NO. 16-11482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EUNICE J. WINZER, Individually and on behalf of the statutory beneficiaries of
GABRIEL A. WINZER; SOHELIA WINZER; HENRY WINZER,
Plaintiffs-Appellants

v.

KAUFMAN COUNTY; BILL CUELLAR; GARRY HUDDLESTON; MATTHEW HINDS,
Defendants- Appellees

HENRY ANDREE WINZER, also known as Henry A. Winzer,
Plaintiff-Appellant

v.

MATTHEW HINDS, Individually and in his capacity as a member of the Kaufman County Sheriff Department; UNKNOWN STATE TROOPERS, Individually and in their capacity as member of Texas Department of Public Safety; UNKNOWN PARAMEDICS, Individually and in their capacity as emergency responders of the East Texas EMS; SERGEANT FORREST FRIESEN,
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Texas

UNOPPOSED MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

The Texas Association of Counties, the Texas Municipal League, the Texas Municipal League Intergovernmental Risk Pool, the Mississippi Municipal Service Company, and the National Association of Police Organizations request leave, under Federal Rule of Appellate Procedure 29 and Fifth Circuit Rule 29, to file an amici curiae brief in support of Appellee Kaufman County's petition for rehearing en banc.

AMICI CURIAE INTEREST

All Amici Curiae represent the interests of law enforcement officers and governmental entities who employ them. Accordingly, they have a significant interest in the development of Section 1983 law.

The Texas Association of Counties 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 Sherriff'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 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 members in cases of special significance to cities and city officials.

The Texas Municipal League Intergovernmental Risk Pool 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, 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 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 1000,000 citizens mutually dedicated to fair and effective law enforcement.

REASONS FOR AMICI CURIAE BRIEF

A splintered Panel in this case found a Fourth Amendment violation regarding a law enforcement officer's use of force in a very dangerous situation. Amici believe that the Dissenting Judge's analysis provides the more faithful interpretation of the Constitution and thus they seek to support the County's petition for further review.

If permitted to stand, the panel opinion will negatively impact law enforcement officers and governmental employers throughout Louisiana, Mississippi, and Texas. Indeed, this case cannot be viewed in isolation. Plaintiffs and lower courts will point to the panel opinion in an effort to cite "clearly established law" sufficient to defeat qualified immunity. Plaintiffs and lower

courts also will utilize the panel opinion to try and impose governmental liability upon municipalities and counties.

Amici seek not to address factual issues but instead to address when a law enforcement officer's use of deadly force is constitutionally "reasonable." The parties in this case do not object to Amici being provided leave to file the attached proposed brief.

CONCLUSION

For these reasons, and the reasons addressed more specifically in the attached proposed brief, Amici seek leave to file their brief in support of Appellants.

Dated: March 25, 2019.

Respectfully submitted,

By: /s/ G. Todd Butler
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Counsel for Amici Curiae

CERTIFICATE OF CONFERENCE

On March 25, 2019, counsel for Plaintiffs-Appellants informed undersigned counsel that this motion would not be opposed.

Respectfully Submitted,

BY: /s/ G. Todd Butler
G. TODD BULTER

Dated: March 25, 2019.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This motion complies with the type-volume limitation of Fed R. App. P. 27(d)(2)(A) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), it contains 676 words.

2. This motion 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 it has been prepared in proportionally-spaced typeface, including serifs, using Word, in Times New Roman 14-point font.

Respectfully Submitted,

BY: /s/ G. Todd Butler
G. TODD BULTER

Dated: March 25, 2019.

CERTIFICATE OF SERVICE

I, G. Todd Butler, certify that I electronically filed this brief with the Clerk of the Court, using the electronic filing system, which sent notification of such filing to all counsel of record:

Dated: March 25, 2019.

/s/ G. Todd Butler
G. Todd Butler

NO. 16-11482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas

AMICUS CURIAE BRIEF OF TEXAS ASSOCIATION OF COUNTIES; TEXAS MUNICIPAL LEAGUE; TEXAS MUNICIPAL LEAGUE INTERGOVERNMENTAL RISK POOL; MISSISSIPPI MUNICIPAL SERVICE COMPANY; AND NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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Attorney for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

So that the judges of this Court may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case, in addition to the persons and entities previously identified by the parties:

A. Amici Curiae:

1. Texas Association of Counties;
2. Texas Municipal League;
3. Texas Municipal League Intergovernmental Risk Pool;
4. Mississippi Municipal Service Company; and
5. National Association of Police Organizations.

B. Phelps Dunbar, LLP and G. Todd Butler, counsel for Amici Curiae

SO CERTIFIED, this the 25th day of March, 2019.

/s/ G. Todd Butler
Counsel for Amici Curiae

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AMICI CURIAE HAVE SUBSTANTIAL INTERESTS IN THIS CASE

This case involves when a law enforcement officer and governmental employer can be held civilly liable for actions taken during the line of duty. Because all Amici Curiae represent the interests of such individuals and entities, they have a significant interest in the outcome of this case, as it may be used as precedent in the future. Various Amici listed below are also Amici in the pending consolidated case of *Cole v. Carson*, Case Nos. 14-10228 & 15-10045, which is under consideration by the en banc Court. This case and the *Cole* case are similar.

The Texas Association of Counties 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 Sherriff'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.

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NO PARTY'S COUNSEL AUTHORED OR PAID FOR THIS BRIEF

No party or party's counsel authored this brief or contributed money to this brief. The brief instead was paid for by Amici Curiae and authored by their counsel.

ARGUMENT

Over a dissent, two members of this Court held that a police officer violated the Fourth Amendment when, after being shot at, he responded with fire at an individual with a toy gun who proceeded towards him while disobeying law enforcement commands. *See* Panel Op. *generally*. The Panel Majority is wrong about Fourth Amendment law and has created a precedent that will negatively impact other police officers and governmental entities moving forward. The en banc Court should intervene.

I. Judge Clement's dissent correctly analyzed the Fourth Amendment.

The watchword of the Fourth Amendment is "reasonableness." So the constitutional question is whether, under the circumstances, Officer Hinds acted reasonably by resorting to the use of deadly force. *See Tennessee v. Garner*, 471

U.S. 1, 7 (1985) (holding that an officer's use of deadly force constitutes a seizure within the meaning of the Fourth Amendment and therefore must be reasonable). Judge Clement correctly concluded that he did.[1]

Frankly, it would be difficult to add much to Judge Clement's thoughtful analysis. On pages 25 through 29, the Panel Dissent highlighted the extremely dangerous situation that Officer Hinds found himself in while trying to protect the public. A suspect shot at him and other officers, at close range and without provocation, and the suspect remained at large in a residential neighborhood. *See* Panel Dissent at p.26.

The dangerous situation, of course, was not one of Officer Hinds' own making. Courts understandably are concerned about officers utilizing deadly force when they themselves have created the need for a lethal response. *E.g.*, *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (considering whether the officer's "own reckless or deliberate conduct during the seizure unreasonably created the need to use such force") (quoted case omitted). But that was not at all what happened here. In addition to ducking shots from an active shooter, Officer Hinds was responding to "multiple calls of a man standing in a rural street shooting a pistol[,]"

[1] There is a significant dispute in this case over a sham affidavit, but, even accepting the Panel Majority's failure to give deference to the District Court's evidentiary ruling, "[t]he result should [have] be[en] the same: Officer Hinds was still entitled to this [C]ourt's recognition that his behavior was reasonable." *See* Panel Dissent at p.23.

"kicking at mailboxes[,]" "point[ing] a gun at a house[,]" and "appear[ing] agitated," all while talking "to himself and yelling[,] 'everyone's going to get theirs' and 'I'm just trying to get back what's mine.'" *See* Panel Op. at p.1. These facts are undisputed.

"Reasonableness," contrary to the Panel Majority's implication, does not mean perfection. Although this case involves an extremely unfortunate situation, it has long been settled that the Fourth Amendment is not a rule of strict liability. For 70 years, the Supreme Court has interpreted the Constitution as affording "leeway" to officers in conducting their official duties. *See Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). "[R]oom must be allowed for some mistakes[,]" the High Court has said, so long as "the mistakes [are] those of reasonable men." *Id*. at 176; *see also Hein v. North Carolina*, 135 S.Ct. 530, 534 (2014) (holding that the Fourth Amendment permits both reasonable mistakes of fact and law).[2]

Just last Term, the Supreme Court reminded lower courts that the reasonableness standard does not present "a high bar." *See District of Columbia v. Wesby*, 138 S.Ct. 577, 586 (2018) (quoted case omitted). That sentiment, however, is found nowhere in the Panel Majority's analysis. Judge Clement correctly

[2] The Panel Majority wrongly (and dangerously) suggests the officers in this case reacted too quickly with the use of lethal force. Panel Op. at p.16. "[T]he law[, however,] does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect." *Mullenix v. Luna*, 136 S. Ct. 305, 311 (2015) (quoted case omitted). Any contrary rule would subject officers to dangers society cannot accept.

criticized the Panel Majority for viewing this case through then lens "of courthouse chambers" instead of from the life or death situation that Officer Hinds and his fellow officers[3] faced in the field. *See* Panel Dissent at p.30.

One could always Monday morning quarterback a tragic event and wonder why an officer did not do this or that differently. But the Fourth Amendment does not concern itself with that type of inquiry. *See Bell v. Irwin*, 321 F.3d 637, 641 (7th Cir. 2003) ("To say that police officers have acted within the bounds that the Constitution sets is not necessarily to say that they have acted wisely."). Reasonableness is the test, and Officer Hinds' actions in this case satisfy that minimal standard.

II. If permitted to stand, this precedent will create problems in the future.

Officer Hinds ultimately was granted qualified immunity, but that is cold comfort for future litigants. Significantly, two questions control qualified immunity: (1) whether the facts demonstrate a constitutional violation and (2) whether the implicated constitutional right was "clearly established" at the time of the defendant's conduct. *Pearson v. Callahan*, 555 U.S. 223, 230-32 (2009). Officer Hinds won at step two, but the Panel Majority's step one conclusion "invites future error." *See* Panel Dissent at p.29.

[3] It should not go unrecognized that Officer Hinds was not the only officer who fired shots. *See* Panel Op. at p.4. The fact that five different trained officers found it necessary to respond with gunfire underscores the reasonableness of Officer Hinds' actions. *Id.*

Specific concerns are twofold. First, plaintiffs and lower courts likely will now point to this case as "clearly established" law sufficient to defeat a claim of qualified immunity. *See Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011) (en banc) (acknowledging that Fifth Circuit cases are "authoritative," such that they count when evaluating the "clearly established law" requirement). Second, even beyond the qualified immunity context, this case likely will be used as a weapon to try and establish liability against municipalities and counties.[4] *See Alvarez v. City of Brownsville*, 904 F.3d 382, 390 (5th Cir. 2018) (en banc) (acknowledging that, like with qualified immunity, a constitutional violation is a necessary – but not sufficient – requirement of governmental liability). Neither result should be permitted.

III. The Supreme Court has signaled that the type of error made in this case deserves correction.

There often is much debate about whether a case is "en banc worthy." By the text of the rule, the case needs to "involve[ ] a question of exceptional importance." *See* F.R.A.P. 35(a)(2). This is such a case and not just because it involves how the Constitution should be interpreted. *See, e.g., Nichols v. United States*, 563 F.3d 240, 242 (6th Cir. 2009) (en banc) ("We granted en banc review to decide an important constitutional question[.]").

[4] To be sure, the county-defendant in this case now faces another round of expensive litigation on remand, despite the Panel's holding that there was no clear violation of the Fourth Amendment.

A contributing factor is the qualified immunity overlay – both with respect to Officer Hinds and with respect to future law enforcement officers. Commentators and Justices alike have recognized that qualified immunity enjoys a preferred status in the law. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 82 (2018) (discussing the Supreme Court trend of reversing qualified immunity denials); *Kisela v. Hughes*, 138 S.Ct. 1148, 1162 (2017) (Sotomayor, J., dissenting) (arguing that the Supreme Court has "display[ed] an unflinching willingness" to accept qualified immunity cases). In no less than 15 cases in the past eight years, the Supreme Court has reversed qualified immunity denials, frequently through "strongly worded summary reversals."[5]

Together, the combination of constitutional interpretation and qualified immunity justifies review by the whole Court. This case includes a persuasive dissent, and even the Panel Majority could not say that Officer Hinds' conduct was

[5] *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. 577 (2018); *White v. Pauly*, 137 S.Ct. 548 (2017) (summary reversal); *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (summary reversal); *Taylor v. Barkes*, 135 S.Ct. 2042 (2015) (summary reversal); *City & County of San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015); *Carroll v. Carman*, 135 S.Ct. 348 (2014) (summary reversal); *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014); *Wood v. Moss*, 134 S.Ct. 2056 (2014); *Stanton v. Sims*, 134 S.Ct. 3 (2013) (summary reversal); *Reichle v. Howards*, 566 U.S. 658 (2012); *Ryburn v. Huff*, 132 S.Ct. 987 (2012) (summary reversal); *Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012); *Ashcroft v. al–Kidd*, 563 U.S. 731 (2011). In 2016, then-Judge Kavanugh made a similar point while dissenting from the D.C. Circuit's refusal to hear *Wesby* en banc, at which time the Supreme Court had "issued 11 decisions reversing federal courts of appeals in qualified immunity cases" "in just the past five years[.]" *See Wesby v. District of Columbia*, 816 F.3d 96 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

"clearly" unconstitutional. When, as here, there are differing views about such important issues, Rule 35's requirements are satisfied.

IV. At a minimum, this Court should stay consideration of the County's petition until after the *Cole* case is decided.

Recently, this Court vacated the panel opinion in the *Cole* case. *See* 915 F.3d 378 (Feb. 8, 2019). *Cole*, like this, involves the issue of whether an officer acted reasonably in utilizing deadly force. Because the en banc Court's analysis could speak to the issues here, it would be prudent to hold this case in abeyance.

CONCLUSION

Judge Clement's dissent called for further review, stating specifically that, "[h]opefully," the Panel Majority's "errors will be corrected before we face their effects." *See* Panel Dissent at p.30. Both parties likewise have requested en banc consideration. The full Court should answer the call for action and grant re-hearing under Rule 35.

Dated: March 25, 2019

Respectfully submitted,

By: /s/ G. Todd Butler

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed R. App. P. 29(b)(4) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 2,175 words.

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 it has been prepared in proportionally-spaced typeface, including serifs, using Word, in Times New Roman 14-point font, except for the footnotes, which are in proportionally-spaced typeface, including serifs, using Word in Times New Roman 12-point font.

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By: /s/ G. Todd Butler
G. TODD BULTER

Dated: March 25, 2019.

CERTIFICATE OF SERVICE

I, G. Todd Butler, certify that I electronically filed this brief with the Clerk of the Court, using the electronic filing system, which sent notification of such filing to all counsel of record.

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G. TODD BUTLER