No. 19-1067

In the
Supreme Court of the United States

NEAL N. BROWDER, ET AL.,
Petitioners,
v.

S. R. NEHAD, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

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INTERESTS FOR AMICI CURIAE[1]

California State Association of Counties (CSAC) is a non-profit corporation. CSAC's membership consists of the 58 California Counties. CSAC sponsors a Litigation Coordination Program. The Program is administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee, comprised of counsel counsels throughout the state. The Committee monitors litigation of concern to counties statewide.

The League of California Cities (League) is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of California. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance.

Amici have determined the questions presented in the petition raise significant and important issues impacting law enforcement on a state and national

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[1] No counsel for any party in this case authored any part of this brief. No party or counsel for any party in this case contributed money intended to fund preparation or submission of this brief. No person or entity other than amici and their counsel contributed money intended to fund preparation or submission of this brief. Amici notified all counsel of record of its intent to file this brief more than 10 days before the due date, and consent to file was given by all.

level. Amici have an interest in ensuring law enforcement officers and their employers have clear and consistent legal guidance on their constitutional obligations when using deadly force. Despite this Court's clear and consistent rulings on qualified immunity in the last decade, and the "high bar" set to deny immunity, the Ninth Circuit (and other lower courts) continue a troubling pattern of ignoring this Court's precedents to deny law enforcement officers qualified immunity in deadly force cases.

Amici want to ensure their members have clear guidance regarding the scope of the constitutional obligations when officers use deadly force. Because "use of force" policies and training are developed to comply with "clearly established law," the failure of lower courts to consistently apply this Court's precedents makes crafting these policies and implementing the necessary training exceedingly difficult, and ever-changing.

SUMMARY OF ARGUMENT FOR CERTIORARI

"Policemen are both symbols and outriders of our ordered society, and they literally risk their lives in an effort to preserve it." *Roberts v. Louisiana*, 431 U.S. 633, 647 (1977) (Blackmun, J., dissenting). Law enforcement officers "are literally the foot soldiers of society's defense of ordered liberty." *Id.* "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." *Id.* at 646-47; *see also Gonzalez v. City of Anaheim,* 747 F.3d 789, 799 (9th Cir. 2014) (Trott, J., dissenting and concurring in part) ("Every day of the year, law enforcement officers leave

their homes to police, protect, and serve their communities. Unlike most employees in the workforce, peace officers carry firearms because their occupation requires them on occasion to confront people who have no respect either for the officers or for the law.").

Statistics bear out the danger of police work. Between 2009 and 2018, 510 officers were feloniously killed.[2] Over this same time period, 552,222 officers were assaulted.[3] While the number of officers killed is quite high, the number assaulted is staggering. The average number of officers employed basically equals the number of officers assaulted.[4] Of the 552,222 officers assaulted between 2009 and 2018, 21,954 were assaulted with firearms, 9,857 were assaulted with a "knife or other cutting instrument," and 80,692 were assaulted with some other "dangerous weapon."[5] Notably, the number of officers assaulted with a "knife or other cutting instrument" reached the highest number ever in 2018, totaling 1,163 officers.[6] And the

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[2] 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.

[3] 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-85.xls.

[4] *Id.*

[5] *Id.*

[6] *Id.*

number of officers killed increased in 2018 to 55 from 46 in 2017.[7]

This case reflects the reality law enforcement officers face on the street. *See Cole v. Carson*, 935 F.3d 444, 476 (5th Cir. 2019), *as revised* (Aug. 21, 2019) (en banc), *pet. for cert. filed* (Dec. 2, 2019) (No. 19-753) (Ho and Oldham, JJ., joined by Smith, J., dissenting) ("[T]he qualified-immunity standard gives us no basis for sneering at cops on the beat from the safety of our chambers.").

Here are the facts of this case. An officer responds to a scene, alone and in the dark. He was told the suspect has a knife and threatened to hurt or kill people with it. The suspect walks toward the officer holding a shiny metallic object the officer believes is the knife and the suspect refuses commands to drop it. Anyone would feel threatened in this situation. But the officer, unlike a citizen, cannot run in the other direction or seek refuge in his car; he or she is duty bound to deal with the situation to safeguard the community.[8] Most recognize situations like this are

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[7] 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.

[8] As the California Supreme Court observed nearly 100 years ago: "[T]he trial judge overlooked the distinction between a peace officer and a citizen; that while the citizen may be obliged to retreat to avoid the necessity, that the officer is under no such compulsion, but rather is obligated to press forward for the accomplishment of his purpose." *People v. Hardwick*, 204 Cal. 582, 586, 269 P. 427, 429 (1928); *see also Hooper v. City of Chula Vista*, 212 Cal. App. 3d 442, 453, 260 Cal. Rptr. 495, 503 (Ct. App. 1989)

dangerous. But what is often lost is the officer, quite literally, is making life and death decisions in fractions of a second.

Situations like the one faced by the officer in this case are, thankfully, most often resolved without the use of deadly force and without injury to the officer or suspect. Other times, however, officers use deadly force believing the existence of a threat sufficient to warrant deadly force. To err is human, and sometimes mistakes are made. Indeed, only after using deadly force did the officer in this case learn the suspect was holding a shiny metallic pen and not the knife. When this occurs, and a lawsuit is commenced, a court is faced with the question of whether the officer should be held civilly liable under 42 U.S.C. section 1983. The appropriate answer to the question depends on the court conducting a proper qualified immunity analysis under the guidelines this Court has repeatedly articulated.

Once again, the Ninth Circuit failed to heed this Court's qualified immunity precedents, despite this Court's repeated instructions on how to conduct a qualified immunity analysis, and how not to.

Although amici recognize this Court is generally not in the error correction business, this Court is again

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("[A] police officer has a duty to the community to carry out his or her obligation to promote law-abiding, orderly conduct, including, where necessary, to detain and arrest suspected perpetrators of offenses."), *disapproved on another ground*, *Quigley v. Garden Valley Fire Prot. Dist.*, 7 Cal. 5th 798, 815 n.8, 444 P.3d 688, 699 (2019).

forced to take action to rectify the Ninth Circuit's error to avoid further expansion of erroneous Ninth Circuit precedent.[9] And the failure to follow this Court's qualified immunity precedents is not just a problem in the Ninth Circuit. As recent decisions from other Circuit Courts reveal, the problem is pervasive.

ARGUMENT

A. This Court's Qualified Immunity Precedents Are Clear

This Court's precedents establish the well known test for qualified immunity. *E.g., City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (summary reversal) ("As we have explained many times: 'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' [Citations].").

This Court has been exceeding pellucid in articulating what constitutes a "clearly established" right. As explained in *District of Columbia v. Wesby*:

> Under our precedents, officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. Clearly established means that, at the time of the

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[9] At least one district court has relied on the opinion in this case to deny officers qualified immunity. *See Coleman v. City of Tempe*, No. CV-17-02570-PHX-DLR, 2019 WL 4394490, at *7 (D. Ariz. Sept. 13, 2019).

officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful. In other words, existing law must have placed the constitutionality of the officer's conduct beyond debate. This demanding standard protects all but the plainly incompetent or those who knowingly violate the law.

To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority. It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that every reasonable official would know. The clearly established standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted. This requires a high degree of specificity. We have repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. A rule is too general if the unlawfulness

> of the officer's conduct does not follow immediately from the conclusion that [the rule] was firmly established.

138 S. Ct. 577, 589–90 (2018) (internal quotation marks and citations omitted)*; see also City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (Qualified immunity's "exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.' [Citation].").

As most recently articulated in a 2019 opinion summarily reversing the Ninth Circuit's denial of qualified immunity, this Court said:

> 'Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue....
>
> '[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless

> the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'

Emmons, 139 S. Ct. at 500 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (summarily reversing Ninth Circuit's denial of qualified immunity)).

There can be no mistaking what this Court requires to deny qualified immunity. Yet lower courts continue to ignore this Court.

B. There Is A Growing Trend In The Ninth Circuit And Other Circuits To Disregard This Court's Qualified Immunity Jurisprudence To Deny Law Enforcement Officers The Liability Protection Afforded By Qualified Immunity That This Court Has Repeatedly Found They Must Be Given

Some panels in the Ninth Circuit understand and heed this Court's qualified immunity precedents. *E.g., S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017) ("We hear the Supreme Court loud and clear."). Others, like the panel in this case, do not.[10] In no uncertain terms, Judge Collins very recently articulated the problem in the Ninth Circuit:

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[10] Even decisions properly applying this Court's mandate appear to do so grudgingly. *E.g., Emmons v. City of Escondido*, 921 F.3d 1172, 1175 (9th Cir. 2019) ("Given the Court's admonition, we are unable to find a case so precisely on point with this one as to satisfy the Court's demand for specificity.").

> In holding that the police officers in this case violated clearly established law when they restrained Joseph Slater in the back of a patrol car, allegedly causing his death, *the panel continues this court's troubling pattern of ignoring the Supreme Court's controlling precedent concerning qualified immunity in Fourth Amendment cases*. Indeed, over just the last ten years alone, the Court has reversed our denials of qualified immunity in Fourth Amendment cases at least a half-dozen times, often summarily. By repeating—if not outdoing—the same patent errors that have drawn such repeated rebukes from the high Court, the panel here once again invites summary reversal. I respectfully dissent from our failure to rehear this case en banc.

Slater v. Deasey, 943 F.3d 898, 904 (9th Cir. 2019) (Collins, J., joined by Bea, Ikuta and Brees, JJ., dissenting from the denial of rehearing en banc) (emphasis added). Judge Collins was not done. Noting how often this Court is called upon to rectify lower court errors in denying qualified immunity, Judge Collins continued:

> Since [ ] 2003 ..., the Supreme Court has issued no less than eight opinions reversing this court's denial of qualified immunity in Fourth Amendment cases—four of which were summary reversals. [Citations]. During that same time period, the Court has issued six more opinions reversing the other circuit courts' denial of qualified immunity in Fourth Amendment cases,

> and three of those were summary reversals. [Citations]. Given that the Supreme Court has thus issued a total of 14 opinions since 2003 reversing the circuit courts' denials of qualified immunity in Fourth Amendment cases, including seven summary reversals, the panel clearly erred when it disregarded much of what the Court said in those cases. *This recent Supreme Court precedent has reiterated two important and closely related rules, and the panel violated both of them in its decision.*

Id. (emphasis added).

Judge Collins could have been writing about this case. The panel decision in this case is one that "continues [the Ninth Circuit's] troubling pattern of ignoring the Supreme Court's controlling precedent concerning qualified immunity in Fourth Amendment cases." *Id.* The panel totally "disregarded the relevant qualified immunity standards as more specifically articulated in [this] [ ] Court's recent case law." *Id.* Indeed, the panel did not cite a single decision by this Court in its short three paragraph rejection of qualified immunity. [11]

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[11] The Ninth Circuit's disregard for this Court's precedents also appears in dissents from majority opinions finding an officer entitled to qualified immunity. A Ninth Circuit judge recently dissented saying: "I respectfully dissent from my colleagues' decision affirming the district court's grant of qualified immunity to the officers on the federal claims. The law has been clearly established for decades that deadly force is justified only when an individual poses 'an immediate threat to the safety of the officers or others.' *Graham v. Connor*, 490 U.S. 386, 396, [ ] [ ] (1989)." *Hernandez v. City of Huntington Beach*, No. 18-56127, 2019 WL

Additionally troubling is the panel's reliance on *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) as "clearly established law." This Court has *twice* told the Ninth Circuit *Deorle* should not be used "in deciding whether a new set of facts is governed by clearly established law." *Kisela,* 138 S. Ct. at 1154, citing *Sheehan*, 135 S. Ct. at 1775-77. "'Whatever the merits of the decision in *Deorle*, the differences between that case and [this] case ... leap from the page.'" *Id.*, quoting *Sheehan*, 135 S. Ct. at 1776.

Unfortunately, the Ninth Circuit is not alone in its troubling evasion of this Court's qualified immunity precedents. In *Rudolph v. Babinec*, 939 F.3d 742 (6th Cir. 2019), Judge Thapar said this:

> Qualified immunity grants police officers leeway to exercise reasonable judgment. Sometimes that judgment will mean the difference between life and death. For this reason, the Supreme Court has stressed that the specificity of the [clearly established] rule is especially important in the Fourth Amendment context. In Fourth Amendment cases, it is especially difficult for an officer to apply the relevant legal doctrine to the ongoing situation in front of him. Thus, the

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7176341, at *2 (9th Cir. Dec. 24, 2019) (Schroeder, J., dissenting). This Court has clearly held the principals articulated in *Graham* provide too general a framework to constitute clearly established law. *See Sheehan*, 135 S. Ct. at 1775-76. Although the lack of adherence to this Court's direction in a dissent is less troubling than in a majority opinion, it is still nevertheless troubling. A judge dissenting in one case may be in the majority in the next one.

> Supreme Court has repeatedly 'stressed the need to identify a case where an officer act[ed] under similar circumstances' and was found to violate the Fourth Amendment. [¶] The Majority Opinion has not identified such a case. It notes instead that this case falls more on the *Fisher* side of the line. That is a far cry from identifying a specific case with similar circumstances that would give an officer fair notice.

Id. at 755 (Thapar, J., concurring in part and dissenting in part) (internal quotation marks and citations omitted, bracketed text in original).

Judge Gruender similarly dissented in *Chestnut v. Wallace*, 947 F.3d 1085 (8th Cir. 2020):

> In recent years, the Supreme Court has issued several decisions reversing denials of qualified immunity by the courts of appeals. The Court found those reversals necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial. We should hew closely to the wisdom of this instruction and to the counsel of our own precedent which emphasizes that officers in the line of duty are not participating in a law school seminar. It is thus worth emphasizing again that police officers are not—and should not be—expected to parse fine distinctions between statutory and constitutional law in split-second decisions. [¶] Because there is no authority that would have

> given Officer Wallace notice that it was a Fourth Amendment violation to conduct an investigative stop in the manner he did under the circumstances presented in this case, I respectfully dissent.

Id. at 1099 (Greunder, J., dissenting) (internal quotation marks and citations omitted).

The dissents by Judges Thaper and Gruender were relatively mild. Dissents from majority opinions denying qualified immunity in other Circuit Courts have been far more spirited. *See, e.g., Guertin v. Michigan*, 924 F.3d 309, 315 (2019) (Kethledge, J., joined by Tharpar, Larsen, Nalbandian and Murphy, JJ., dissenting from denial of rehearing en banc) ("[T]he majority's decision on the issue of qualified immunity is barely colorable.").

In *Cole*, Judge Smith artfully expressed his disagreement with the en banc majority opinion denying qualified immunity:

> 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 today's ruling and the raw count of judges, [fn] 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.

935 F.3d at 469 (Smith, J., dissenting). Judges Ho and Oldham were more direct in their dissent:

> Our circuit, like too many others, has been summarily reversed for ignoring the Supreme Court's repeated admonitions regarding qualified immunity. There's no excuse for ignoring the Supreme Court again today.

Id. at 479 (Ho and Oldham, JJ., joined by Smith, J., dissenting). Judge Jones was equally direct in her dissent:

> Neither we nor the Supreme Court has ever held that police officers confronted in close quarters with a suspect armed and ready to shoot must hope they are faster on the draw and more accurate. The increasingly risky profession of law enforcement cannot put those sworn to 'serve and protect' to a Hobson's choice: place their lives on the line by heroic forbearance or risk their financial security in defense of lawsuits. The Supreme Court has repeatedly stated in plain terms that the purpose of qualified immunity is to prevent precisely this quandary.

Cole, 935 F.3d at 457–58 (Jones, J., joined by Smith, Owen, Ho, Duncan and Oldham, JJ., dissenting).

Judge Wilkinson's dissent from a denial of qualified immunity in *Harris v. Pittman*, 927 F.3d 266 (4th Cir. 2019), could never be described as subtle:

> 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. Perhaps the Court's patience on this point is endless, because, golly, it has been so

> sorely tried. The failings that have been so routinely documented by the Supreme Court rear their head once again. 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. The result? The majority has ignored Supreme Court precedent, somehow finding Pittman's actions to save his own life something our Constitution cannot condone.

Id. at 282–83 (Wilkinson, J., dissenting).

For qualified immunity to work as this Court intends, lower courts must follow this Court's directions. For whatever reason, this is not consistently happening. Since 2004, this Court has reversed qualified immunity denials 18 times, often summarily. *See Emmons*, 139 S. Ct. 500 (2019) (summarily reversing); *Kisela,* 138 S. Ct. 1148 (2018) (summarily reversing); *Wesby*, 138 S. Ct. 577 (2018); *White v. Pauly*, 137 S. Ct. 548 (2017) (summarily reversing); *Sheehan*, 575 U.S. 600 (2015); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (summarily reversing); *Taylor v. Barkes*, 575 U.S. 822 (2015) (summarily reversing); *Carroll v. Carman*, 574 U.S. 13 (2014) (summarily reversing); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Wood v. Moss*, 572 U.S. 744 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013) (summarily reversing); *Reichle v. Howards*, 566 U.S. 658 (2012);

Messerschmidt v. Millender, 565 U.S. 535 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012) (summarily reversing); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011); *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364 (2009); *Pearson v. Callahan*, 555 U.S. 223 (2009); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (summarily reversing).

Perhaps one reason lower courts continue to damage this Court's fortification of qualified immunity is recent academic and social criticism of qualified immunity.[12] But lower courts should not be persuaded to diverge from this Court's direction in dereliction of the judicial pecking order. Even if in complete disagreement with this Court, lower courts must defer to this Court. Lower courts across the Country should heed the sound and appropriate advice given by Judge Willett in his dissent in *Cole*:

> I repeat what I said last month: The entrenched, judge-invented qualified immunity regime ought not be immune from thoughtful reappraisal.... That said, as a middle-management circuit judge, I take direction from the Supreme Court. And the Court's direction on qualified immunity is increasingly unsubtle. We must respect the Court's exacting instructions—even as it is proper, in my judgment, to respectfully voice unease with them.

935 F.3d at 470 (Willet, J., dissenting).

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[12] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 88 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1800 (2018).

C. Society Ultimately Pays The Price For The Erosion Of Qualified Immunity

There is no doubt that "qualified immunity is important to society as a whole." *White,* 137 S. Ct. at 551. "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson,* 555 U.S. at 231; *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (qualified immunity reflects a proper balance between "'vindication of constitutional guarantees'" and "'risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties'").

Failing to properly apply qualified immunity inflicts "social costs," which include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). There also exists the very real "danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' [Citation]." *Id.*

A fear that the continued erosion of qualified immunity will "scare off" qualified candidates considering a career in law enforcement is not imaginary. Law enforcement agencies across the Country are experiencing increasingly problematic staffing issues. *See Cole*, 935 F.3d at 478 n.2 (Ho and Oldham, JJ., joined by Smith, J., dissenting) ("Those

social costs are particularly stark today given widespread news of low officer morale and shortages in officer recruitment.");[13] *see also* Police Executive Research Forum, *The Workforce Crisis, and What Police Agencies Are Doing About It* (September 2019), https://www.policeforum.org/assets/WorkforceCrisis.pdf.

Indeed, "[n]ationwide, interest in becoming a police officer is down significantly."[14] "And retaining officers once they've joined is getting harder, too."[15] Officers are also leaving much earlier than expected.[16]

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[13] Judges Ho and Oldham cited to: Ashley Southall, *When Officers Are Being Doused, Has Police Restraint Gone Too Far?*, N.Y. Times, July 25, 2019, at A22; Martin Kaste & Lori Mack, *Shortage of Officers Fuels Police Recruiting Crisis*, NPR (Dec. 11, 2018, 5:05 AM), https://n.pr/2Qrbrnq; and Jeremy Gorner, *Morale, Policing Suffering in Hostile Climate, Cops Say; 'It's Almost Like We're the Bad Guys,' Veteran City Officer Says*, CHI. TRIB., Nov. 27, 2016, at 1.

[14] Tom Jackman, *Who Wants to be a Police Officer: Job Applications Plummet at most U.S. Departments, Perceptions of Policing, Healthy Economy Contribute to Decreased Applications at 66 percent of Departments*, Wash. Post (Dec. 4, 2018), https://www.washingtonpost.com/crime-law/2018/12/04/who-wants-be-police-officer-job-applications-plummet-most-us-departments/

[15] *Id.*

[16] *Id*; *see also* Luke Barr, *US Police Agencies Having Trouble Hiring, Keeping Officers, According to a New Survey*, ABC News (Sept. 17, 2019, 1:01 a.m.), https://abcnews.go.com/Politics/us-police-agencies-trouble-hiring-keeping-officers-survey/story?id=65643752 ("Produced by the Police Executive Research Forum, the survey shows a 'triple threat' for police departments: there is a decrease in applications, early exits and higher rates of retirement.").

Lawsuits surely deter "able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. Qualified immunity's protection of officers from liability serves the societal goal of encouraging smart and talented candidates to choose and stay with law enforcement as a career, which is often a thankless profession so vital to a properly functioning society. Without a doubt, society does not want, and is not well-served, by law enforcement being left to only the "most resolute, or the most irresponsible." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998).

The societal impacts caused by the degradation of qualified immunity's protection for law enforcement officers was aptly observed by Judge Wilkinson:

> 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 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.

Harris, 927 F.3d at 286–87 (Wilkinson, J., dissenting) (emphasis added).

CONCLUSION

This Court has not hesitated to quickly reverse the Ninth Circuit when it errs in denying qualified immunity. *See, e.g*, *Emmons*, 139 S. Ct. 500 (summarily reversing); *Kisela,* 138 S. Ct. 1148 (summarily reversing). This Court should do so again here. And in so doing, this Court can yet again reaffirm to lower courts that it means what it says regarding qualified immunity. Qualified immunity is an "exacting standard" that protects officers unless "'existing precedent ... placed the statutory or constitutional question beyond debate.'" *Sheehan*, 135 S. Ct. at 1774 (quoting *al–Kidd*, 563 U.S. at 741). Put another way, qualified immunity is a "demanding standard" protecting "all but the plainly incompetent or those who knowingly violate the law." *Wesby*, 138 S. Ct. at 589.

This Court should either summarily reverse the Ninth Circuit or grant the petition.

Respectfully submitted,

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