits the use of deadly force to prevent the escape of a fleeing person if "there is probable cause to believe that [the person] has committed a

[5]In contrast, the Judicial Council's Criminal Jury Instructions removed the reference to *Garner* in the instruction on homicide by a peace officer in light of AB 392. *See* CALCRIM 507 – Justifiable Homicide: By Peace Officer (revised April 2020)

crime involving the infliction or threatened infliction of serious physical harm … and if, where feasible, some warning has been given." 471 U.S. at 12. AB 392 more clearly limits this justification for deadly force to when it is *necessary* to prevent the escape of the fleeing person. Moreover, it is not enough for the officer to have probable cause that the person committed a crime involving the infliction or threatened infliction of serious bodily injury. Now, under California law, an officer is justified in using deadly force to apprehend a fleeing person for such a crime only "if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended." Penal Code § 835a(c)(1)(B). Lexipol's training materials fail to advise law enforcement on this new statutory provision.

For all the reasons set forth above, the Department must immediately re-train any officers that have received the Lexipol materials and clarify the significance of AB 392 to ensure that Department members do not proceed with a mistaken understanding of the law.

III. The Department's Lexipol Policy

The Department's Use of Force Policy, Lexipol Policy 300 (hereinafter "Policy"), also fails to accurately reflect California law. Although the Policy cites to Penal Code § 835a, it omits the "necessary" standard articulated by the amended statute, excludes the statute's definition of "totality of the circumstances," and rewords the provision addressing alternatives to deadly force to change its meaning. Other portions of the Policy track verbatim the language of Penal Code § 835a, making these deviations from the statutory language remarkable – particularly because they obscure some of the most significant changes to the law effected by AB 392.

A. The Policy Completely Omits the Governing "Necessary" Standard In California's New Use of Force Law

The Department's Lexipol Policy leaves out the central feature of AB 392: the amended legal standard that restricts law enforcement use of deadly force to "only when necessary in defense of human life." Penal Code § 835a(a)(2). This omission is inexcusable. The debate over AB 392 in the California Legislature made clear that the core of the bill was its change to a "necessary" standard for deadly force, from the constitutional standard of reasonableness. But the word "necessary" does not appear at all in the section of the Policy addressing deadly force.[6]

The relevant section of the Policy, Section 300.4 – Deadly Force Applications, states:

> "The use of deadly force is only justified in the following circumstances (Penal Code § 835a):

[6]Although the Policy does state that officers should only use "the amount of force that reasonably appears necessary to accomplish a legitimate law enforcement purpose" in its general section on use of force (§ 300.3 – Use of Force), the Policy does not make clear that this applies to deadly force, particularly given that the Policy's requirements for the use of deadly force appear in a separate section multiple pages later. There is no language in the Policy clarifying that deadly force must be necessary *in defense of human life*, as set forth in AB 392.

(a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes is an imminent threat of death or serious bodily injury to the officer or another person.

(b) An officer may use deadly force to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. . . ."

Compare the first paragraph quoted above to the corresponding paragraph from AB 392:

> "A peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force ***is necessary for either of the following reasons***: . . . ." Penal Code § 835a(c)(1) (emphasis added).

Lexipol thus excises the central feature of the new legal standard – that force must be "necessary" for defending human life– from the Policy governing deadly force. It sets out the two situations in which an officer's use of deadly force may be permissible under AB 392, but it fails to include the crucial legal standard that deadly force is permissible only when *necessary* to address one of those two situations. Penal Code § 835a clearly states that an officer must reasonably believe that deadly force is "necessary" for either of the two specified purposes in order for the use of deadly force to be permissible. The revised Criminal Jury Instruction on homicide by a peace officer, CALCRIM 507, does the same. The Policy, by contrast, simply states that an officer "may" use deadly force in either of the two situations described—incorrectly instructing officers that they have latitude to use deadly force in the specified circumstances even when safe and feasible alternatives are available and potentially even obvious.

B. The Policy fails to instruct officers on the statutory duty to use alternatives to deadly force.

As noted, AB 392 instructs officers to use alternatives instead of deadly force whenever possible. In the relevant part, AB 392 states:

> "*In determining whether deadly force is necessary, officers* shall evaluate each situation in light of the particular circumstances of each case, and *shall use other available resources and techniques if reasonably safe and feasible* to an objectively reasonable officer." Penal Code § 835a(a)(2) (emphasis added).

This requirement complements and operationalizes AB 392's "necessary" standard. If safe and feasible alternatives to deadly force are available to an officer in a particular situation, then deadly force is clearly not "necessary." By the same token, if no safe and feasible alternatives to deadly force are available to an officer in a particular situation, then the officer may reasonably believe that deadly force is necessary.

The Policy does not include this provision, however. Instead, the Policy contorts the statutory language to state the following:

> "If an objectively reasonable officer would consider it safe and feasible to do so under the totality of the circumstances, officers should evaluate the use of other reasonably available resources and techniques when determining whether to use deadly force." Policy § 300.4 – Deadly Force Applications.

Whereas AB 392 states that officers "*shall use*" alternatives when safe and feasible to an objectively reasonable officer, the Policy instead states that under the same circumstances, officers "*should evaluate the use*" of alternatives. Thus, the Policy fails to instruct officers to actually *use* those alternatives after considering them, if doing so is safe and feasible, as required by law. The Policy thus obscures officers' legal duty under AB 392 to consider and use alternatives instead of deadly force whenever reasonably safe and feasible.

C. The Policy omits the statutory definition of "totality of the circumstances."

AB 392 codified in Penal Code § 835a(c) definitions for three terms: (1) "deadly force," (2) "imminent," and (3) "totality of the circumstances." The Policy accurately recites the statutory definitions for the first two terms in section 300.1.1 – Definitions, but it omits altogether the definition of "totality of the circumstances."

Adding further confusion, the Policy includes "the conduct of the involved officer" in the list of factors that should be taken into consideration when "evaluating whether an officer has used reasonable force," citing Penal Code § 835a, but it cuts out the statutory language that specifies that "the conduct of the officer … *leading up to the use of deadly force*" must be considered. Penal Code § 835a(e)(3) (emphasis added). The conduct of the officer *leading up to the use of deadly force* is not mentioned anywhere in the Policy.

These omissions are significant because a key element of AB 392 is the definition of "the totality of the circumstances" as "all facts known to the peace officer at the time, *including the conduct of the officer and the subject leading up to the use of deadly force*." Penal Code § 835a(e)(3) (emphasis added). This definition codifies the Legislature's concerns about officer conduct that may unnecessarily create situations leading to the use of deadly force.[7]

By omitting the statutory definition of the term "totality of the circumstances" from section 300.4, the Policy fails to give officers adequate notice of how their conduct will be evaluated by external investigating agencies and in court. And, for the same reason, the Policy fails to set forth how the Department must conduct its internal review of deadly force incidents in accordance with the law.

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[7]Notably, Lexipol referred to this concern as "insanity" in a blog post expressing opposition to AB 931, AB 392's predecessor bill. *See* https://www.lexipol.com/exactly-who-creates-the-need-for-deadly-force; *see also* https://www.lexipol.com/resources/blog/responses-common-arguments-police-use-deadly-force/ (providing talking points in opposition to AB 931 that argued against considering officers' actions prior to the use of force).

AB 392 was passed with the intent of saving lives. Lexipol's attempts to obscure the legal significance of the bill undermine this important goal and put Pacifica PD's policy out of compliance with California law. By basing its policy and training on an inaccurate interpretation of AB 392, Lexipol ensures that your officers act on outdated standards and your use of force review is inconsistent with the law – exposing the City to civil liability and officers to individual criminal liability, contrary to the purported purpose of your Lexipol subscription

We ask that you provide us with a response to this letter by June 30, 2020, describing the actions that Pacifica PD will take to promptly come into compliance with AB 392. Thank you for your consideration of this important matter. We look forward to your response.

Sincerely,

Peter Bibring, Director of Police Practices
ACLU of California