

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-469 Caption [use short title]

Motion for: Leave to File Brief of Amici Curiae International Municipal Lawyers Association and National Association of Police Organizations in support of Defendants-Appellants' Petition for Rehearing En Banc

Set forth below precise, complete statement of relief sought: Leave for International Municipal Lawyers Association and National Association of Police Organizations to File Amici Brief in support of Defendants-Appelants' Petition for Rehearing En Banc

Grant, et al. v. City of Syracuse, et al.

MOVING PARTY: Int'l Municipal Lawyers Ass'n & Nat'l Ass'n of Police Orgs OPPOSING PARTY: Plaintiffs-Appellees

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Brian J. Butler OPPOSING ATTORNEY: A. Cabral Bonner, et al. [name of attorney, with firm, address, phone number and e-mail] Bond, Schoeneck & King, PLLC Law Offices of Bonner & Bonner One Lincoln Center, Syracuse, NY 13202 Suite 211, 475 Gate Five Road, Sausalito, CA 94695 315.218.8000 / bbutler@bsk.com 315.331.3070 / cabral@bonnerlaw.com

Court- Judge/ Agency appealed from: Second Circuit

Please check appropriate boxes: Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL: Has this request for relief been made below? Yes No Has this relief been previously sought in this court? Yes No Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted) Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: /s/ Brian J. Butler Date: 01/26/2022 Service by: CM/ECF Other [Attach proof of service]

19-0469-cv(L)

19-558-cv(CON); 19-0738-cv(XAP)

United States Court of Appeals
for the
Second Circuit

ALONZO GRANT, STEPHANIE GRANT,
Plaintiffs-Appellees-Cross-Appellants,

v.

DAMON LOCKETT, Police Officer, PAUL MONTALTO, Police Officer,
Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN
SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR
REHEARING *EN BANC***

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The International Municipal Lawyers Association (IMLA) and the National Association of Police Organizations (NAPO), by their undersigned counsel, hereby move this Court for an order granting leave to file an *amici curiae* brief before the Court's consideration of Appellants Lockett and Montalto's Petition for Rehearing En Banc, pursuant to Federal Rule of Appellate Procedure 29.

Proposed *Amici* state the following in support of this Motion:

1. IMLA is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Established in 1935, IMLA is the oldest and largest association of attorneys representing municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

2. The National Association of Police Organizations ("NAPO") is a coalition of police units and associations from across the United States. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement in the country. NAPO represents over 1,000 police units and associations, over 241,000

sworn law enforcement officers (including more than 30,000 within this Circuit), and more than 100,000 citizens who share a common dedication to fair and effective law enforcement.

3. Proposed *Amici* have an interest in the resolution of this case. The question of whether a governmental official is entitled to qualified immunity is a legal one, which must be decided by the court, not a jury. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The Supreme Court has repeatedly signaled to lower courts the exceptional importance of qualified immunity, by regularly departing from Supreme Court Rule 10 to issue summary reversals in cases where lower courts misapply the doctrine. *See e.g., Kisela v. Hughes*, 138 S. Ct. 1148, (2018). Because the district court deprived Defendants of their fundamental right to have a court decide the question of qualified immunity, this Court should grant en banc review to apply the doctrine properly.

4. *Amici* respectfully submit that their brief will aid the Court's consideration of this case by providing additional legal and factual arguments regarding the importance of qualified immunity, particularly the impact of the decision on law enforcement.

5. *Amici* drafted this brief in consultation with Bond, Schoeneck & King on behalf of IMLA on a pro bono basis. On January 11, 2022, representatives for *Amici* reached out to A. Cabral Bonner, Jesse Ryder, Charles Bonner, and Steven

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**BRIEF OF AMICI CURIAE INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION AND NATIONAL ASSOCIATION OF POLICE
ORGANIZATIONS IN SUPPORT OF DEFENDANTS-APPELLANTS'
PETITION FOR REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae International Municipal Lawyers Association and National Association of Police Organizations, by and through their undersigned counsel, hereby certify they have no parent corporation and no publicly held corporation owns ten percent or more of their stock.

Dated: January 26, 2022

BOND, SCHOENECK & KING, PLLC

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STATEMENT OF IDENTIFICATION¹

I. Identity and Interest of Amici Curiae

The International Municipal Lawyers Association (“IMLA”) is a non-profit, nonpartisan professional membership organization comprised of more than 2,500 local government entities as represented by their chief legal officers, state municipal leagues, and individual attorneys. Established in 1935, IMLA’s mission is to advance the responsible development of municipal law through education and advocacy, by providing the collective viewpoint of local governments before the United States Supreme Court and Courts of Appeals, and in state supreme and appellate courts.

The National Association of Police Organizations (“NAPO”) is a coalition of police units and associations from across the United States. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement in the country. NAPO represents over 1,000 police units and associations, over 241,000 sworn law enforcement officers (including more than 30,000 within this Circuit), and more than 100,000 citizens who share a common dedication to fair and effective law enforcement.

¹ Pursuant to FED. R. APP. P. 29(a)(4)(E) and LOCAL R. 29.1(b), Amici state that no party’s counsel authored the brief in whole or in part, and no party, party’s counsel, or any person other than amici curiae or their counsel contributed money that was intended to fund preparing or submitting this brief.

II. Source of Authority to File

Pursuant to Federal Rule of Appellate Procedure 27 and 29(b), and 2d Cir. L.R. 27.1 Amici have filed a motion for leave to file this brief in support of Defendants/Appellants. Amici notified counsel of their intent to file this brief and counsel for Defendants/Appellants consented to Amici's filing of this brief, but counsel for Plaintiffs/Appellees did not consent.

ARGUMENT

In the context of law enforcement, good faith or qualified immunity offers a bulwark against allegations of unlawful arrests and claims of excessive force. Whether qualified immunity applies in a given case is undeniably a matter of law which judges, not lay people, must decide:

First, a court must decide whether the facts that a plaintiff has alleged (see FED. R. CIV. P. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct.

Pearson v. Callahan, 555 U.S. 223, 232 (2009) (citations omitted).

That responsibility cannot be delegated to a jury, whether directly or indirectly. In this case, the trial court did just that,² depriving defendants of their fundamental protections.

² See Special App'x ("SA") at p. 76

The court's error affects more than just the defendants, as cities and counties across the circuit and around the country rely on courts applying the law properly in cases where public animus can be turned against officers charged with enforcing unpopular laws in unpopular ways. Amici can speak to the collateral damage caused by the court's missteps. This deprivation of qualified immunity will add to the growing inability of communities to attract and retain police officers. The current unrelenting attack on virtually all law enforcement, including against the vast majority who abide by rigorous standards of conduct, is amplified by wrongful denial of qualified immunity. Qualified candidates and long-term law enforcement employees are increasingly seeking alternative career paths that do not threaten massive personal liability. Depriving these defendants of the well-established protections assigned to officers acting in good faith will only worsen the law enforcement crisis. This court should grant *en banc* review to correct the lower court's mistakes and underscore the exceptional importance of qualified immunity.

I. Qualified Immunity Protects the Good Faith Actions of Police Officers, Allowing them to Fulfill their Duties

Protecting local government officials – including police officers – from *post hoc* rationalization forms the framework for qualified immunity. It enables public officials to fulfill their responsibilities without the threat of litigation and personal liability so long as they act in a manner that “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

Pearson, 555 U.S. at 231. It is particularly foundational for law enforcement because it allows for reasonable errors in judgment, regardless of whether the error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Id.* In the realm of excessive force, where there can be no clear line of demarcation, *post hoc* rationalization in the tranquility of the courthouse undermines society’s charge to police to enforce the law, protect public safety and engender calm. In the last decade alone, the Supreme Court has summarily reversed appellate courts at least twelve times in qualified immunity cases.³ In an environment where fewer than one percent of petitions are granted by the Court, so many summary reversals evidence the Court’s recognition of the importance of qualified immunity, standing in stark contrast to Supreme Court Rule 10, which warns that a “petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplications of a properly stated rule of law.” SUP. CT. R. 10. That restriction has not limited the Court’s intervention to preserve qualified immunity: “This Court has repeatedly told courts . . . not to define clearly established

³ See *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021); *Tahlequah v. Bond*, 142 S. Ct. 9 (2021); *Lombardo v. City of St. Louis*, 141 S. Ct. 2239 (2021); *Taylor v. Riojas*, 141 S. Ct. 52 (2020); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullenix v. Luna*, 577 U.S. 7 (2015); *Taylor v. Barkes*, 575 U.S. 822 (2015); *Carroll v. Carman*, 574 U.S. 13 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013); *Ryburn v. Huff*, 565 U.S. 469 (2012).

law at a high level of generality.” *Kisela*, 138 S. Ct. at 1152 (internal quotations omitted).

An honest examination of the challenges facing police officers confirms why qualified immunity is so vital. At any time, officers may be called upon to exercise split-second judgments which literally mean the difference between life and death. They undertake “their sworn obligation to intervene in aid of public safety, often on a moment’s notice with little opportunity for reflection and based on incomplete information.” *See Cortez v. McCauley*, 478 F.3d 1108, 1141 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring in part and dissenting in part); *cf. Roberts v. Louisiana*, 431 U.S. 633, 646-47 (1977) (Rehnquist, J., dissenting) (“Policemen 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.”). The Supreme Court is thus vigilant in protecting qualified immunity: “Because of the importance of qualified immunity ‘to society as a whole,’ the Court often corrects lower courts when they wrongly subject individual officers to liability.” *City & Cty. Of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 601 n. 3 (2015) (citation omitted).

In the scheme of law enforcement, domestic violence often leads to officer deaths,⁴ yet society expects officers to protect potential – as well as actual – victims upon pain of public excoriation for failing to do so. Sadly, just last week a 22-year-old New York City officer was murdered responding to a 911 call from a mother fighting with her son.⁵ The officers in this case responded to a 911 call suggesting domestic violence. Had they simply walked away, they would not be defendants in this case, but they could well have been fired, disciplined or worse had the aggressor continued to escalate his increasingly volatile behavior.

The significance of qualified immunity, whether to police officers, to municipal officials, or to society as a whole, elevates this case as a matter of exceptional importance.

II. The Court’s Failure to Determine Whether Qualified Immunity Applied Was Not Harmless Error

The record below confirms that the officers responded to a domestic disturbance where they were required to discern immediately the participants’ motivations, and propensity towards violence. Suffice to say that, because the trial

⁴ Cassandra Kercher et al., *Homicides of law enforcement officers responding to domestic disturbance calls*, PubMed, nih.gov.

⁵ *One N.Y.P.D. Officer Killed, a 2nd Wounded, Officials Say: Live Shooting Updates*, N.Y. TIMES (Jan. 21, 2022), (“Keechant Sewell, the police commissioner, described Officer Rivera as a ‘son, husband, officer and friend’ who had been ‘killed because he did what we asked him to do.’”), <https://www.nytimes.com/live/2022/01/21/nyregion/nypd-officers-shot-harlem>.

court (1) allowed the introduction of wholly inappropriate and inadmissible evidence, due to plaintiff's insertion of conclusions by the Citizen's Review Board and testimony by District Attorney Fitzpatrick and due to the improper failure to bifurcate plaintiffs' *Monell* claim from their claim against the individual officers; (2) failed to issue timely and effective curative instructions; and (3) refused to permit special interrogatories to the jury which would have properly separated issues of fact from questions of law, the court below compromised the jury's fact finding duties, while giving the jury a wholly inappropriate role of determining questions of law. *See SA at p. 76.* Amici agree with appellants that each of these errors improperly swayed the jury; taken together, there is no way these errors can be construed as harmless. *Pet. of Defs.-Appellants for Panel Reh'g and Reh'g en banc*, pp 10-27. This court's own standards require nothing less: to be harmless, an error must be "unlikely to have swayed the factfinder's judgment in any material respect." *Grant v. Lockett*, No. 19-469, 2021 WL 5816245 *4 (2d Cir. Dec. 8, 2021) (citing *Tesser v. Board of Education*, 370 F.3d 314, 319 (2d Cir. 2002)).

The discrete roles to be played in a qualified immunity case, with the jury as fact finder and the court in applying the law, are well-established. The panel in this case properly referenced the applicable analytical construct: after disputed factual issues have been resolved, the trial court must then resolve the legal question of

qualified immunity. *Pearson*, 555 U.S. 223. As Judge Winter explained in his dissent in *Warren v. Dwyer*:

This issue seems preeminently a matter for the court rather than for the jury. It is in essence a legal decision whether, on the basis of the law as it existed at the time of the particular incident, the lawfulness of the officer's conduct was reasonably clear or was a matter of doubt. Juries are hardly suited to make decisions that require an analysis of legal concepts and an understanding of the inevitable variability in the application of highly generalized legal principles.

906 F.2d 70, 77 (2d Cir. 1990) (emphasis added).

The panel found that the district court “abused its discretion in submitting the ultimate question of qualified immunity to the jury” but nevertheless concluded that the error was not prejudicial. *Summ. Order, Grant v. Lockett*, No. 19-469, 2021 WL 5816245 (2d Cir. Dec. 8, 2021), p. 4. Given the Supreme Court's repeated signaling that this issue is uniquely important, the panel was wrong to so conclude. The jury not only exceeded its authority in answering questions of law – whether the arrest was legal and whether the use of force violated the Fourth Amendment – those findings were based entirely on a confluence of improper evidence, as the panel found and as appellants persuasively argue. Moreover, irrespective of the harmful evidence admitted, the lack of any analysis by the trial court on qualified immunity warrants this court's review.

III. This Court's Failure to Cure the Abuse of Discretion Below Undermines Law Enforcement

The panel's failure to remedy the trial court's obvious abuse of discretion in denying qualified immunity reverberates far beyond the individual defendants and the Syracuse Police Department; it undermines the role of law enforcement generally. As Amici's membership will attest, municipalities are facing an unprecedented crisis in retaining police officers and filling ever-increasing vacancies. While Amici support the movement toward greater accountability from law enforcement, it is imperative that courts assure fair treatment for those who answer the call and protect their constitutional rights just as we demand they do of others. Doing otherwise erodes the confidence we need police to have in our courts – that, like society's demand that the police uphold the law, judges will do the same. No corners will be cut, no person deprived a fair trial, and no officer found liable for acting in good faith.

Appellate court decisions which refuse to correct obvious injustices to law enforcement will only exacerbate the predicament facing communities seeking to maintain police and sheriff's departments. It is no secret that America's municipalities are facing a critical shortage of men and women willing to secure public safety. In a 2020 survey, 86 percent of police chiefs nationwide reported a shortage of sworn officers, with nearly half stating that the shortage had worsened

over the past five years.⁶ Public hostility and risk of significant personal liability add to demographic and economic factors which are depleting local law enforcement. Examples abound between 2010 and 2019, Nashville saw a 60 percent decline in police applications. Seattle's police department reported a 40 percent to 50 percent drop in applications, while Jefferson County, Colorado's applications plummeted 70 percent.⁷ Greensboro, North Carolina's police force was short by 72 officers in March 2021; by late July 2021, that shortage was 90—more than 15% of the city's budgeted cohort.⁸ The problem has deeply affected Second Circuit municipalities as well. Since 2020, the Rochester Police Department has seen 65 members leave for other jobs or retirement and has only been able to hire 16 officers to replace them.⁹

⁶ Charles Fain Lehman, *America's Quiet Policing Crisis*, CITY JOURNAL (Feb. 5, 2020), https://www.city-journal.org/police-recruitment-crisis?wallit_nosession=1.

⁷ *The Workforce Crisis, and What Police are Doing about It*, POLICE EXECUTIVE RESEARCH FORUM (Sept. 2019), <https://www.policeforum.org/assets/WorkforceCrisis.pdf>.

⁸ John Hammer, *Number of Greensboro Police Officers Continues to Decline*, RHINO TIMES (July 28, 2021), <https://www.rhinotimes.com/news/number-of-greensboro-police-officers-continues-to-decline/>.

⁹ Ally Peters, *'Incredibly concerning': Staffing shortages impact local police at a time when violence is high* (June 16, 2021, 6:43 PM), <https://www.rochesterfirst.com/news/local-news/incredibly-concerning-staffing-shortages-impacting-police-departments-at-a-time-when-violence-is-high/>.

The situation in Syracuse is even more dire: staffing has fallen from 520 to 380 officers,¹⁰ creating a “critical shortage” and eroding morale.¹¹

These shortages presage a profound detriment to American neighborhoods, accelerating a continuing multi-year decline in the ratio of officers to constituents.¹²

As the International Association of Chiefs of Police puts it:

If law enforcement agencies continue to lose officers without bringing in a number of qualified recruits to replace them, communities will soon begin to feel the effects. Longer wait times for calls for service, fewer crimes solved and cleared, and on-duty officers who are burned out and overworked threaten the quality of life in our communities.¹³

¹⁰ Lacey Leonardi, SPD staffing shortages cripple cold case investigations (Nov. 15, 2021, 7:00 PM), <https://spectrumlocalnews.com/nys/central-ny/news/2021/11/14/spd-staffing-shortages-cripple-cold-case-investigations>.

¹¹ Amanda Hull, Syracuse police union president sounds alarm on staffing shortage and officer morale (Aug. 5, 2021), <https://cnycentral.com/news/local/syracuse-police-union-president-sounds-alarm-on-staffing-shortage-and-officer-morale>; Andrew Donovan, After series of shocking murders, Mayor warns of ‘dangerously low’ staffing at Syracuse Police Department (May 26, 2021, 7:22 PM), <https://www.localsyr.com/news/local-news/after-series-of-shocking-murders-mayor-warns-of-dangerously-low-staffing-at-syracuse-police-department/>.

¹² Shelley Hyland, *Full-Time Employees in Law Enforcement Agencies, 1997-2016*, Statistical Brief NCJ 251762, Bureau of Justice Statistics (Aug. 2018), <https://www.bjs.gov/content/pub/pdf/ftelea9716.pdf>.

¹³ *The State of Recruitment: A Crisis for Law Enforcement*, International Association of Chiefs of Police, https://www.theiacp.org/sites/default/files/239416_IACP_RecruitmentBR_HR_0.pdf.

Precedents such as this case will accelerate the problem, making police forces less able to respond to troubled neighborhoods, domestic disputes, and desperate constituents.

CONCLUSION

Based on the foregoing, Amici respectfully request that this Court grant *en banc* review.

Dated: January 26, 2022

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CERTIFICATE OF COMPLIANCE

I, BRIAN J. BUTLER, hereby certify as follows:

1. The brief complies with the length requirements of Fed. R. App. P. 29(b)(4) because this brief consists of 2,585 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: January 26, 2022

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