No. 19-889

IN THE

Supreme Court of the United States

KAUFMAN COUNTY; MATTHEW HINDS,
PETITIONERS,

v.

EUNICE J. WINZER, INDIVIDUALLY AND ON BEHALF OF THE STATUTORY BENEFICIARIES OF GABRIEL A. WINZER; SOHELIA WINZER; HENRY WINZER, RESPONDENTS.

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

BRIEF FOR *AMICI CURIAE* TEXAS ASSOCIATION OF COUNTIES, TEXAS MUNICIPAL LEAGUE, TEXAS MUNICIPAL LEAGUE INTERGOVERNMENTAL RISK POOL, MISSISSIPPI MUNICIPAL SERVICE COMPANY, AND NATIONAL ASSOCIATION OF POLICE ORGANIZATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTEREST OF *AMICI CURIAE*[1]

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

The Texas Municipal League ("TML") is a non-profit association of over 1,100 incorporated cities that provides legislative, legal, and educational services to its members. Over 13,000 persons, consisting of city mayors, council members, city managers, city attorneys, and department heads, are member officials of TML by virtue of their respective cities' participation. The TML legal defense program was established to monitor major litigation that affects municipalities and to file amicus briefs on behalf of its

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[1]Undersigned counsel provided notice and obtained consent from the parties to file this *amicus curiae* brief more than 10 days before its filing. No party or its counsel authored this brief in whole or in part. No party, counsel, or any other person except *Amici* and their counsel contributed to the cost of preparing and submitting this brief.

members in cases of special significance to cities and city officials.

The Texas Municipal League Intergovernmental Risk Pool ("TML-IRP") is a self-insurance risk pool created by over 2,500 participating governmental entities in the State of Texas under the provisions of the Interlocal Cooperation Act, Texas Government Code sec. 791.001, *et seq*. These governmental entities include municipalities and a variety of other governmental entities, including transportation authorities, utility districts, water districts, conservation districts, emergency service districts, appraisal districts, housing authorities, hospital districts, and local mental health and mental retardation authorities.

The Mississippi Municipal Service Company 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 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

100,000 citizens mutually dedicated to fair and effective law enforcement.

Amici are concerned about the outcome of this case because they represent the interests of law-enforcement officers and governmental employers. This case concerns whether law-enforcement officers and counties or municipalities may be held civilly liable for actions taken by officers in the line of duty. Despite granting qualified immunity to the individual defendant, a divided panel of the Fifth Circuit opened the door for municipal liability against Kaufman County where none should exist. *Amici* thus supports Petitioners' request that this Court grant certiorari review in order to address the proper analysis for municipal liability and correct the Fifth Circuit's fundamental error.

SUMMARY OF THE ARGUMENT

This Court should grant the Petition for Writ of Certiorari for many reasons discussed in the Petition itself. But those reasons are not exhaustive or perhaps even most persuasive. This Court should also grant certiorari review to address the Fifth Circuit's incomplete analysis, which focused entirely on qualified immunity and omitted a discussion of municipal liability. The two doctrines are distinct but related, and resolution of both is necessary for the proper disposition of this case.

The qualified-immunity and municipal-liability analyses share a common question: whether a violation of constitutional rights occurred. Contrary to the panel majority's conclusion, no such violation was present on

the undisputed facts of this case. But *amicus* recognizes that error correction is not this Court's function, and certiorari is not warranted for that purpose alone. Rather, this Court should grant certiorari to address a more fundamental issue—namely, the interplay between qualified immunity and municipal liability.

A thorough and proper Section 1983 analysis requires discussion of municipal liability where (as here) a governmental entity is sued. Because the panel majority incorrectly decided the constitutional question, or the first prong of the municipal-liability analysis, consideration of the remaining prong was necessary but foregone. Had the panel majority thoroughly and properly analyzed municipal liability, it would have concluded that this lawsuit against Kaufman County cannot be maintained. This incomplete analysis creates substantial policy implications for governmental entities and law-enforcement officers that the doctrines of municipal liability and qualified immunity were designed to avoid.

ARGUMENT

In most cases arising under 42 U.S.C. § 1983, including this one, plaintiffs sue both governmental employees in their individual capacities and the governmental employer itself.[2] Individual governmental employees may be entitled to qualified immunity while the governmental entity may be protected by the rigors of *Monell v. Department of Social Services*, 436 U.S. 658 (1978). These two analyses

[2]Plaintiffs here sued Kaufman County, Texas, along with Officer Matthew Hinds in his individual capacity. *See* App. 1a–2a.

are distinct but related and should be analyzed together where applicable. For both analyses, plaintiffs must prove the violation of a constitutional right, but substantiating this element is not the only requirement for establishing the entitlement to qualified immunity or protection of the governmental entity against liability.

The Fifth Circuit in this case got the joint constitutional question wrong, erroneously concluding that there were genuine issues of material fact on the issue of a Fourth Amendment violation. What's worse, however, is that the Fifth Circuit wholly failed to analyze municipal liability—in direct contravention of *Monell*. *See* 436 U.S. at 658 ("[I]t is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983."); *see also* Sup. Ct. R. 10(c) (noting that certiorari may be granted where a court of appeals "has decided an important federal question in a way that conflicts with relevant decision of [the Supreme] Court"). By omitting the discussion of municipal liability, the Fifth Circuit failed to appreciate how its ruling impacted the remaining portions of the proper analysis under Section 1983.

Amici will begin by briefly discussing the constitutional question, demonstrating that no violation of the Fourth Amendment existed in this case. *Amici* will then address the additional (but interrelated) requirements for establishing liability against individual-capacity and municipal defendants. And *amici* will conclude by highlighting the important policy consequences of the Fifth Circuit's decision.

I. Dissenting judges in the panel and rehearing opinions correctly concluded that no constitutional violation occurred.

The undisputed facts underscore that Officer Hinds did not commit a constitutional violation, which is the antecedent question for both the qualified immunity and municipal liability analyses. The applicable Fourth Amendment boundaries have long been well-settled by this Court: "Where [an] officer has probable cause to believe that [a] suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The Fourth Amendment is not a rule of strict liability, instead providing "leeway" to officers in conducting their official duties. *See Brinegar v. United States*, 338 U.S. 160, 175–76 (1940). The panel incorrectly determined that "Hinds was not entitled to qualified immunity under the first prong." App. 32a.[3]

Dissenting from the panel majority, Judge Edith Brown Clement neatly summarized the uncontroverted evidence to prove that no constitutional violation occurred. App. 35a–47a. It is uncontested that Officer Hinds "was responding to a dispatch that a man was recklessly shooting his firearm in a residential area, threatening the lives of innocent civilians in their homes." App. 42a. The gunman shot at police without provocation from a distance of 100-150 yards. App. 42a.

[3]The panel ultimately afforded Officer Hinds qualified immunity because it could not conclude that the decedent's right to be free from excessive force was "clearly established," as required by qualified immunity's second prong. App. 32a–33a.

He ran from Officer Hinds, darting into thick brush for cover. App. 42a. When he emerged, the gunman was riding a bicycle "headlong" toward the officers, brandishing what the officers believed to be a gun. App. 43a. And he ignored an officer's command to "Put that down!" App. 43a. Given these circumstances, all of the officers on the scene "stated that they feared for their safety and the safety of others at that critical moment." App. 44a. As a result, Officer Hinds "had reason to believe that the suspect posed a threat of serious harm to him or to others." App. 44a (quoting *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 396–97 (5th Cir. 2009)) (internal quotation marks and alterations omitted). His decision to use deadly force was not objectively unreasonable, and no constitutional violation occurred.

Judge Clement's dissent is not an island; other Fifth Circuit colleagues took issue with the panel majority and dissented from the denial of rehearing en banc. Both Judges Jerry E. Smith and James C. Ho[4] opined on the broader policy implications of the panel majority's conclusion on the issue of qualified immunity. According to Judge Smith, the panel majority contradicted "heretofore-settled Supreme Court and Fifth Circuit caselaw" by villainizing police officers who respond with deadly force to "threatening and well-armed potential killers." App. 5a. And Judge Ho criticized the panel majority for "second-guessing split-second decisions by police officers from the safety of [their] chambers." App. 10a.[5] These judges correctly

[4]Judges Smith, Clement, and Kurt D. Engelhardt joined Judge Ho's dissent from the denial of rehearing en banc. App. 5a.

[5]*See https://www.cnn.com/2019/10/23/politics/judge-mass-shootings-police-officers/index.html* (last accessed Jan. 14, 2020) (discussing

concluded that the principal purpose of qualified immunity—protecting "officials from harassment, distraction, and liability when they perform their duties reasonably," *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)—was frustrated in this case.

Judges Clement, Smith, and Ho thus reached the conclusion consistent with this Court's established precedent, *e.g.*, *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 *Pearson*, 555 U.S. at 231; *Graham v. Connor*, 490 U.S. 386, 397 (1989), and their opinions should have controlled the constitutional question. Officer Hinds did not commit a Fourth Amendment violation because his use of force was objectively reasonable. Because no constitutional violation occurred, Officer Hinds was entitled to qualified immunity, and Kaufman County was entitled to a ruling that no municipal liability could attach.

II. The panel majority failed to appreciate the interplay between qualified immunity and municipal liability, creating an incomplete and erroneous analysis that conflicts with doctrinal underpinnings of both.

In addition to flubbing the constitutional question, the panel majority erred more significantly by not acknowledging how qualified-immunity and municipal liability work together. Qualified immunity, on the one hand, requires inquiry into whether there was a "clearly established" constitutional violation. *See*

Judge Ho's opening line: "If we want to stop mass shootings, we should stop punishing police officers who put their lives on the line to prevent them.").

City of Escondido v. Emmons, 139 S. Ct. 500, 503-04 (2019) (per curiam). Municipal liability, on the other hand, requires inquiry into whether a policy or custom caused a constitutional violation. *See Monell*, 436 U.S. at 694–95. By holding that Officer Hinds was entitled to qualified immunity (App. 32a–33a), the panel necessarily should have held that there was no municipal liability.

The starting point is consideration of *how* municipal liability is proven. There are three ways to establish a municipal policy for purposes of liability under Section 1983: (1) proof of an express policy that caused the constitutional deprivation; (2) a widespread practice amounting to a custom that caused the constitutional deprivation; or (3) a final policymaker whose actions caused the constitutional deprivation. *E.g.*, *Kujawski v. Bd. of Comm'rs*, 183 F.3d 734, 737 (7th Cir. 1999). In this case, there are no allegations related to an express unconstitutional policy or the actions of a final policymaker, so an unofficial custom was the only viable theory of municipal liability.

But Plaintiffs cannot recover against Kaufman County under this theory because of the panel's qualified-immunity determination. When, as here, a court determines that the defendant did not violate "clearly established" law (App. 32a–33a), then the court must likewise determine that there is no widespread, unofficial custom. The reason is simple: When a "new" unconstitutional circumstance is recognized, municipal policymakers have had no chance to enact or enforce a widespread custom to address it yet. Any new circumstance necessarily requires time before it is met with related policies and customs of any kind.

To be sure, courts have long adhered to this specificity principle. It is well-settled that "a widespread practice" cannot be based on a one-time event, which is precisely what happened in this case. *See Henderson v. Anderson*, 463 F. App'x 247, 251 (5th Cir. 2012) ("Because the Hendersons produced no evidence that this was anything more than a one time occurrence, we cannot . . . infer a persistent and widespread practice or custom."). Put differently, Officer Hinds shooting the decedent occurred once, has not been replicated, and could not be predicted. Plaintiffs have therefore produced no evidence that Kaufman County has a widespread policy or practice contributing to the unreasonable use of excessive force among its officers.

Amici do not argue that the grant of qualified immunity will always control the municipal-liability question. Indeed, it is possible for an individual officer to be entitled to qualified immunity contemporaneously with a first-time finding of municipal liability based on an express policy determined to be unconstitutional. But this case is based on pattern-and-practice liability, which cannot occur when the violation of constitutional rights was not clearly established in the first place.

This Court should take the opportunity to clarify generalizations in the case law and reject the notion that qualified immunity and municipal liability are entirely separate doctrines. There is room for play in the joints, illustrated well by this case.

III. The panel's decision raises substantial policy implications for municipalities and law enforcement officers that are inconsistent with settled Section 1983 doctrine.

There is a substantial body of writing on the policy implications underlying the doctrine of qualified immunity. It is "grounded in the acknowledgement that officers must make split-second judgments about the appropriate use of force in chaotic, highly dangerous situations." App. 39a (citing *Graham*, 490 U.S. at 397). By protecting law-enforcement officers from unfair speculation and second-guessing, qualified immunity accounts for the tense realities of policing and permits officers to perform their duties unencumbered by the fear of unnecessary or inappropriate liability. And doing away with the doctrine would work an opposing harm: "The costs [of meritless claims] 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." *Cole v. Carson*, 935 F.3d 444, 461 (5th Cir. 2019) (en banc); *accord City & Cty. of San Francisco*, 135 S. Ct. 1765, 1774 n.3 (2015) (noting that cases of this nature may impact law-enforcement officers by exposing them to monetary damages and potential harm to their careers).

The panel majority ignoring the municipal-liability analysis creates similar consequences for Kaufman County, its citizens, and the officers it

employs. For example, the panel majority should have dismissed this lawsuit under *Monell*, stopping the clock and preventing the accumulation of additional attorneys' fees and costs. Because it did not, Kaufman County must bear untold, frivolous litigation costs on remand—and those costs will fall squarely on taxpayer shoulders. Further affecting the citizens, the money that Kaufman County will use to fund this litigation cannot be directed to necessary county functions, including the administration of law enforcement, education, healthcare, welfare services, and waste management, creating the possibility that Kaufman County residents will needlessly suffer a decrease or total deprivation of these amenities. The Fifth Circuit's opinion may also create a detrimental reduction in talented applicants for governmental employment, or it may cause county officials to think twice before retaining positions in public service. By doing so, the Fifth Circuit has jeopardized the already limited resources available to those who work daily to protect and serve.

None of these potential consequences are worth the ink that was spared by the panel majority not fully addressing the question of municipal liability. This Court should analyze what the Fifth Circuit did not, spare Kaufman County the time and expense of unnecessary litigation on remand, and protect the limited human and nonhuman resources that are currently available to law-enforcement agencies.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to confirm the proper analysis for municipal liability and bring the Fifth Circuit into compliance with decades of precedent. By addressing the panel majority's flawed and incomplete analysis, this Court can protect Kaufman County and others like it from additional unnecessary litigation and the consequent diversion of limited municipal resources.

Respectfully submitted,

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