No. 19-753

IN THE

Supreme Court of the United States

MICHAEL HUNTER, MARTIN CASSIDY, CARL CARSON,

Petitioners,

v.

RANDY COLE, KAREN COLE, RYAN COLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, MAJOR CITIES CHIEFS ASSOCIATION, NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, NATIONAL SHERIFFS' ASSOCIATION, LOUISIANA MUNICIPAL ASSOCIATION, MISSISSIPPI MUNICIPAL SERVICE COMPANY, TEXAS ASSOCIATION OF COUNTIES, TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION, TEXAS POLICE CHIEFS ASSOCIATION, COMBINED LAW ENFORCEMENT ASSOCIATIONS OF TEXAS AND CITIES OF ARLINGTON, GARLAND, GRAND PRAIRIE, AND SUGAR LAND, TEXAS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Cited Authorities

Page

Page

STATUTES

OTHER AUTHORITIES

Cited Authorities

Page

Page

INTEREST OF *AMICI CURIAE*[1]

The International Association of Chiefs of Police (IACP) is the world's largest and most influential professional association for police leaders. With more than 30,000 members in over 160 countries, the IACP is a recognized leader in global policing, committed to advancing safer communities through thoughtful, progressive police leadership. Since 1893, the association has been serving communities worldwide by speaking out on behalf of law enforcement and advancing leadership and professionalism in policing worldwide. IACP represents the interests of law enforcement agencies at the state, local and federal levels. IACP members include law enforcement executives and officers who are charged with the responsibility of protecting citizens from crime.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 3,000 members. IMLA's membership is comprised of local government entities, including cities, counties, state municipal leagues, and individual attorneys representing governmental interests. Since its establishment in 1935, IMLA has advocated for the rights and privileges of local governments.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have been given at least 10 days' notice of amici's intent to file, and have consented to the filing of this brief.

The Major Cities Chiefs Association (MCCA) is a professional association of Chiefs and Sheriffs representing the largest cities in the United States and Canada. The MCCA provides a collaborative forum for the advancement of public safety through innovation, research, community outreach, leadership development and government engagement.

The National Association of Police Organizations (NAPO) is a nationwide alliance of organizations committed to advancing the interests of law enforcement officers. Since NAPO's founding in 1978, it has become the strongest unified voice supporting law enforcement in the United States. The organization represents over 1,000 police units and associations, over 241,000 sworn officers, and more than 50,000 citizens mutually dedicated to fair and effective law enforcement.

The National Sheriffs' Association (Association), a 26 U.S.C. § 501(c)(4) non-profit organization, was formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States and to promote, to protect, and to preserve our nation's Departments/Offices of Sheriff. The Association has more than 14,000 members and is a strong advocate for more than 3,000 individual sheriffs located throughout the United States. More than 99% of our Nation's Departments/Offices of Sheriff are directly elected by the people in their local counties, cities, or parishes. The Association promotes the public interest goals and policies of law enforcement in our Nation, and it participates in judicial processes (such as this case) where the vital interests of law enforcement and its members are at stake.

The Louisiana Municipal Association (LMA) is an association of 305 governmental entities throughout Louisiana (303 cities, towns, and villages, and two parishes), formed in 1926 for protection and promotion of interests of its member entities and their citizens, to improve efficiency and effectiveness of government. Through its subsidiary Risk Management, Inc., the LMA provides inter-local risk management indemnity programs, including police liability.

The Mississippi Municipal Service Company (MMSC) is a non-profit company that administers the Mississippi Municipal Liability Plan (MMLP), which provides Mississippi municipalities with liability coverage, including public official and law enforcement coverage. The MMLP is funded through resources pooled together by its members in order to assure their protection and defense against municipal risks.

The Texas Association of Counties (TAC) is a Texas non-profit corporation with all 254 Texas counties as members. The following associations are represented on the TAC Board of Directors: County Judges and Commissioners Association of Texas; North and East Texas Judges and Commissioners Association; South Texas Judges and Commissioners Association; West Texas Judges and Commissioners Association; Texas District and County Attorneys Association; Sheriffs' Association of Texas; County and District Clerks' Association of Texas; Texas Association of Tax Assessor-Collectors; County Treasurers' Association of Texas; Justice of the Peace and Constables Association of Texas; and Texas Association of County Auditors.

The Texas Municipal League (TML) is a non-profit association of over 1,100 incorporated cities. TML provides legislative, legal, and educational services to its member cities. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of over 400 attorneys who represent Texas cities and city officials in the performance of their duties. TML and TCAA advocate for interests common to all Texas cities.

The Texas Police Chiefs Association (TPCA) was founded in 1958 to promote, encourage and advance the professional development of Chiefs of Police and senior police management personnel throughout the State of Texas. TPCA actively seeks to promote the professional practice of law enforcement administration, to represent the membership and the profession on issues of concern, and to encourage high ethical standards of conduct among law enforcement administrators through its code of ethics.

The Combined Law Enforcement Associations of Texas (CLEAT) is the largest labor organization representing the rights and interests of law enforcement in Texas. CLEAT's membership consists of more than 20,000 law enforcement professionals statewide. The organization provides legal, legislative, and collective bargaining services to its members and affiliated associations.

The cities of Arlington, Garland, Grand Prairie, and Sugar Land are home rule municipalities in Texas. Each operates a police department. When necessary, these cities defend their public officials, law enforcement included, against suits arising from the performance of their duties. Arlington, Garland, Grand Prairie, and Sugar Land have all had one or more police officers who were

shot and killed in the line of duty. Like all American cities, legal precedents on the use of force by police have a direct impact on the cities joining this brief.

Amici represent various levels of local government, including law enforcement agencies. *Amici* have an interest in ensuring that law enforcement officers have clear legal guidance regarding the scope of their constitutional authority in carrying out their duties – particularly in cases involving the use of deadly force – to enable officers to make reasonable and lawful decisions in protecting the public without fear of civil lawsuits. Although this Court's decisions have consistently emphasized the importance of qualified immunity, lower courts continue to improperly deny peace officers the protection of qualified immunity in cases alleging the unreasonable use of force. In this instance, the Fifth Circuit based their denials on a misapplication of qualified immunity principles. *Amici* have an interest in this Court reinforcing the rules that apply at summary judgment when determining claims of immunity from Fourth Amendment use of force claims, and *amici* respectfully urge the Court to grant certiorari in this case.

SUMMARY OF ARGUMENT

The police profession is dangerous, stressful, and often thankless. Every citizen encounter contains the possibility of an unanticipated violent confrontation, and there is no way to predict which encounter will end in violence. While most citizen contacts are benign, officers are forced to be on constant alert because they do not know when danger may present itself. Because the citizen is the one initiating the violence against a reasonable officer, and

"action beats reaction," police enter every encounter at a disadvantage. *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 384 (5th Cir. 2009). The reasonable officer has to evaluate so many unknowns (e.g., Does the suspect have a gun or a phone in his/her pocket? Where are all the exits, in case the suspect runs? Is the suspect reaching for a knife or scratching his/her back?) while simultaneously mentally racing through the legal protocols and training – and the officer must do so within a matter of seconds before making a decision with potentially deadly consequences. If this Court is going to hold officers accountable for not following clearly established law, officers should likewise be able to depend on this Court to protect them when no clearly established law exists. Unfortunately, the Fifth Circuit has not provided Officers' Hunter, Cassidy, and Carson with such protection, in spite of the lack of clearly established law, and has provided a dangerously inconsistent precedent for the rest of the officers in this jurisdiction to follow:

> Abandon hope, all ye who enter Texas, Louisiana, or Mississippi as peace officers with only a few seconds to react to dangerous confrontations with threatening and well-armed potential killers. In light of ruling, and the raw count of judges, there is little chance that, any time soon, the Fifth Circuit will confer the qualified-immunity protection that heretofore-settled Supreme Court and Fifth Circuit caselaw requires. Pet. App. 54a.

This deterioration of the qualified immunity protection could also have larger societal impacts. The Fifth Circuit dissents argue that the majority ruling "undoes the careful balance of interests embodied in our doctrine of qualified

immunity, stripping the officers' defenses without regard to the attendant social costs." Pet. App. 76a. In the current climate, it is already difficult to hire and retain quality officers. Qualified candidates will be even less likely to apply for police positions if they believe that there will be an increased exposure to personal liability for reasonable actions. Further, the likelihood of officers leaving the police force prior to retirement age is a present challenge to jurisdictions. It will become even more difficult to retain officers if they feel like the judicial system "undermines officers' ability to trust their judgment during those split seconds when they must decide whether to use lethal force." Pet. App. 80a (quoting *Winzer v. Kaufman Cty.*, 916 F.3d 464, 482 (5th Cir. 2019) (Clement, J., dissenting)). The time and money spent on officer training is an opportunity cost if those officers leave the workforce. Even a 1% increase nationally in police turnover resulting from diminished officer immunity protections would result in a national loss of $406,580,000 of taxpayer dollars invested into peace officer training. Thus, the case presented is important both to the individual officers and to public safety for society as a whole.

This Fifth Circuit ruling represents a chink in the immunity armor afforded to law enforcement. *Amici* respectfully request that this Court grant certiorari and issue a reversal in this matter.

ARGUMENT

I. An Analysis of the Perceptions of an Objectively Reasonable Officer Supports a Reversal

The first prong of Fourth Amendment excessive force analysis is an evaluation of whether "the officer

has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). This evaluation has an objective reasonableness component; in assessing "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger," courts can utilize "reasonable inferences which he [the officer] is entitled to draw from the facts." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). This Court has recognized that probable cause is dealing "with probabilities," and that it is "not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

The reasonableness determination recognizes that the officer must "make a split-second decision in response to a rapidly unfolding chain of events." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). This Court gives considerable deference to the officer, such that "if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The question is not a comparative analysis of whether another decision is more reasonable, but rather whether the officer's original decision, standing alone, is located within the constellation of reasonable decisions. *See* Pet. App. 34a, 40a.

The second prong of the Fourth Amendment excessive force analysis protects an official's conduct with immunity so long as it "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800,

818 (1982)). The "existing precedent must have placed the statutory or constitutional question beyond debate" in order for an officer to be denied immunity for actions taken. *Ashcroft v. al–Kidd,* 563 U.S. 731, 741 (2011).

Because the Fifth Circuit majority "ignore[s] the critical criterion for qualified immunity in Fourth Amendment cases: the reasonableness of the officers' reasonable perceptions," this section endeavors to highlight some of the considerations a reasonable officer would have weighed during the three to five second encounter with Cole. Pet. App. 35a. Based on these considerations and surrounding circumstances, a reasonable officer could have concluded that there was threat of serious physical harm to himself or others, and that there was no clearly established law prohibiting the use of deadly force in these circumstances.[2]

A. A Recent Shooting Illustrates that Respondent's Actions Reasonably Indicated that He Posed a Threat of Serious Bodily Injury

A Volusia County, Florida sheriff's department faced a similar situation to the instant case.[3] On April 11, 2019, a suspect and peace officers engaged in a high-speed car chase. The police were able to disable the car, at which point the suspect exited the car, immediately pointed a

2. *See* Pet. App. 28a-53a for Judge Jones' dissent regarding the absence of clearly established law.

3. *Video captures wild Florida car chase and deadly shootout*, CBS News (April 13, 2019), https://www.cbsnews.com/news/video-captures-wild-florida-car-chase-and-shootout/; An unedited video of the encounter is available at https://www.youtube.com/watch?v=J-qCwv1-RUY.

gun at his own head, and began running away from the police on foot. The suspect, while running, moved the gun from pointing at his own head, turned, and opened fire on the peace officers. One shot hit a sheriff's deputy. The bullet grazed the top of his head, causing injury.

The Volusia County encounter serves as a real-world example that, in spite of the fact that the gun was not pointed directly at the officer initially, a reasonable officer in the shoes of Petitioners would have perceived a threat of serious bodily injury to himself or others, based on the totality of the circumstances. The Volusia County suspect, pointing the gun to his temple while running, turned and shot at the police—and the suspect was able to accomplish all these actions before the officers were able to react and return fire. This incident is in conflict that with the Fifth Circuit's determination that Respondent posed no threat of serious physical harm to the Petitioners, as it demonstrates that a suspect holding a gun to this head was able to shoot and injure an officer before the officer could return fire.

B. A Reasonable Officer Would Have Likely Identified Cole as a Potential Active Shooter

Active shooter incidents have been a tragic and frequent event in the recent history of the United States.[4] The Federal Bureau of Investigations (FBI) documented 160 active shooter incidents between 2000 and 2013, with an average of sixteen occurring annually from 2006 to

4. The FBI defines active shooter as "an individual actively engaged in killing or attempting to kill people in a populated area." Federal Bureau of Investigation, *Active Shooter Study: Quick Reference Guide* (2014), https://www.fbi.gov/file-repository/as-study-quick-reference-guide-updated1.pdf/view

2013.[5] Of these incidents, twenty-four percent occurred at a school.[6] Eighty-five percent of the school shooters were students themselves.[7]

Since the tragic 1999 event in Columbine, law enforcement agencies have evolved their policies and training to more effectively respond to the newly emerging profile of active shooters.[8] These active shooter incidents are fundamentally different from most other police encounters, in that active shooters aim to inflict mass casualties as quickly as possible, usually in a matter of minutes.[9] As such, police are trained to evaluate active shooters differently than other types of suspects because their motivations are starkly dissimilar to other suspects. One of the concepts stressed during law enforcement training is how to identify an active shooter before the shooter takes action.[10] This training also emphasizes the heightened danger inherent in police encounters with an active shooter.[11]

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5. *Id.*

6. *Id.*

7. *Id.*

8. Police Executive Research Forum, *The Police Response to Active Shooter Incidents* (March 2014), https://www.policeforum.org/assets/docs/Critical_Issues_Series/the%20police%20response%20to%20active%20shooter%20incidents%202014.pdf

9. *Id.*

10. *Id.*

11. *Id.*

The Secret Service did a study on qualities common among school shooters, and Cole possessed six of ten of the key characteristics. Those pertinent here are as follows:[12]

1. The most common motive of school shooters was a grievance with classmates (Cole and his girlfriend recently ended their relationship. Pet. App. 55a.);

2. Most school shooters used firearms, usually acquired from the home (Cole was armed with at least one gun that was taken from the family gun safe. Pet. App. 122a.);

3. Most school shooters had psychological, behavioral, or developmental issues (Cole was suffering from obsessive-compulsive disorder, treated with medications, and was described as having poor judgment and impaired impulse control. Pet. App. 56a.);

4. All school shooters experienced social stressors involving their relationships with peers and/or romantic partners (Cole was upset over breaking up with his girlfriend, and was moving toward the school where she was a student. Pet. App. 55a.);

5. Many school shooters had prior contact with police (The police visited Cole the night before

12. National Threat Assessment Center, *Protecting America's Schools: A U.S. Secret Service Analysis of Targeted School Violence,* U.S. Secret Service, Department of Homeland Security (November 2019), https://www.secretservice.gov/data/protection/ntac/Protecting_Americas_Schools.pdf

the incident because of a disturbance with his parents. Pet. App. 81a.); and

6. All school shooters exhibited concerning behaviors, and also communicated their intent to attack (Cole had threatened to shoot anyone who tried to take his gun, and had threatened to kill his girlfriend and himself. Pet. App. 30a, 56a.).

These identifiers, in combination with the known facts about Cole, could lead a reasonable officer to believe that there was a likelihood that: (1) Cole was intending to take the gun to his girlfriend's school in order to harm her and any others in his path; and (2) Cole will likely resist any police attempts to prevent him from carrying out his plan.[13] After all, "it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture." *Ryburn*, 565 U.S. at 476–77. This combination of events could lead a reasonable officer to believe that Cole, at the time of the encounter, was a threat to fire on officers.

A denial of qualified immunity for reasonable actions taken during a possible mass shooter incident could create a deterrence in an officer's willingness to place themselves in harm's way to save lives in those highly deadly encounters. In the Fifth Circuit case *Winzer v. Kaufman County*,

13. Judge Jones recounts the following undisputed facts that indicate Cole's repeated resistance to police authority leading up to the encounter: "Officer Cassidy had learned that Cole 'had threatened to shoot anyone who tried to take his gun and had refused an order to drop his weapon.' Cole II, 905 F.3d at 338. Officer Hunter watched Cole walk steadily down the train tracks ignoring other police who were yelling at him to stop and put down his 9 mm semiautomatic pistol." Pet. App. 30a.

Judge Ho wrote about the negative potential impact of finding a Fourth Amendment violation in reference to active or potentially active shooter situations:

> If we want to stop mass shootings, we should stop punishing police officers who put their lives on the line to prevent them… It is unknown how many lives were saved by these deputies on April 27, 2013. What is known, however, is that Kaufman County will now stand trial for their potentially life-saving actions—and that its taxpayers, including those who will forever be traumatized by Winzer's acts of terror, will pick up the tab for any judgment. I have deep concerns about the message this decision, and others like it, sends to the men and women who swear an oath to protect our lives and communities. For make no mistake, that message is this: See something, do nothing. 940 F.3d 900, 901-903 (5th Cir. 2019) (Ho, J. dissenting from denial of en banc review)

If this "see something, do nothing" message from the courts infects the entire police workforce, it is easy to see how the ripple effect could have catastrophic consequences. Most directly, a Broward County, Florida active shooter tragedy shows the dire repercussions of an officer's unwillingness to enter the fray.[14] In this February 14, 2018

14. Mark Berman, *Former Broward sheriff's deputy who did not confront Parkland shooter arrested, charged with neglect*, The Washington Post (June 4 2018), https://www.washingtonpost.com/national/former-broward-sheriffs-deputy-who-did-not-confront-parkland-shooter-arrested-charged-with-neglect/2019/06/04/3ef5564c-86fd-11e9-98c1-e945ae5db8fb_story.html

school shooting, a Sherriff's deputy was the lone armed officer on campus during the bloodshed, but instead of attempting to stop the shooter, the deputy choose to stand outside the school building where the shooting was taking place.[15] This tragedy ended with seventeen students and staffers killed.[16] More peace officers may choose to take an overly cautious path that could result in lives lost if the law enforcement community believes that the courts will not guard them from liability for reasonable actions taken to protect the public.

C. A Reasonable Officer Would Be Cognizant of the Unpredictable Danger to Law Enforcement

The central mission of police work is to protect the public and preserve the peace within the officer's jurisdiction. Tex. Code Crim. Pro. Ann. art. 2.13. This mission is primarily carried out by peace officers proactively protecting their jurisdictions from individuals who choose to commit acts of violence against others. As such, policing is inherently dangerous.

The FBI reports that 510 American peace officers were "feloniously killed" in the line of duty from 2009 to 2018.[17] Of these 510 officers, 471 officers were killed with a firearm, 368 were wearing body armor, 343 were assigned to vehicle patrol at the time of their death, and 175 were killed with firearms

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15. *Id.*

16. *Id.*

17. Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted, 2009-2018,* U.S. Department of Justice, https://ucr.fbi.gov/leoka/2018/tables/table-1.xls

when the officer was less than five feet from the offender.[18] These statistics illustrate the unforeseen and unpredictable nature of deadly action taken against police. Many of these incidents began as seemingly routine police matters, but quickly devolved into dangerous encounters. [19]

Because "use of force" training and policy is crafted to specifically comply with clearly established law, the Fifth Circuit ruling in this case suggests a new policy standard that an officer "may not use deadly force—without prior warning—against an armed, distraught suspect who, with finger in the pistol's trigger, posed 'no threat' while turning toward an officer ten to twenty feet away." Pet. App. 41a. This diminution of qualified immunity would limit officers' ability to reasonably defend themselves and others in an already dangerous line of work, and discourage individuals from entering the police service.

"In the wide gap between acceptable and excessive uses of force, however, immunity serves its important purpose of encouraging officers to enforce the law, in 'tense, uncertain and rapidly evolving' split second situations, rather than stand down and jeopardize community safety." Pet. App. 44a. Police officers risk their lives to protect society, and they do

18. Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted,* U.S. Department of Justice, https://www.fbi.gov/services/cjis/ucr/publications

19. *See also Plumhoff v. Rickard*, 572 U.S. 765 (2014) (traffic stop for missing headlight); *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (traffic stop for suspected DWI); *Scott v. Harris*, 550 U.S. 372 (2007) (traffic stop for speeding); *Salazar-Limon v. City of Houston*, 826 F.3d 272 (5th Cir. 2016) (traffic stop for speeding and suspected DWI), *Terry v. Ohio*, 392 U.S. 1 (1968) (Investigatory stop of suspicious circumstances)

so despite an awareness of the unpredictable dangers that may arise.

II. An Erosion of Qualified Immunity Has Societal Consequences

Qualified immunity has been a frequent legal issue before this Court. Fifteen times in eight years, this Court has reversed qualified immunity denials.[20] The doctrine of qualified immunity has been attacked by critics as providing too much protection to reckless officers and as having no footing in text or history.[21] Yet, even ardent opponents against qualified immunity recognize that

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20. *See City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (summary reversal); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (summary reversal); *District of Columbia v. Wesby*, 138 S. Ct. 2561 (2018); *White v. Pauly,* 137 S. Ct. 548 (2017) (summary reversal); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (summary reversal); *Taylor v. Barkes*, 575 U.S. 822 (2015) (summary reversal); *City & County of San Francisco v. Sheehan*, 575 U.S. 600 (2015); *Carroll v. Carman*, 574 U.S. 13 (2014) (summary reversal); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Wood v. Moss*, 572 U.S. 744 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013) (summary reversal); *Reichle v. Howards*, 566 U.S. 658 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012) (summary reversal); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Ashcroft v. al–Kidd*, 563 U.S. 731 (2011).

21. *E.g.,* Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. Times (Aug. 27, 2014), http://nyti.ms/1ASeUKc (arguing that the Supreme Court's qualified immunity decisions "mean that the officer who shot Michael Brown and the City of Ferguson will most likely never be held accountable in court"); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 46 (2018) (arguing that the Supreme Court's qualified immunity decisions are "far removed from ordinary principles of legal interpretation").

qualified immunity is an important public policy, worthy of close and careful attention, and that is particularly so when, like here, exigent circumstances were present. Pet. App. 63a. This is true because "[p]olicemen on the beat are exposed, in the service of society, to all the risks which the constant effort to prevent crime and apprehend criminals entails. Because these people are literally the foot soldiers of society's defense of ordered liberty, the State has an especial interest in their protection." *Roberts v. Louisiana*, 431 U.S. 633, 646–47 (1977) (Blackmun, J. dissenting). If the critics of qualified immunity are dissatisfied, they may go to Congress for relief. *Kimble v. Marvel Entertainment*, LLC, 135 S. Ct. 2401 (2015). In 1996, Congress amended Section 1983 and took no action to address, reform, or eliminate the defense of qualified immunity. *See* Federal Courts Improvement Act, 110 Stat. 3847, 3853. Dissidents against qualified immunity should make arguments for change with Congress, not this Court.

As aptly observed in Judge Wilkinson's dissent to a denial of a Fourth Circuit En Banc rehearing on a qualified immunity dispute in *Harris v. Pittman*:

> At some point a pattern of Court decisions becomes a drumbeat, leaving one to wonder how long it will take for the Court's message to break through…The majority has used the summary judgment standard once more to eviscerate qualified immunity protections. In the majority's hands, every dispute becomes genuine and every fact becomes material. Qualified immunity fades to the end of every discussion, its values reserved for lip service until little enough is left. 927 F.3d 266, 283 (4th Cir. 2019) (Wilkinson, J. dissenting).

This Court's drumbeat has become "increasingly unsubtle": qualified immunity must be preserved for the good of society. Pet. App. 59a. There could be high potential societal costs created by the lower courts' misapplications of the qualified immunity standard.

A. An Erosion of Immunity Could Cause a Chilling Effect on the Law Enforcement Workforce

Throughout the creation and evolution of this immunity standard, this Court has frequently recognized the ramifications to local law enforcement that would result from an erosion of qualified immunity. A review of the financial considerations when hiring and retaining quality police officers highlights the delicate struggle currently faced by local governments even with immunity intact. These taxpayer costs would undoubtedly grow with a weakened immunity protection for police.

As numerous reports and legal authorities have noted, the law enforcement industry is in the midst of a hiring crisis. There is a nationwide discussion among industry leaders on how to combat this problem. Approximately sixty-three percent of law enforcement respondents to a 2019 survey said that the number of applicants applying for full-time officer positions has either "decreased significantly" or "decreased slightly" compared to five years ago. [22] In fact, many departments have chosen to expand their minimum standards in education, fitness, and past drug use in order to enlarge the candidate pool.[23]

22. Police Executive Research Forum, *The Workforce Crisis, and What Police Agencies Are Doing About It* (September 2019), https://www.policeforum.org/assets/WorkforceCrisis.pdf

23. *Id.*

Nationally, the number of law enforcement employees is declining. Between 2013 and 2016, the number of full-time peace officers decreased from approximately 725,000 officers to 701,000.[24] This picture is incomplete, however, until increases in the country's population are factored into the analysis. The number of full-time sworn officers per 1,000 U.S. residents has been declining over two decades, from 2.42 officers per 1,000 residents in 1997 to 2.17 officers per 1,000 in 2016.[25] This is an eleven percent reduction in peace officer staffing.[26]

Unfortunately, the problems with officer retention begin almost immediately upon the hiring of new officers. A study of 446 recruits entering Arizona police academies found that thirteen percent dropped out before completing the academy and an additional twenty-two percent dropped out during field training or before completing their first year on a force, making a combined thirty-five percent dropout rate.[27] Put differently, if there are ten officers in one recruit class, nine will make it through the training academy and six will still be a police officer in the second year.

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24. Shelley Hyland, *Full-Time Employees in Law Enforcement Agencies, 1997-2016*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2018), https://www.bjs.gov/content/pub/pdf/ftelea9716.pdf

25. *Id.*

26. *Id.*

27. Jeremy M. Wilson, *Police Recruitment and Retention for the New Millennium: the State of Knowledge*, RAND Center on Quality Policing (2010), https://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG959.pdf

When a law enforcement department is unable to retain its officers' long term, the costly and time intensive training requirements have fiscal impacts. An average police academy lasts twenty-one weeks.[28] There is usually another thirteen weeks of on-the-job training with a specially trained "field training officer" who is continually supervising the new officer while the new officer makes citizen contacts.[29] On average, it takes nine months before this new officer is ready to act unsupervised in the field. Police departments invest a significant amount of time and money to train each officer, which is unlike many other professions that require a certain level of education and/or training at the applicant's expense prior to employment.

A quality candidate may be even less likely to apply for a career in law enforcement if that person knows that reasonable actions taken may not be given immunity protection. The *Harris v. Pittman* dissent discusses this conundrum:

> Police work, like the calling of many a skilled tradesman, has often been handed down through the generations in America, but self respect depends in part upon societal respect, and that for officers is sadly ebbing. Court decisions that devalue not only police work but the very safety of officers themselves risk severing those bonds of generational transmission that have so

28. Brian Reaves, *State and Local Law Enforcement Training Academies, 2013*, U.S. Department of Justice, The Bureau of Justice Statistics (July 2016), https://www.bjs.gov/content/pub/pdf/slleta13.pdf

29. *Id.*

> sustained the working classes of our country. It is a shame, because professional police work helps to bridge the gulf between the haves and have nots in a community and protects our most vulnerable and dispossessed populations. Law must sanction officers who would abuse their power or disregard controlling law; it should not scare off those who worry that no matter what they do or whom they protect, they cannot avoid suits for money damages. 927 F.3d 266, 286–87 (4th Cir. 2019) (Wilkinson, J. dissenting)

Lawsuits deter "able citizens from acceptance of public office," and imposes enormous burdens and stress on officers. *Harlow*, 457 U.S. at 814. Even if the employing agency indemnifies the officer, the officer must live with the stress and uncertainty of litigation until the allegations are dismissed. A lawsuit is, after all, a public outcry alleging that this officer acted improperly, and this is a heavy professional burden to bear.[30] Without qualified immunity, many smart, talented people will avoid entering law enforcement, and the police workforce would be left with only the "most resolute or the most irresponsible." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998). It is in the public's interest to maintain these immunity protections to prevent this outcome.

In order to train recruits in a manner consistent with the Fifth Circuit's majority opinion, a police academy would now have to train the recruits that an officer "confronting armed, mentally disturbed suspects in close

30. *See* Kevin Gilmartin, *Emotional Survival for Law Enforcement* (2002).

quarters must invariably stand down until they have issued a warning and awaited the suspects' reaction or are facing the barrel of a gun." Pet. App. 52a. It is not difficult to discern the negative effects of such a standard on the hiring and retention of police officers, and the consequent negative societal effects. Many recruits will rethink their career path when they appreciate the danger inherent with this new standard.

It takes $58,000, as a 2008 national average, to train one peace officer.[31] Combining that fact with the 701,000 officers nationally, even a 1% increase in police turnover resulting from a decrease in officer immunity protections would result in a national loss of $406,580,000 of taxpayer dollars invested into peace officer training.

Without question, if police officers abuse their position of power in society, the law should hold them accountable for those overreaching actions. An aggrieved individual should be able to bring a lawsuit against an officer that is "plainly incompetent" or "knowingly violate[s] the law." *Malley*, 475 U.S. at 341. On the other hand, this Court has recognized that an officer should have summary judgment protection for acting reasonably, as there are high societal costs of subjecting an official to a burdensome and stressful trial proceeding. Qualified immunity is the "best attainable accommodation of competing values." *Harlow*, 457 U.S. at 814. Judge Jones' Fifth Circuit dissent describes the public policy reasons behind this immunity standard:

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31. Jeremy M. Wilson, *Police Recruitment and Retention for the New Millennium: the State of Knowledge*, RAND Center on Quality Policing (2010), https://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG959.pdf

> The breadth of this shield represents a deliberate balance between affording a damages remedy for constitutional abuses and the social and personal costs inflicted by meritless claims. *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038 (1987). The costs to society include the costs of litigation, the diversion of limited public resources, the deterrence of able people from going into public service, and the danger that fear of being sued will discourage officials from vigorously performing their jobs. *Id.*; *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736 (1982). The devastating costs imposed by unfounded lawsuits on officers otherwise entitled to immunity are reputational, potentially employment-related, financial and emotional. Pet. App. 36a.

The current workforce crisis facing the law enforcement industry makes it essential to preserve existing police resources and to avoid the loss of financial investment attendant to additional officers leaving police service. Any erosion in qualified immunity affects these interests and would certainly come at a taxpayer cost. This Court must continue to support law enforcement by allowing them the "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft,* 563 U.S. at 743. "And absent plain incompetence or intentional violations, qualified immunity must attach, because the "social costs" of any other rule are too high." Pet. App. 75a.

CONCLUSION

This Court should grant certiorari and reverse the judgment of the Court of Appeals.

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