No. 14-1143

In the
SUPREME COURT OF THE UNITED STATES

CHADRIN LEE MULLENIX, In His Individual Capacity,

Petitioner,

v.

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AND NATIONAL SHERIFFS' ASSOCIATION

[Add any additional counsel]

J. Michael Connolly
Counsel of Record
William S. Consovoy
Thomas R. McCarthy
CONSOVOY MCCARTHY PLLC
GEORGE MASON UNIVERSITY SCHOOL OF LAW SUPREME COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
mike@consovoymccarthy.com

Attorneys for Amicus Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The National Association of Police Organizations ("NAPO") is a coalition of police units and associations from across the United States. It was organized for the purpose of advancing the interests of America's law enforcement officers. 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, and more than 100,000 citizens who share a common dedication to fair and effective law enforcement. NAPO often appears as *amicus curiae* in cases of special importance.

The National Sheriffs' Association ("NSA") is a non-profit association formed under 26 U.S.C. 501(c)(4). Formed in 1940 the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,083 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected.

SUMMARY OF THE ARGUMENT

[ADD]

ARGUMENT

[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

I. QUALIFIED IMMUNITY IS CRITICALLY IMPORTANT TO POLICE OFFICERS AND THE PUBLIC THEY ARE SWORN TO PROTECT.

The doctrine of 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 v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity thus shields government officials from liability for money damages unless they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. In other words, unless a government official "knowingly violate[s] the law," *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013), or acts in a way that is "plainly incompetent," *id.*, he must receive immunity.

Critical public policies underlie the doctrine of qualified immunity. Personal-liability lawsuits "diver[t] official energy from pressing public issues." *Harlow*, 457 U.S. at 814. Every minute an officer is engaged in the litigation process—producing documents, being deposed, preparing for trial, or testifying as a witness—is one less minute that he is doing his job to protect the public. Indeed, the "driving force" behind the creation of the qualified immunity doctrine was a desire to ensure that "insubstantial claims against government officials will be resolved prior to discovery" so that officers can get back to work. *Pearson*, 555 U.S. at 232; *see Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (qualified immunity protects officials from the "demands customarily imposed upon those defending a long drawn out lawsuit").

Personal-liability lawsuits also "deter able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. These lawsuits impose enormous costs on officers. On a professional level, these lawsuits hinder officers' careers, as officers must live under the shroud of suspicion until the allegations against them are dismissed. These suits also impact officers' personal lives. While officers will often be indemnified against

litigation costs and judgments,[2] many still face the prospect of personal liability if punitive damages are imposed. This threat of punitive damages can cause enormous harms. For example, an officer applying for a home or car loan would likely have to disclose the possibility of liability if he or she were a defendant in a lawsuit, which could prevent them from securing a needed loan. Officers also might see their personal lives invaded through discovery, as they might be forced to disclose their personal finances because such information might be relevant when assessing punitive damages. *See, e.g., P. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Without qualified immunity, bright, capable individuals—the exact men and women who should be put in a uniform—will not join the police force. This will leave communities with only the "most resolute or the most irresponsible." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998). This is not a recipe for success.

Finally, the threat of personal-liability lawsuits can cause police officers to hesitate and act tentatively. When threatened with liability, government officials "may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester v. White*, 484 U.S. 219, 223 (1988). Ultimately, exposing government officials to the same legal standards as

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[2] Personal-liability suits impose enormous costs on state and local governments that must defend against these suits. The median cost of being a defendant in federal court is $20,000. *See* Emery G. Lee III, Fed. Judicial Ctr., *National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* at 37 (2009). When discovery is involved, the median cost triples to $60,000. *Id*. By comparison, the median annual salary of police officers is about $56,000. United States Department of Labor, Bureau of Labor and Statistics, *available at* http://www.bls.gov/oes/current/oes33051/oes333051.htm. Needless to say, governments would be better served by using their limited funds to hire more police officers rather than defend against these lawsuits.

ordinary citizens "may detract from the rule of law instead of contributing to it." *Id.*

This reticence can endanger both the public and police officers themselves Undoubtedly, everyone is safer when officers act swiftly and exercise discretion in combatting crime and protecting the public. As one FBI official has explained:

> Law enforcement effectiveness often depends on officers' confidence and willingness to act swiftly and decisively to combat crime and protect the public However, the fear of personal liability can seriously erode this necessary confidence and willingness to act. Even worse, law enforcement officers … may become overly timid or indecisive and fail to arrest or search—to the detriment of the public's interest in effective and aggressive law enforcement.

Daniel L. Schofield, *Personal Liability: The Qualified Immunity Defense*, FBI Law Enforcement Bulletin, Mar. 1990, *available at* https://www.ncjrs.gov/pdffiles1/Digitization/123809NCJRS.pdf.

Nowhere is this assertiveness more needed than in high-speed chases. High-speed police chases are extremely dangerous to the public at large. It is the duty of law enforcement officers to face these dangers and protect the public from further harm.

When police fail to end a high-speed chase quickly, the results can be deadly. Every year in the United States hundreds of people die as a result of high-speed chases. *See* H. Range Hutson et al., *A Review of Police Pursuit Fatalities in the United States from 1982-2004*, Prehospital Emergency Care, Jul.-Sept. 2007, at 278. Between 1982 and 2004, there were 7,430 fatalities as a result of high-speed chases. Of these, 81 were police officers (about 1%), 1,791 were occupants of another vehicle (about 24%), and 203 were individuals outside of the vehicles (about 3%). *Id.* The remaining deaths arose from either the driver or the occupants of the fleeing

vehicle (about 72%). In other words, every year many dozens of police officers and innocent bystanders die as a result of fleeing suspects. *Id.*; *see also* Patrick T. O'Connor & William L. Norse, *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 Mercer L. Rev. 511, 511-12 (2006) (noting that in 2003 of the 350 people who died as a result of high-speed chases more than a hundred were innocent bystanders).

Indeed, state reporters are replete with criminal cases in which high-speed chases killed innocent bystanders or police officers. *See, e.g.*, *People v. Prindle*, 944 N.E.2d 1130, 1131-32 (N.Y. 2011) (convicting defendant of second degree manslaughter where defendant killed innocent bystander after fleeing from police); *People v. Moore*, 114 Cal. Rptr. 3d 540, 542 (Cal. Ct. App. 2010) (affirming second degree murder conviction where defendant led police on high speed chase and caused an accident that killed innocent bystander); *McKinley v. State*, 945 A.2d 1158, 1159-61 (Del. 2008) (affirming second degree murder conviction where defendant struck and killed innocent motorist while leading police on a high speed chase); *O'Neal v. State*, 236 S.W.3d 91 (Mo. Ct. App. 2007) (affirming second-degree felony murder convictions for defendant who led police on chase in which officer collided with bystander's vehicle, killing two occupants); *Michelson v. State*, 805 So.2d 983, 984-87 (Fla. Dist. Ct. App. 2001) (directing trial court to convict defendant of third degree felony murder where defendant struck and killed innocent motorist while fleeing from police at high speeds); *State v. Pantusco*, 750 A.2d 107, 109 (N.J. Super. Ct. App. Div. 2000) (affirming felony murder conviction where innocent motorist was killed as a result of defendant's flight from police); *State v. Lovelace*, 738 N.E.2d 418, 420-21 (Ohio 1999) (affirming involuntary manslaughter conviction for defendant who led police on chase in which officer struck and killed third party) *State v. Chambers*, 589 N.W.2d 466 (Minn. 1999) (affirming first degree murder conviction where defendant killed police officer by striking police roadblock at the end of high speed chase); *Lester v. State*, 737 So.2d 1149, 1150-52 (Fla. Dist. Ct. App. 1999) (remanding for trial court to enter vehicular homicide

conviction where defendant struck and killed innocent bystander while fleeing from police); *Meeks v. State*, 455 S.E.2d 350, 351-53 (Ga. Gt. App. 1995) (affirming vehicular homicide convictions where defendant struck and killed police officer while leading other officers on high speed chase). In these kinds of cases, fleeing suspects become killers, and their vehicles become murder weapons.

The police are just as obligated to terminate a high-speed chase as they are to stop a would-be murderer from pulling the trigger. Indeed, ending the pursuit and letting suspects escape is not an option. As this Court has recognized, a fleeing suspect will not simply slow down and no longer drive recklessly once the police have ceased their pursuit. *Scott*, 550 U.S. at 385. Instead, the suspect would likely continue to drive recklessly in an attempt to get as far away as possible. *Id.* Thus, a rule requiring police not to pursue fleeing criminals would create perverse incentives, as suspects would be encouraged to flee as dangerously as possible so that pursuit would cease. *Id.* at 385-86. No police force would condone such a rule.

Faced with these situations—a fleeing suspect who is putting countless innocent lives in danger—it is imperative that police officers remain free to use their best judgment to resolve the situation peacefully. Police officers usually do not have the time to "err on the side of caution." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991); *see also Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) ("[A]voiding unwarranted timidity on the part of those engaged in the public's business … [e]nsur[es] that those who serve government do so with the decisiveness and the judgment required by the public good"). These officers must act fast use "quickly"? and decisively with the confidence that they have "breathing room to make reasonable but mistaken judgments." *Pearson*, 555 U.S. at 231.

In short, qualified immunity serves essential public policies. When courts are allowed to chip away at these protections—as the Fifth Circuit clearly has here—these critical safeguards become weakened. This Court regularly stands guard against such encroachments. *See,*

e.g., Carroll v. Carman, 135 S. Ct. 348, 352 (2014); *Lane v. Franks*, 143 S. Ct. 2369, 2381 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-23; *Wood v. Moss*, 134 S. Ct. 2056, 2070; *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *Ryburn v. Huff*, 132 S. Ct. 987, 990 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084-85 (2011). It should continue to do so.

II. THE FIFTH CIRCUIT'S DECISION BLATANTLY DISREGARDS THIS COURT'S QUALIFIED-IMMUNITY PRECEDENT.

Qualified immunity shields federal and state officials from money damages unless a plaintiff makes two showings. First, he must plead facts showing that "the official violated a statutory or constitutional right." *al-Kidd*, 131 S. Ct. at 2080 (quoting Harlow, 457 U.S. at 818). Second, he must plead facts showing "the right was 'clearly established' at the time of the challenged conduct." *Id.* at 2080 (quoting *Harlow*, 457 U.S. at 818). Respondent can make neither showing.

Under the first prong of the qualified immunity test, a police officer does not violate a statutory or constitutional right unless his actions are objectively unreasonable. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). In making this determination, the Court "allow[s] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Plumhoff*, 134 S. Ct. at 2021. The officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.; see Saucier v. Katz*, 533 U.S. 194, 207 (2001) (allowing courts to consider only the facts known to the officer "when the conduct occurred").

Here, while reasonable people can debate whether Officer Mullenix made the *right* decision, there is no question that his actions were *reasonable*. That is all that matters. When Officer Mullenix reached the overpass over I-29 and got into position to intercept Leija, it is undisputed that he knew the following:

- About 20 minutes earlier in Tulia, Texas, a police officer had attempted to serve an arrest warrant on Leija and he had fled the scene. Fifth Circuit Record on Appeal ("ROA") 571-572, 867, 869.
- For more than 26 miles, Leija had led police on a high-speed chase up I-29 at speeds of between 85 and 110 mph. ROA 571-572, 867, 869.
- Multiple officers were involved in attempting to subdue Leija. In addition to Mullenix, Officer Rodriguez was the lead officer chasing Leija; Officer Troy Ducheneaux was setting up tire spikes underneath the overpass where Mullenix was positioned; and other officers prepared to set up tire spikes at two additional locations farther north on I-29. ROA 572, 574, 871.[3]
- Leija twice called 911 and threatened harm to police officers. On the first call, Leija threatened to kill the officer following him. On the second call, Leija threatened to kill any officer he saw. *See* ROA 869 (dashcam stating Leija "will shoot any officer he sees"); *see also id*. at 566-570; *id*. at 572; *id*. at 871, Recording

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[3] The radio dispatch recorded the following conversation between Officer Ducheneaux and Officer Mullenix:

> Officer Ducheneaux: "Chad do you know a 24 yet?"
>
> Officer Mullenix: "He just advised at Randall County line still north bound at 110. Subject in vehicle is calling and says will shoot any officer he sees, so be careful with the spikes."
>
> Officer Ducheneaux: "10-4, will try to set up spikes at Cemetery Road and 217 as well."
>
> Officer Mullenix: "10-4. I may go on bridge at Cemetery road with rifle and see what kind of shot I can get."
>
> Officer Ducheneaux: "10-4."

ROA 871, Recording No. 4.

No. 8; *id*. at 871, Recording No. 9 (stating "he advised he is armed and will use it").

- Leija might have been intoxicated. *See* ROA 871, Recording No. 23 (stating that the "subject may be intoxicated"); *see also id*. 572, 569-570.
- As Leija approached, Mullenix believed he had two options: shoot Leija's car in an attempt to disable his engine block and end the high-speed chase, or do nothing and hope that Leija was subdued in another manner (e.g., through tire spikes or other police maneuvers). ROA 573-575.
- Mullenix knew that doing nothing could potentially cause harm to police officers, as officers are regularly injured in the process of laying tire spikes. He knew one of his trainers had been shot standing on the side of the road waiting on a high-speed pursuit. He also knew that officers have to exit their vehicle to set out spikes. And he knew Officer Ducheneaux was under the bridge with his red and blue police lights flashing, which would make him an easy target for Leija. ROA 572-574.
- Mullenix also knew that if he let the car go by unimpeded innocent bystanders would continue to be in danger, because even if Leija's vehicle ran over the tire spikes, Leija could continue to drive at high speeds for many more miles, allowing him not only to shoot Officer Ducheneaux, but also other officers north of the overpass. ROA 574.
- Mullenix had to act fast use "quickly"?, as Leija's vehicle was rapidly approaching his position. ROA 757, 869.[4]

[4] According to Officer Mullenix's dashcam, the entire event—Officer Mullenix arriving on the scene, talking to Trooper Rodriguez, exiting his vehicle, retrieving his rifle, running into position, and firing his weapon—occurred in less than three minutes. *See* ROA 869 (showing Officer Mullenix arriving at the bridge at minute 9:04 and firing his weapon at minute 11:46).

Mullenix chose action. By engaging Leija's vehicle, Mullenix stopped the high-speed chase and prevented innocent lives (including bystanders and police officers) from being lost. Mullenix's actions were no different from those of the officers in *Scott* and *Plumhoff*. Indeed, the car chase here was arguably *more* dangerous. Compared to the driver in *Plumhoff*, Leija drove faster (110 mph versus 100 mph), drove for almost four times as long (about eighteen minutes versus five minutes), and never came to a stop (the driver in *Plumhoff* "came temporarily to a near standstill"). *See Plumhoff*, 134 S. Ct. at 2021; *see also Scott*, 550 U.S. at 374 (noting that the suspect drove at speeds over 85 miles per hour for six minutes and nearly ten miles). If the officers in these cases acted reasonably, so too did Officer Mullenix.

In finding otherwise, the Fifth Circuit made two principal findings: (1) the high-speed chase "occurred in rural areas, without businesses or residences near the interstate" and Leija "did not run any vehicles off the road," Pet. App. 26a-27a, and (2) officers were setting up tire spikes behind Officer Mullenix and so there might have been other opportunities to subdue Leija, *id.* 27a-28a. Neither rationale is persuasive.

First, the Fifth Circuit's opinion amounts to a rule that police officers must allow a high-speed chase to continue as long as it is occurring in a rural area and the getaway driver is skilled at avoiding accidents. But "[i]t is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he" flees the police outside of city limits and he believes he can handle his car deftly. *Scott*, 550 U.S. at 374. "The Constitution assuredly does not impose this invitation[.]" *Id.* Officer Mullenix was under no obligation to "take[] that chance and hope[] for the best." *Id.* at 385.

Second, the Fifth Circuit's opinion is based on the incorrect belief that tire spikes are a flawless method for ending high-speed chases without any casualties. Not true. The people most in danger of tire spikes are the officers themselves. Placing tire spikes can be "a real danger for law enforcement officers." Gregory McMahon, *Deployment of Spike Strips*, FBI Law Enforcement

Bulletin, Sept. 2012, *available at* http://leb.fbi.gov/2012/september/bulletin-alert-deployment-of-spike-strips. "The use of spike strips began in 1996. Since that time, drivers have struck and killed 26 law enforcement officers, five in 2011—the most since 2003, which also featured five officer deaths. In at least one of the 2011 deaths, an offender intentionally struck an officer." *Id.*; *see, e.g., Jefferson v. State*, 276 S.W.3d 214 (Ark. 2008) (describing how an officer was killed while placing tire spikes in the street). Indeed, some jurisdictions in Texas prohibit the use of tire spikes for this very reason. *See* Tanya Eiserer, *Dallas Police Ban Use of Spike Strips That Can Halt Fleeing Vehicles*, Dallas Morning News, June 7, 2012 ("Dallas police are banning spike strips out of concern that an officer may be hurt or killed while trying to use the devices. There's an increasing awareness that such tire-deflation devices, once thought to be a useful tool, can be dangerous[.]").

Moreover, even if officers are not injured in the process, tire spikes do not always succeed in ending the high-speed chase. Numerous criminal cases can attest to this. Fleeing suspects can avoid tire spikes by driving dangerously around them. *See, e.g., State v. Jones*, 103 So.3d 420, 421 (La. Ct. App. 2012) (the fleeing suspect avoided tire spikes by driving onto curbs and medians); *Young v. State*, 86 So. 261, 263-64 (Miss. Ct. App. 2011) (the fleeing suspect was able to drive around tire spikes "on multiple occasions"). Fleeing suspects can also continue to drive (and do so dangerously) even when they have run over the tire spikes. *See, e.g. State v. Moyers*, 266 S.W.3d 272, 277 (Mo. Ct. App. 2008) (after driving over tire spikes, the suspect continued an hour long flight going 90 mph on deflated tires); *State v. Johnson*, 220 S.W.3d 377, 379 (Mo. Ct. App. 2007) (the defendant continued to drive after running over two sets of tire spikes); *Athay v. Stacey*, 128 P.3d 897, 900 (Idaho 2005) (the suspect immediately accelerated to 96 mph after driving over spikes and eventually collided with another vehicle while traveling 104 mph). Given these realities, the Fifth Circuit's decision to place so much reliance on the potential availability of tire spikes was deeply flawed.

In any event, the potential availability of tire spikes did not require Officer Mullenix to refrain from using deadly force. There is no "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382. Whether or not Mullenix's actions constituted "deadly force," all that matters is whether his actions were "reasonable," which they certainly were. *Id.*

Finally, even if these two factors have some relevance, the Fifth Circuit's opinion gave them way would use "far" too much weight, as there were far more probative facts for the qualified-immunity analysis. For example, the court should have focused on the speed of the driver (85-110 mph), the duration of the chase (more than 25 miles over 18 minutes), and the time of the chase (after dark, around 10:30 pm). Even worse, the Fifth Circuit ignored the critical factor at issue: Leija's culpability. In deciding whether Mullenix's actions were reasonable, the Fifth Circuit was required to "consider the risk of bodily harm that [Mullenix's] actions posed to [Leija] in light of the threat to the public that [Mullenix] was trying to eliminate." *Scott*, 550 U.S. at 384. "It was [Leija], after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [Mullenix] confronted." *Id.* By contrast, "those who might have been harmed had [Mullenix] not taken the action he did were entirely innocent." *Id.* With Mullenix facing a fleeing, possibly intoxicated criminal who was driving recklessly after dark and threatening to kill police officers at first sight, there should have been "little difficulty in concluding it was reasonable for [Mullenix] to take the action that he did." *Id.* By focusing on protecting Leija's life above all others, the Fifth Circuit ignored the fact that it was *Leija* who put everyone in this dangerous situation—not the officers.

Even if Respondent satisfies the first prong of the qualified immunity analysis, however, she still fails at the second prong of the test because it was not "clearly established" at the time of Mullenix's conduct that his actions were unconstitutional. Pet. Br. 21-29. A police officer's conduct violates clearly established law "when,

at the time of the challenged conduct, the contours of a right are sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right." *al-Kidd*, 131 S. Ct. at 2083 (emphasis added). This is a demanding standard: "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* Importantly, the standard is not whether clearly established law *supported* the officer's use of force; it is whether an officer's conduct was *prohibited* by clearly established law. *See* Pet. Br. 26.

Here, not only was there no precedent prohibiting Mullenix's actions, but the opposite was true: there was clearly established law *endorsing* Officer Mullenix's conduct. The Court in *Scott* could not have been clearer when it "la[id] down a … sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott*, 550 U.S. at 386. That should have been the end of the matter. Indeed, the fact that almost half of the judges on the Fifth Circuit believed Mullenix acted reasonably should be conclusive that there was no clearly-established law prohibiting his conduct. *See al-Kidd*, 131 S. Ct. at 2086 (noting that the official was entitled to qualified immunity "not least because eight Court of Appeals judges agreed with his judgment in a case of first impression"). As a result, Officer Mullenix should have received qualified immunity for this reason too.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

[Add any additional counsel]

J. Michael Connolly
Counsel of Record
William S. Consovoy
Thomas R. McCarthy

CONSOVOY MCCARTHY PLLC
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
mike@consovoymccarthy.com

Attorneys for Amicus Curiae

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