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STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, 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 *amicus* and their counsel contributed money intended to fund preparation or submission of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

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 law enforcement officers in this country. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement in the country. NAPO represents over 1,000 police units and associations, over 241,000 sworn law enforcement officers (including more than 30,000 within this Circuit), and more than 100,000 citizens who share a common dedication to fair and effective law enforcement. NAPO appears as *amicus curiae* in cases of special importance. *See, e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (No. 14-1143); *Saucier v. Katz*, 533 U.S. 194 (2001) (No. 99-1977).

NAPO has a strong interest in this case. Law enforcement officers depend on the judiciary to protect them from the burdens of personal-liability lawsuits. In this

case, however, the trial court effectively eliminated the critical qualified immunity protections upon which NAPO's members rely. The court's two-fold decision, in first refusing defendants' request for special interrogatories and second in allowing a ill-equipped jury to determine the critical legal question of qualified immunity—resulted in perilous precedent; precedent that is dangerous to officers, as well as the public that they have been called to serve.

STATEMENT OF THE CASE

Amicus curiae adopt and incorporate by reference Defendants-Appellants-Cross-Appellee's statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Law enforcement officers undisputedly face a "dangerous and complex world." *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992). "By asking police to serve and protect us, we citizens agree to comply with their instructions and cooperate with their investigations." *Mattos v. Agarano*, 661 F.3d 433, 453 (9th Cir. 2011) (en banc) (Kozinski, C.J., concurring in part and dissenting in part). Not all citizens hold up their end of the bargain and now, more than any other time, "officers face an ever-present risk that routine police work will suddenly become dangerous."[1] *Id.*

[1] Statistics bear out these observations. Every year, the Federal Bureau of Investigation (FBI) publishes an annual report of law enforcement officers assaulted in the line of duty. *See* Federal Bureau of Investigation, 2018 Law

Domestic dispute calls pose a unique risk for law enforcement, with the volatility of such situations making them particularly dangerous. Domestic disputes not only place the physical safety of victims at risk, but also threaten the physical safety of responding officers. *Bettis v. Bean*, No. 14-CV-113, 2015 WL 5725625, at *10 n.12 (D. Vt. Sept. 29, 2015). When officers respond to a domestic call, they understand that " 'violence may be lurking and explode with little warning.' " *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir. 2005) (quoting *Fletcher v. Clinton*, 196 F.3d 41, 50 (1st Cir. 1999)). Indeed, "more officers are killed or injured on domestic violence calls *than on any other type of call*." Hearings before Senate Judiciary Committee, 1994 WL 530624 (F.D.C.H.) (Sept. 13, 1994) (statement on behalf of National Task Force on Domestic Violence) (emphasis added).

In this case, Alonzo Grant summoned the police to remove his pregnant daughter from his home. When City of Syracuse police officers Damon Lockett and Paul Montalto responded several minutes later, the Grants attempted to turn the officers away. However, these officers were required to remain on the premises and de-escalate the domestic situation.

Enforcement Officers Killed and Assaulted (2018), *available at* https://ucr.fbi.gov/leoka/2018. In 2018 alone, law enforcement agencies reported that a staggering 58,866 officers were assaulted during the performance of their duties.

The parties' accounts of what happened next diverged on a number of key and critical issues. Not surprisingly, Officer Lockett and Officer Montalto's assertion of qualified immunity turned on many of these disputed issues of fact.

At the end of trial, the jury returned a verdict against Officers Lockett and Montalto for violating Alonzo Grant's federal constitutional rights. Although the jury should have, at that point, resolved the parties' key factual disputes, the District Court refused to provide the jury with special interrogatories. Instead, the District Court simply had the jury resolve the officers' entitlement to qualified immunity, a task that they were ill-equipped to handle.

When courts exercise their discretion in a way that erodes the protections of qualified immunity, as District Court did here, the critical safeguards embodied by the doctrine become useless. The District Court's two-fold error sets a dangerous precedent that cannot be permitted to stand uncorrected by this Court. Plaintiffs and lower courts will no doubt be tempted to use the same flawed process as did the District Court below, resulting in officers within this Circuit being deprived of the proper protection of qualified immunity.

ARGUMENT

QUALIFIED IMMUNITY SERVES A STRONG PUBLIC INTEREST IN PROTECTING PUBLIC OFFICIALS FROM THE COSTS ASSOCIATED WITH THE UNNECESSARY DEFENSE OF UNFOUNDED CIVIL ACTIONS

Qualified immunity protects public officials from the expense and vexation of protracted litigation, possible damages, and from the chilling effect that potential litigation has upon the exercise of their responsibilities. It is particularly important to the protection of police officers, as well as the public they are sworn to serve, because it shields "officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). The doctrine shields an officer regardless of whether an error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *See Pearson*, 555 U.S. at 231.

The doctrine provides immunity from suit. *See Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007). At bottom, it is an " 'entitlement not to stand trial.' " *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1114 (9th Cir. 2002) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)).

In repeatedly and emphatically supporting the doctrine,[2] courts have universally recognized that the danger of being sued for the discharge of one's

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[2] Through a number of "strongly worded summary reversals," *Wesby v. D.C.*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting), the Supreme Court has reversed the denial of qualified immunity at least fifteen times in the past eight years. *See, e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (summary reversal); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (summary reversal); *District of*

duties is likely to "dampen the ardor of all but the most resolute, or the most irresponsible (public officials), in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). By giving law enforcement "breathing room to make reasonable but mistaken judgments," *Pearson*, 555 U.S. at 231; *see Messerschmidt*, 565 U.S. at 546 , qualified immunity ensures that only those police officers who "knowingly violate the law" or act in a way that is " 'plainly incompetent' " will face the enormous burden of litigation, *Stanton v. Sims*, 571 U.S. 3, 6 (2013); *Ashcroft*, 563 U.S at 743 (observing that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."); *see Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Police officers are commonly faced with situations where they may be called upon to use some measure of force. In diligently pursuing their duties in good faith, officers should not have to fear harassing litigation or paying potential monetary damages, whenever they use any force that they reasonably believe to be

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Columbia v. Wesby, 138 S. Ct. 2561 (2018); *White v. Pauly*, 137 S. Ct. 548 (2017) (summary reversal); *Mullenix*, 136 S. Ct. at 305 (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*, 574 U.S. 13 (2014) (summary reversal); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Wood v. Moss*, 572 U.S. 744 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013) (summary reversal); *Reichle v. Howards*, 566 U.S. 658 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012) (summary reversal); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

lawful. This fear of personal liability[3] can erode an officer's necessary confidence and willingness to act. An officer's hesitation to use force for fear of being sued endangers not only his or her life, but also the lives of other citizens. As a result, 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*, 555 U.S. at 231; *see also 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").

Although qualified immunity is a hot-button issue in today's world, it has nonetheless been identified "as the best attainable accommodation of competing values," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), with commentators noting that it is a necessary remedy to misuse of the judicial system, as well as a balanced means for protecting those who protect us. *See Cortez v. McCauley*, 478 F.3d 1108, 1141 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring in part and dissenting in part) ("The qualified immunity doctrine embodied in this portion of the Saucier analysis is intended to protect diligent law enforcement officers, in appropriate cases, from the whipsaw of tort lawsuits seeking money damages

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[3] "Whatever contractual obligations [the City of Syracuse] may (or may not) have to represent and indemnify the officers" is not a concern for the courts. *Sheehan*, 135 S. Ct. at 1774 n. 3

arising from their conduct effectuating their sworn obligation to intervene in aid of public safety, often on a moment's notice with little opportunity for reflection and based on incomplete information."); *cf. Roberts v. Louisiana*, 431 U.S. 633, 646-47 (1977) (Rehnquist, J., dissenting) ("Policemen on the beat are exposed, in the service of society, to all the risks which the constant effort to prevent crime and apprehend criminals entails. Because these people are literally the foot soldiers of society's defense of ordered liberty, the State has an especial interest in their protection.").

Despite the Supreme Court's recognition that qualified immunity is important "to society as a whole," *Sheehan*, 135 S. Ct. at 1774 n. 3 (internal quotation marks omitted), the District Court failed to give qualified immunity the attention and care that doctrine requires. As a result, two City of Syracuse police officers have been found personally liable to the tune of more than one million dollars. "That equates to about 20 years of after—tax income for the officers, not to mention the harm to their careers." *Wesby*, 816 F.3d at 102.

The District Court all but ignored these concerns in the present case, abusing its discretion when it refused to submit defendants' special interrogatories to the jury. The trial court compounded this very serious error by improperly permitting the jury to resolve defendants' entitlement to qualified immunity. In doing so, the court took the jury's duty as factfinder away from them, thereby tipping the scales

of justice against Defendants such that the resulting verdict can only be characterized as a clear miscarriage of justice.

THE DISTRICT COURT'S REFUSAL TO PROVIDE THE JURY WITH SPECIAL INTERROGATORIES IN ORDER TO RESOLVE DISPUTED ISSUES OF FACT, AS WELL AS THE DISTRICT COURT'S DECISION TO ALLOW THE JURY TO RESOLVE THE ULTIMATE LEGAL QUESTION IS A CLEAR ABUSE OF DISCRETION REQUIRING REVERSAL

Qualified immunity is appropriate where "(1) [an officer's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or (2) it was 'objectively reasonable' for [the officer's] to believe that his actions were lawful at the time of the challenged act." *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007). The former inquiry, "is a question of law," *Kerman v. City of New York*, 374 F.3d 93, 108 (2d Cir. 2004), while the latter "is a mixed question of law and fact," *id.* ("A contention that—notwithstanding a clear delineation of the rights and duties of the respective parties at the time of the acts complained of—it was objectively reasonable for the official to believe that his acts did not violate those rights 'has its principal focus on the particular facts of the case.' " (quoting *Hurlman v. Rice*, 927 F.2d 74, 78-79 (2d Cir. 1991)).

"Although a conclusion that the defendant official's conduct was objectively reasonable as a matter of law may be appropriate where there is no dispute as to the

material historical facts, if there is such a dispute, *the factual questions must be resolved by the factfinder*[.]"*Kerman*, 374 F.3d at 108 (emphasis added) (internal citations omitted). After disputed factual issues have been resolved, the trial court must then resolve the legal question of qualified immunity.

This proposition has been repeated frequently by the Second Circuit. *See Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990) (noting that qualified immunity is "a question of law better left for the court to decide."); *see also Jackson v. City of New York*, 606 F. App'x 618, 620 n.2 (2d Cir. 2015); *Harris v. O'Hare*, 770 F.3d 224, 239 (2d Cir. 2014), as amended (Nov. 24, 2014); *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 761 (2d Cir. 2003); *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 103 (2d Cir. 1999); *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995). As Circuit Judge Winter stated in his dissent on other grounds:

> "This issue seems preeminently a matter for the court rather than for the jury. It is in essence a legal decision whether, on the basis of the law as it existed at the time of the particular incident, the lawfulness of the officer's conduct was reasonably clear or was a matter of doubt. *Juries are hardly suited to make decisions that require an analysis of legal concepts* and an understanding of the inevitable variability in the application of highly generalized legal principles. Moreover, such an analysis would seem to invite each jury to speculate on the predictability of its own verdict.
>
> A major difficulty, of course, is that the court ruling on the qualified immunity issue must know what the facts were that the officer faced or perceived, and the finding of those facts appears to be a matter for the jury. This is the

> factual overlap referred to above, presumably to be handled by the framing of special interrogatories.

Warren v, 906 F.2d at 77 (emphasis added).

In situations where the parties dispute the facts faced or perceived by the officer, then a court is "wise" to submit the key factual disputes to the jury for resolution. *Stephenson v. Doe*, 332 F.3d 68, 81 n.19 (2d Cir. 2003); *see also Taravella v. Town of Wolcott*, 599 F.3d 129, 135 (2d Cir. 2010) (noting that qualified immunity presents "a mixed question of law and fact," and "[a]lthough a conclusion . . . as a matter of law may be appropriate where there is no dispute as to the material historical facts, if there is such a dispute, *the factual question must be resolved by the factfinder*" (emphasis added) (internal quotation marks omitted)); *Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007) ("To the extent that a particular finding of fact is essential to a determination by the court that the defendant is entitled to qualified immunity, it is the responsibility of the defendant to request that the jury be asked the pertinent question[.]")

Although the Second Circuit has recognized that the use of special interrogatories are generally a matter for the judge's discretion, *Stephenson*, 332 F.3d at 81 n.19 (citing. *Romano v. Howarth*, 998 F.2d 101, 104 (2d Cir. 1993)), at least one other court has indicated that "[i]n a proper case, the use of special jury interrogatories going to the qualified immunity defense is not discretionary with the court, *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002). This is because "a

public official who is put to trial *is entitled to have the true facts underlying his qualified immunity defense decided*[.]" *Id.* (emphasis added) (quoting *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996)); *see Willingham v. Loughnan*, 261 F.3d 1178, 1184 n. 9 (11th Cir. 2001) ("[W]hen the question of qualified immunity turns on specific questions of fact, the use of special interrogatories can be very helpful to a judge in determining the legal question of whether qualified immunity applies.").

Here, the question of qualified immunity was resolved entirely depending upon which version of the disputed facts was accepted. Yet, the District Court casually and improperly refused defendants' appropriate request to submit thirty-three special interrogatories to the jury. These precise and pointed special interrogatories, which would have resolved the version of facts accepted by the jury without inviting the jury to speculate on the predictability of the verdict, included the following, by way of example:

> [¶ 2] Did the Defendant Damon Lockett establish, by a preponderance of the evidence, that on June 28, 2014, he reasonably perceived and believed that Plaintiffs Alonzo Grant and Stephanie Grant were arguing loudly inside their home?
>
> [¶ 3] Did the Defendant Damon Lockett establish, by a preponderance of the evidence, that on June 28, 2014, he reasonably perceived and believed that Alonzo Grant was extremely upset and/or agitated?
>
> [¶ 4] Did the Defendant Damon Lockett establish, by a

> preponderance of the evidence, that on June 28, 2014, he reasonably perceived and believed that Alonzo Grant was gesturing aggressively with his arms toward Stephanie Grant?
>
> [¶ 5] Did the Defendant Damon Lockett establish, by a preponderance of the evidence, that on June 28, 2014, he reasonably perceived and believed that Alonzo Grant punched or shoved the front door open, causing it to slam against the railing of the front porch? SEP
>
> [¶ 6] Did the Defendant Damon Lockett establish, by a preponderance of the evidence, that on June 28, 2014, he reasonably perceived and believed that Plaintiff Alonzo Grant was refusing to allow Officer Lockett to handcuff him? SEP

Defendants were entitled to have these factual disputes decided by the jury *Johnson*, 280 F.3d at 1318; *see also Oliveira v. Mayer*, 23 F.3d 642, 650 (2d Cir. 1994) ("The District Court should have let the jury (a) resolve these factual disputes and (b) based on its findings, decide whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law when they detained the plaintiffs.").

Ultimately, the district court's failure to submit special interrogatories to the jury—which would have resolved the factual disputes that are overlapping between the substantive claims against a police officer and qualified immunity issues—infringed on Officers Lockett and Montalto's "Seventh Amendment right to have the facts found by a jury." *Kerman*, 374 F.3d at 117; *see LaLonde v. Cty. of Riverside*, 204 F.3d 947, 963 (9th Cir. 2000); *Thompson v. Mahre*, 110 F.3d 716,

719 (9th Cir. 1997) ("Thus, where there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand and a material issue of fact, the Seventh Amendment, require submission to a jury"); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 24 (1st Cir. 1995) (collecting cases).

The District Court's failure to provide the jury with special interrogatories was in and of itself a serious error, but the District Court went even further, simply disregarded its duty to resolve entitlement to qualified immunity, and allowing the jury to resolve "[t]he ultimate question." *Zellner*, 494 F.3d at 367. The jury was tasked with resolving the following questions:

> 15A. Did [Ofc. Lockett] prove by a preponderance of the evidence that it was objectively reasonable for him to believe that his actions were not violating [Mr. Grant]'s right to be free from excessive force?
>
> 15B. Did [Ofc. Lockett] prove by a preponderance of the evidence that it was objectively reasonable for him to believe that his actions were not violating [Mr. Grant]'s right to be free from false arrest?
>
> 16A. Did [Ofc. Montalto] prove by a preponderance of the evidence that it was objectively reasonable for him to believe that his actions were not violating [Mr. Grant]'s right to be free from excessive force?
>
> 16B. Did [Ofc. Montalto] prove by a preponderance of the evidence that it was objectively reasonable for him to believe that his actions were not violating [Mr. Grant]'s

right to be free from false arrest?

The court's submission of qualified immunity to the jury for resolution was inappropriate. Even with the cursory instruction it received from the court, the jury was hardly suited to make a decision on qualified immunity; a determination that "required an analysis of legal concepts and an understanding of the inevitable variability in the application of highly generalized legal principles." *Warren v Dwyer*, 906 F.2d at 77; *see Simmons v. Bradshaw*, 879 F.3d 1157, 1166 (11th Cir. 2018) ("[I]t is not the province of the jury to decide a defendant's entitlement to qualified immunity.")

Because the jury must decide what facts an officer faced or perceived when the parties dispute the facts, the trial court's refusal to utilize special interrogatories was a clear abuse of its discretion, resulting in an egregious violation of the officers' Seventh Amendment rights. Likewise, the court clearly abused its discretion when it abdicated its duty to resolve Officers Lockett and Montalto's entitlement to qualified immunity to the jury.

CONCLUSION

Qualified immunity remains a necessary constitutional protection against the cost, time and vexation that unnecessary trials impose upon officers. The correct application of the doctrine is required and its need cannot be overstated. The doctrine allows law enforcement officers to act in good faith without having to worry that factfinders remote in time from the incident will later second-guess decisions made

in the pressures and uncertainties of the moment and conclude that they would have preferred a different course of action. A police officer's effective and safe discharge of his or her duties often depends on the ability to take reasonable steps to exert control of an arrest situation "with independence and without fear of consequences." *Harlow*, 457 U.S. at 819. Accordingly, qualified immunity serves a critically important function for law enforcement.

The District Court's abuse of its discretion, however, undermined the protections of qualified immunity. Accordingly, *amicus curiae* respectfully urges that the judgment of the trial court be reversed.