No. 14-59

In the Supreme Court of the United States

JOHN DARREN SCHULTZ, FRANKLIN GOMEZ, AND GERARDO GUTIERREZ,
Petitioners,

v.

GAGE WESCOM, INDIVIDUALLY, AND FRANK WESCOM, JR., PARENT AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NIKKOLAS LOOKABILL, DECEASED,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The National Association of Police Organizations ("NAPO") and the International Municipal Lawyers Association ("IMLA") respectfully submit this brief in support of granting the petition for writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit. For the reasons that follow, *amici* believe that the Court should grant certiorari and review the Ninth Circuit's ruling that it lacked jurisdiction to hear the Petitioners' appeal of the district court's qualified immunity determination.

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.

IMLA is a non-profit organization dedicated to advancing the interests and education of local government and its counsel. IMLA is committed to developing fair and realistic legal solutions and

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[1] Counsel for the parties received timely notice of *amici*'s intent to file this brief, and all parties have given blanket consent to the same. It is on file with the Court. No counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

assisting members as they address legal issues facing local governments—inclusive of their police departments. IMLA submits *amicus* briefs in litigation that significantly impact a substantial number of local governments.

SUMMARY OF ARGUMENT

The Simpsons is the longest-running scripted show in television history. The show takes place in "Springfield." The enigma of Springfield's true location is a running joke in the series. At the risk of killing the joke by explaining it, the reason the "Where's Springfield?" joke is funny is because almost every state has a Springfield.

If a police officer in Springfield, New York were sued for alleged civil rights violations, he or she would be entitled to a prompt resolution of the issue of qualified immunity. If the district court refused to rule on the legal merits of the defense for untenable reasons (or no reason at all), the New York officer would have an immediate remedy in the Second Circuit. The same would be true for police officers in Springfield, Massachusetts (First Circuit), Pennsylvania (Third Circuit), Virginia (Fourth Circuit), Texas (Fifth Circuit), Michigan (Sixth Circuit), Minnesota (Eighth Circuit), or Colorado (Tenth Circuit). However, police officers in Springfield, Oregon or Springfield, Illinois would not be entitled to the same interlocutory review as their counterparts around the country. The Ninth and Seventh Circuits have taken the position that refusals to rule on qualified immunity—despite their undeniable importance to the litigants—are "un-appealable." With due respect, this minority view is in

error.[2] Both NAPO and IMLA respectfully ask that this Court grant the petitioners' writ in order to resolve this Circuit split and confirm that the Courts of Appeals do have jurisdiction to correct erroneous refusals to consider qualified immunity. To that end, *amici* would offer the following three observations.

First, when a district court refuses to consider qualified immunity, that refusal has consequences disproportionately affecting law enforcement in the Seventh and Ninth Circuit. While perhaps easy for lawyers to view litigation in the abstract, it is anything but abstract for the parties. A civil rights defendant is hauled into court and accused of near-criminal conduct. The lawsuit almost invariably impacts his or her reputation, finances, credit, career, and personal life. Officers find themselves working under a cloud of suspicion, and the public begins to lose confidence in the police agency and the courts. In short, everyone is worse off when civil rights cases are unnecessarily prolonged. If there was unlawful conduct, the officer should certainly be held accountable. But, if the question of qualified immunity can be answered as a matter of law, there is no just reason for litigation to last one moment longer.

Second, denying jurisdiction in this context renders this Court's qualified immunity holdings toothless. Over a decade ago, it was rightly impressed upon district courts that they should resolve qualified

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[2] Notably, this hypothetical could be adapted to speak to FBI Agents, Secret Service, or Attorneys General operating in Springfield, all of whom are reliant on evenhanded application of the qualified immunity doctrine.

immunity "early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). This sentiment, however, is of little benefit in the two Circuits that deny authority to enforce that rule, thereby departing from the spirit—if not, the letter—of this Court's holdings. Qualified immunity is an important right, which should be addressed early. But without a mechanism of enforcement, this hallowed right rings hollow.

And ***lastly***, there are considerable institutional mechanisms to ensure that a defendant thinks hard about appealing any interlocutory order, thereby obviating any concerns over abusing the appellate process. Most obviously, there is the cost of the appeal and delay of the case. There are also sanctions for frivolous appeals, *see* Fed. R. App. P. 38, and the added exposure for increased attorneys' fees under 42 U.S.C. § 1988. Furthermore, interlocutory appeals of qualified immunity have been a reality for almost three decades, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), with no glut of specious appeals. Any assertion of "court congestion" would be without basis.

For the reasons that follow, *amici* respectfully submit that the writ should be granted.

ARGUMENT

I. Litigation Has Consequences

Defending a lawsuit—or even responding to a subpoena—is often a costly and burdensome enterprise. But, generally speaking, that is the price we pay to live in a society where injured parties have a remedy with the courts. *Amici* do not begrudge this. Nor is it what

this petition is about. This petition presents an altogether different question. It asks:

> Whether the burdens of litigation for public officials should last any longer than necessary, when a case is amenable to dismissal as a matter of law, but the district court refuses to rule.

The answer is no, and it is respectfully submitted that this Court should resolve the Circuit split in favor of this principle.

A. Litigation Is Expensive

In 2009, the Federal Judicial Center reported to the Judicial Conference Advisory Committee on Civil Rules on the costs of litigation, based upon a survey sent to over 5,500 attorneys based upon 3,550 cases. The median cost of being a defendant in federal court is $20,000. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf (last visited August 13, 2014), at 37. In the event that discovery is sought and responded to—*i.e.*, the type of case at issue here, where ruling is deferred *for discovery*—the median cost triples to $60,000.[3] *Ibid.* Evidence further suggests that the costs are rising. Between 2000 and 2008, Fortune 200 companies reported outside legal fees and costs increasing from $66 million to $115

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[3] The 10th percentile is $10,000 and the 95th percentile is $991,900. *Id.*

million.[4] The cost of litigation is undeniably great, and has therefore been the target of repeated studies and reform efforts. *See, e.g.,* Am. Bar Ass'n, Report of Pound Conference Follow-Up Task Force, in The Pound Conference: Perspectives on Justice in the Future 295, 318 (A. Leo Levin & Russell R. Wheeler eds., 1979) ("Substantial criticism has been leveled at the operation of the rules of discovery. It is alleged that abuse is widespread, serving to escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements. Ordeal by pretrial procedures, it has been said, awaits the parties to a civil law suit."); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C.L. REV. 747, 747–48 (1998) ("[S]ince 1976, proposals for amendment to the rules have generally involved retreats from the broadest concept of discovery—in essence to try to contain the genie of broad discovery without killing it."). The success of these efforts has been, stated diplomatically, modest. Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?* 39 B.C.L. REV. 517, 519–21 (1998) ("Here we go again").

Lawyers may be accustomed to these numbers, but most parties are not—especially police officers. Their hourly wage averages $28.23, *see* United States Department of Labor, Bureau of Labor and Statistics, available at http://www.bls.gov/oes/current/oes33051.

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[4] *See* LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES, app. 1 at 2-3, 7 fig. 3 (2010), available at http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation Cost Survey of Major Companies.pdf (last visited August 13, 2014).

oes333051.htm (last visited on August 13, 2014), making their median *annual* income approximately $56,130 (less taxes). *Id.* This is just shy of the cost of defending the average case in federal court.

Presently, police officers that engage in the same conduct, in different Circuits, are subject to very different outcomes. In eight of the Circuits, a dispositive legal issue may well resolve the case in advance of discovery. In two, the district court may postpone ruling indefinitely without any means of review, at great cost to the defendant. Given the stakes and their role in the community, we owe law enforcement *in all Circuits* better.

Litigation is expensive, and perhaps it always will be—with discovery being a central factor. Again, *amici* understand the importance of dispute resolution in an organized society, but the gravity of these numbers should not be lost. Litigation, even if righteously brought, should not last one minute longer than necessary for appropriate case disposition.

B. Litigation Takes An Emotional Toll

According to the American Association of Nurse Anesthetists, medical professionals react to lawsuits with feelings of intense shame and guilt. The symptoms of litigation stress syndrome include isolation, negative self-image, anger, increased negative moods, and physical and emotional fatigue. Sandra Tunajek, *Dealing with Litigation Stress Syndrome* (July 2007), available at http://www.aana.com/resources2/health-wellness/Documents/nb_milestone_0707.pdf (last visited August 13, 2014). The study reports that 95 percent of lawsuit defendants

acknowledge some physical and/or emotional reaction. Special programs are being set up for physicians defending lawsuits, to address their associated feelings of anger, depression, self-doubt, and isolation. Amy Lynn Sorrel, *Litigation Stress: Being Sued is Personal as well as Professional*, American Medical News (2009), available at http://www.amednews.com/article/20091102/profession/311029974/4/ (last visited August 13, 2014).

These findings are not controversial or subject to serious debate. Nor are medical professionals the only group that takes lawsuits seriously. A lawsuit is stressful for everybody—especially a police officer. They are being accused of violating the very law and constitution they swore to uphold. Sometimes, as in this case, the allegation is that they unlawfully *killed* another person arbitrarily, unnecessarily, and without lawful justification. Simply having to identify oneself as a defendant in a federal lawsuit—and perhaps explain the circumstances—is traumatic, especially in the current political climate. Being connected to a perceived abuse of authority immediately associates the officer with Rodney King or Trayvon Martin.

On top of this, the discovery process has a way of stripping people naked. In many cases, the defendant must disclose private correspondence, medical treatment, or other intimate details of their life. Often, it becomes public knowledge, subjecting the officer to ridicule and humiliation.

This may be a toll that must be exacted in some cases. But it should never be done unnecessarily.

C. Litigation Has Additional Implications

In addition to the embarrassment, financial impact, and emotional toll, there are a number of additional implications that bear emphasis. For example, involvement with lawsuits has an inevitable impact on reputation, particularly if there is not a decisive dismissal by the court. There is, again, a difference in the way lawyers view lawsuits and the way the rest of the public does. The former may be more interested in whether a cognizable claim is stated, whether the allegations are well-pled, and whether there is sufficient evidence to create a genuine issue of fact. The latter simply knows that the officer is accused of abusing his or her authority or (here) killing someone.

The indirect financial impact is also significant. One nearly-ubiquitous question on applications for a new home loan or refinance is whether the applicant is "involved in a lawsuit." Lenders (rationally) want to know if a large verdict will impact their risk. The same is true for most other types of credit, and even cellular phones. Then, if an officer wants to leave his career during the course of litigation, other employers are entitled to know—and often do ask—whether he or she has "ever been a defendant in a lawsuit." And this says nothing of the opportunity cost of hours spent responding to discovery, huddled with expensive lawyers, sitting in a courtroom, or the like.

And of course there is the impact on the officer's own career. In the event that the department stands behind the officer, it may be accused of "ratifying" the conduct, *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), or setting up a "pattern" in the event of another incident, *City of Canton, Ohio v. Harris*, 489

U.S. 378 (1989). Accordingly, officers are oftentimes placed on leave or "desk duty" during the lawsuit. This, as a matter of course, forecloses them from earning pay for outside details, thereby placing an added financial burden on them and their families. Careers are stymied, stalled, or, many times, destroyed.

In short, refusing to rule on a dispositive motion is *absolutely* a decision—and one of great importance to the people involved. *Cf. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (giving Section 1291's requirement of a "final decision[]" a "practical rather than a technical construction."). And that decision should be carefully considered, thoughtfully made, and subject to the procedural protections of an appellate review, particularly when the immunity—a shield designed to absolve the individual officer from all of the burdens described above—is reduced to nothing by forcing the official to shoulder them. Most Circuits agree with this concept, but two do not. This Court should accept review and resolve the split in favor of the majority.

II. Appellate Review Will Only Serve To Ensure That This Court's Well-Established Qualified Immunity Principles Are Effectuated By District Courts

A. Qualified Immunity Serves An Important Societal Purpose

Qualified immunity shields federal and state officials from lawsuits unless a plaintiff establishes: (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly

established" at the time of the challenged conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Liability only inures for violating "clearly established law," such that "every reasonable official" would perceive the constitutional violation. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). While a case directly on point is not always required, existing precedent must place the question "beyond debate." *Id*. at 2083. Properly applied, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id*. at 2085.

This doctrine does not exist for its own sake. It exists for significant public policy purposes—which have more to do with society at large than any one individual. *Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992); *see also Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) (" … avoiding unwarranted timidity on the part of those engaged in the public's business . . . [e]nsuring that those who serve the government do so with the decisiveness and the judgment required by the public good"); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (to avoid "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"); *Butz v. Economou*, 438 U.S. 478, 506 (1978) ("to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority"). Police officers—or, for that matter, FBI Agents, the Secret Service, or Attorneys General—all need room to make difficult decisions, under difficult circumstances, and not dither in fear of Monday morning quarterbacks when the use of force to save a life appears necessary. *See Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (noting

that officers should not always "err on the side of caution").[5] And if qualified immunity cannot be relied upon when it is needed most, good people will be deterred from public service, leaving communities with only the "most resolute or the most irresponsible." *Crawford-El v. Britton*, 523 U.S. 574, 590 n. 12 (1998).[6]

B. The Purpose Of Qualified Immunity Is Not Furthered When Its Determination Is Not Ruled Upon Or Postponed

This Court has further held—rightly—that these objectives are ill-served by qualified immunity determinations at the close of the case. The question

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[5] These holdings are grounded in facts. Generally speaking, both the officer and suspect are safer in the context of decisive action. Taser studies illustrate the point. When the conflict is promptly defused, there are fewer and less serious injuries than when standoffs escalate. *See, e.g.,* Bozeman, William, et al., *Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Officers Against Criminal Suspects*, Annals of Emergency Medicine (2009) (36 month study of over 1200 Taser uses found "[m]ild or no injuries were observed after [Taser] use in 1,198 subjects (99.75%. . . .). Of mild injuries, 83% were superficial puncture wounds from [Taser] probes. . . .Two subjects died in police custody; medical examiners did not find [Taser] use to be causal or contributory in either case."); MacDonald, John, et al., *The Effect of Less-Lethal Weapons on Injuries in Police Use-of-Force Events*, American Journal of Public Health (2009) ("Using administrative data from 12 local police departments including more than 12,000 use-of-force cases, we found that the use of physical force by police increased the odds of injury to suspects and officers. Conversely, the use of less-lethal weapons (OC spray and [Tasers]) decreased the odds of injury to suspects.").

[6] These holdings are quite consistent with the consequences of litigation noted above. *Supra* Section I.

must be resolved "at the earliest possible stage in litigation." *Hunter*, 504 U.S. at 227; *accord Wood v. Moss*, 134 S. Ct. 2056, 2065 n.4 (2014); *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007). Generally speaking, "discovery should not be allowed" until it is determined that the plaintiff has properly stated a claim for the violation of a clearly established right. *Harlow*, 457 U.S. at 818; *see also Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (noting that "the burdens of 'such pretrial matters as discovery . . . can be peculiarly disruptive of effective government'"); *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987).

As this Court impliedly—if not, explicitly—held, litigation has consequences for police officer defendants. It is not enough to "let the litigation run its course." There is an affirmative obligation on the district court to address qualified immunity early, before the full burden of litigation befalls the officer. Without a clearly established right at issue, there is by definition no need for further litigation with respect to the individual official being sued. It follows, then, that qualified immunity may be appropriately granted or denied. But, if the facts are not disputed, the question should *not* be deferred until the conclusion of the case.

This begs the question, what remedy does a party have when a district court *does* refuse to rule on qualified immunity for untenable reason. In the Seventh and Ninth Circuit, the answer is "none." The defendant officer has no remedy, other than to suffer through ongoing litigation. And the principles about "early resolution" of qualified immunity, so carefully explained by this Court, are meaningless.

Indeed, it was precisely this reasoning that led the Court to apply the collateral order doctrine to qualified immunity in *Mitchell*:

> *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

Mitchell, 472 U.S. at 526-27 (emphasis in original); *accord Plumhoff v. Rickard*, 134 S. Ct. 2012, 2018-20 (2014). Two observations must be made.

One, this language directly and emphatically speaks to pretrial burdens. Had the Court viewed "trial" as the lynchpin, it would have said "immunity from trial," not "immunity from suit." *Ibid.* The Court's discussion, moreover, would have been couched as an "entitlement not to stand trial"; the Court would not have added "or face the other burdens of litigation." *Ibid.* But the *Mitchell* court did use those words—for good reason. Lawsuits are not just trials. This is perhaps more true now than ever.

And two, it is virtually impossible to read the Seventh and Ninth Circuit position as consistent with *Mitchell*. Accepting their view, appellate review *is* available when qualified immunity is *denied* for untenable reasons, because that ruling unfairly subjects the defendant to the burdens of suit. Yet, appellate review is *unavailable* when qualified immunity is indefinitely *deferred* for untenable reasons, *despite* being a ruling that unfairly subjects the defendant to the burdens of suit. Under *Saucier*, qualified immunity should be resolved early "when the defense is dispositive." 533 U.S. at 201 (2001). If this does not occur, there is no practical or analytical difference between a bad ruling and no ruling.

It is generally accepted that qualified immunity is an important substantive and collateral right, which must be addressed early and with care. This petition only asks that all Circuit Courts be afforded a procedural mechanism to safeguard it.

III. A Ruling In The Petitioners' Favor Will Not Lead To A Flood Of Meritless Appeals

Perhaps the only policy-based response to the petition is that appellate courts are already congested, and granting this petition will lead to a flood of meritless interlocutory appeals that further burden the judiciary and delay civil rights litigation. *Amici* sympathize with the courts, and do not minimize their burden. However, there are a number of reasons to reject this argument.

First, district court judges are, on balance, very capable. Though not perfect, the vast majority of their rulings are well-reasoned and supportable.

Accordingly, it can be fairly assumed that qualified immunity determinations will only be postponed for good reason. If anything, a ruling in the petitioners' favor will *bolster* this. The possibility of appeal and reversal can only cause the district court judge to more carefully consider the qualified immunity question.

Second, any possibility of frivolous, harassing, or ill-founded appeals is speculative—as it assumes global bad faith and incompetence on the part of defendants—and further, such conduct would be subject to sanctions. Indeed, that is why sanctions exist. Fed. R. App. P. 38; *Glanzman v. Uniroyal*, *Inc.*, 892 F.2d 58, 61 (9th Cir. 1989) ("[T]he decision to appeal should be a considered one... not a knee-jerk reaction to every unfavorable ruling."). There is even an independent remedy when the attorney drives the misconduct. *See* 28 U.S.C. § 1927. There will always be wrongheaded litigation, to be sure, but it is a small fraction and easily addressed.

Third, any rational defendant will think very carefully about prosecuting an interlocutory appeal in a civil rights case. They are expensive, both in the form of paying one's own expenses, as well as one's opponent's under 42 U.S.C. § 1988 if the plaintiff ultimately prevails.

And finally, there is no empirical experience that would support rampant interlocutory appeals; only experience to the contrary. This Court announced that qualified immunity denial orders were immediately appealable decades ago. *Mitchell*, 472 U.S. 511. This is almost certainly a more common occurrence than "refusals to rule" on qualified immunity. Yet there is no flood of appeals. In all likelihood, this is a function

of the above considerations related to cost and legal basis. There is no reason to think this will change if the reasoning of the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits is extended to the Seventh and Ninth Circuits.

At bottom, this petition is important, not just to the parties and *amici,* but all of society. Police do a difficult service for very little compensation. If they abuse their authority, they should be held accountable. But, at a minimum, we owe it to them to reach the salient legal questions in their cases without needless delay.

CONCLUSION

For the foregoing reasons, the NAPO and IMLA respectfully requests the Court grant petitioners' petition for writ of *certiorari* and reverse the Ninth Circuit ruling that it lacked jurisdiction over the district court's refusal to rule on qualified immunity.

Respectfully submitted,

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