No. **18-46**

In the
Supreme Court of the United States

CITY OF MIDDLETOWN, THOMAS SEBOLD, JOSHUA WARD AND MICHAEL D'ARESTA
Petitioners,

v.

WILLIAM MCKINNEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy, by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts. Amicus curiae IMLA's members represent all levels of state and local government, including law enforcement agencies such as state police, county sheriff's departments, and city police departments. IMLA and its members have an interest in ensuring that municipal employees are allowed to make discretionary decisions to protect and serve their communities without fear of the consequences of insubstantial lawsuits.

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[1] Counsel for petitioners and respondent were notified ten days prior to the due date of this brief of the intention to file and have consented to the filing of this amicus brief. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution towards preparation of this brief.

STATEMENT OF THE CASE

Amicus curiae IMLA joins in and refers to the Statement of the Case in the petition for writ of certiorari ("Pet.") at pages 2-11.

SUMMARY OF ARGUMENT

On February 19, 2010 the respondent, William McKinney, was arrested on charges related to an armed robbery. The petitioners, Middletown police officers responded to his cell after McKinney twice obstructed the camera and began acting irrationally. In response to McKinney's violent and resistant behavior the petitioners used force more fully described in the petitioners' statement of the case.

The petitioners affirmatively asserted qualified immunity in their answer to the complaint and filed a motion for summary judgment contending the use of force was reasonable and they were entitled to qualified immunity. The District Court granted summary judgment finding that the petitioners' use of force was objectively reasonable. Finding no constitutional violation, the District Court did not reach the issue of qualified immunity.

On appeal, the Second Circuit reversed the District Court finding that a reasonable jury could conclude that the use of force was excessive. The Second Circuit declined to address the issue of qualified immunity which had been raised, briefed and argued before the court. The court stated that, "We express no view on whether the officers will ultimately be entitled to qualified or governmental immunity for the claims against them."

Petitioners ably demonstrated in their petition that the Second Circuit did not properly evaluate the

use of force from the perspective of the officers, improperly denied petitioners qualified immunity and failed to consider whether the claimed rights were clearly established given the largely undisputed facts.

Amicus write separately to address the negative impact of the Second Circuit's failure to conform with the mandatory duty to apply the clearly established law analysis to petitioners' qualified immunity defense. For decades this Court has consistently and emphatically stated that lower courts must analyze the clearly established prong of the qualified immunity defense. This Court has recognized the intent and purposes of the qualified immunity defense when government officials are sued for insubstantial cases and such official's conduct and the acts complained of did not amount to a violation of clearly established law at the time.

Qualified immunity is an entitlement that, in part, protects government employees from the costs and burdens of litigation. If our appellate courts can merely ignore their duty to consider qualified immunity defenses properly raised, briefed and argued the interests of thousands of municipal employees and millions of municipal taxpayers may be jeopardized.

Petitioners raised qualified immunity at every stage of litigation. To date the qualified immunity defense has not been addressed. The Second Circuit decided not to consider qualified immunity after determining that a jury might find the force to be unreasonable. The court's exercise of discretion is an untenable position since this Court's precedent clearly and unequivocally requires consideration of

qualified immunity at the time the court determined there might be a constitutional violation based on undisputed facts.

This Court has for decades repeatedly and consistently held that qualified immunity is a fundamental entitlement not to stand trial or face the burdens of litigation and should be decided at the earliest stage of litigation. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This Court refers to the application of qualified immunity as a threshold question and has mandated that courts decide this immunity question. *Seigert v. Gilley*, 500 U.S. 226 (1991). Deciding qualified immunity is the core responsibility of appellate courts and requiring appellate courts to decide such issues is not an undue burden. *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2019 (2014).

In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court mandated a two-step sequence for resolving government officials' qualified immunity. First, a court must decide whether the facts make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Id*. at 201. *Pearson v. Callahan*, 555 U.S. 223 (2009), allowed courts to exercise discretion and skip to the clearly established prong of qualified immunity. Therefore, this Court has allowed discretion to skip the constitutional question but has always mandated a decision on the clearly established law prong of qualified immunity.

In the present case the Second Circuit failed to follow the mandate of this Court that it must resolve

the qualified immunity issue by considering clearly established law. No discretion has ever been allowed to ignore this second prong. In refusing to entertain petitioners qualified immunity defense the court effectively denied petitioners their entitlement to have qualified immunity decided at this early stage of litigation.

As this Court stated in *Plumhoff* deciding qualified immunity would not have been an undue burden. In this case, where the district court found no excessive force and respondent in his brief to the Second Circuit cited no clearly established law placing the petitioners on notice that their use of force was unconstitutional, the appellate court could have easily decided the immunity issue. This case is the type of insubstantial claim that should be resolved at the earliest possible stage in litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). When the Second Circuit found a jury might find the use of force to be unreasonable they were mandated at that stage to consider whether the law was clearly established as to the alleged constitutional violation.

In failing to consider qualified immunity in derogation of their lawful duty the court ignored the negative ramifications as cited in *Harlow*. The IMLA is particularly mindful of how failure to 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, as well as the 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." *Harlow*, 457

U.S. at 814.

This case was ripe for adjudication of the qualified immunity issue. With no material facts in dispute the court was required to consider clearly established law after deciding a jury might find a constitutional violation. Acquiescing to the court's refusal to consider qualified immunity in this case and others cited herein is contrary to this Court's mandate and ignores the downstream harm in this and future cases.

Amicus curiae IMLA respectfully urges the court to grant the petition.

WHY REVIEW SHOULD BE GRANTED

I. REVIEW IS NECESSARY TO ASSURE MEANINGFUL INTERLOCUTORY REVIEW OF ORDERS DENYING DISPOSITIVE MOTIONS BASED ON QUALIFIED IMMUNITY

This Court has repeatedly granted certiorari in recent years to admonish appellate courts not define clearly established law at a high level of generality. *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1776 (2015). The circuit court's refusal to consider the clearly established prong is equally, if not more, deserving of this court's admonishment. 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." *Saucier,* 533 U.S. at 202. *Saucier* and its progeny have instructed appellate courts on the appropriate

manner of assessing clearly established law. In this case and previous cases the Second Circuit has, contrary to this Court's precedent, refused to even apply the clearly established law. The Court's intentional inaction represents a far greater transgression warranting certiorari. The amicus asks this Court to grant certiorari to admonish appellate courts as to their responsibility to address clearly established law when properly raised.

This Court has repeatedly recognized the importance of qualified immunity in assuring that government officials be free to perform their duties without fear of entanglement in litigation and potential liability. This protection is frequently more important in the context of police use of force incidents when officers must make decisions in tense, rapidly evolving circumstances where officers cannot be expected to reflect on prior law that applies to the particular stressful circumstances confronting them.

This Court has emphasized that qualified immunity protects all but those who are plainly incompetent or those who knowingly violate the law, as it affords protection to officers who make a reasonable mistake of fact or objectively reasonable mistake in application of law. A finding based on undisputed facts that a jury may find a constitutional violation does not bar the application of qualified immunity. Qualified immunity "depends on an inquiry distinct from whether an officer has committed a constitutional violation…" *Heien v. North Carolina*, 135 S.Ct. 530, 537 (2014).

This Court has repeatedly recognized the importance of qualified immunity to assure that officers are not subjected to the burdens of litigation

and threat of liability. An officer is entitled to qualified immunity when his or her 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). While this Court's case law " 'do[es] not require a case directly on point' " for a right to be clearly established, " 'existing precedent must have placed the statutory or constitutional question beyond debate.' " *Id.* In short, immunity protects " 'all but the plainly incompetent or those who knowingly violate the law.' " *Id.*

In the present case defendants properly pled qualified immunity and raised qualified immunity at every appropriate stage of the proceedings. Plaintiff sued for excessive force, and defendants answered the complaint raising the affirmative defense of qualified immunity. Thereafter, the individual defendant officers moved for summary judgment based on qualified immunity. The district court granted the motion, finding no genuine issue of material fact as to whether the force was excessive. The district court did not have to address the issue of qualified immunity based on clearly established law after finding the force used did not constitute a constitutional violation.

The district court stated that, "the undisputed facts establish that the defendant officers' use of force was reasonable under the circumstances and did not amount to excessive force in violation of the Fourth Amendment." A finding that no constitutional harm occurred made it unnecessary to reach the clearly established law issue.

On plaintiff's appeal to the Second Circuit the

individual defendants properly briefed and argued qualified immunity. The Appellate Court ignored the qualified immunity defense merely reversing the district court finding that, "based on the unique circumstances of this case, we think a reasonable jury could conclude that the combination of baton strikes, the use of a taser, and, especially, the use of a police canine was excessive in the context of a confined detention cell, notwithstanding McKinney's resistance."

The Second Circuit side-stepped its core obligation to consider qualified immunity based on clearly established law. In fact, the Court recognized that the defendants might be entitled to qualified immunity in stating that, "We express no view on whether the Officers will ultimately be entitled to qualified or governmental immunity for the claims against them." Citing *Phaneuf v. Fraiken*, 448 F.3d 591, 600 (2d Cir. 2006). An appellate court's intentional indifference to the fundamental right to have qualified immunity decided at the earliest stage of litigation underscores the importance of granting review to correct the court's failure to undertake a meaningful inquiry with respect to defendants' entitlement to qualified immunity.

In ignoring well-settled Supreme Court precedent mandating the consideration of qualified immunity, the Second Circuit has not established any standards or described circumstances under which such discretion should be exercised nor has the Court stated any reasons for the exercise of such discretion. The net effect is that officers may be denied their fundamental right to have qualified immunity decided at the earliest stages of litigation

based on nothing more than the whim of the particular panel deciding their motion.

This court has never held that a lower court may deny a defendant's dispositive motion claiming qualified immunity solely on the finding of a constitutional violation or, as in this case, a question as to whether a jury could find a constitutional violation. In *Siegert v. Gilley*, 500 U.S. 226 (1991) certiorari was granted to clarify the analytical structure under which a claim of qualified immunity should be addressed. The court repeated the mandate to consider this "threshold immunity question" for the purposes of sparing "a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Id.* at 232. Qualified immunity was recognized as an entitlement not to stand trial or face the other burdens of litigation. This court reiterated the need to resolve the many insubstantial claims on summary judgement unless the plaintiff's allegations state a claim of violation of clearly established law enunciated in *Harlow v. Fitzgerald*. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Deciding such legal issues is the core responsibility of appellate courts and requiring appellate courts to decide such issues is not an undue burden. *Plumhoff*, 134 S.Ct. at 2019.

The Second Circuit abrogated this core responsibility in the present case. At the appellate level the court could have affirmed the district court ruling finding no constitutional violation or it could have explored the qualified immunity issue after determining that a jury could find the use of force was excessive. But the law did not allow the court to

ignore the clearly established prong of qualified immunity. "Under our precedents, officers are entitled to qualified immunity under section 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia, v. Wesby*, 138 S. Ct. 577, 589 (2018) citing *Reichle v. Howards*, 566 U.S. 658, 664 (2012). The Court in *Saucier* required that both of these questions must be answered sequentially. In *Pearson* this Court allowed some flexibility in the qualified immunity analysis. "On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

In *Pearson* this Court discussed the test from *Saucier*, and mandated a "two step sequence…" *Pearson,* 555 U.S. at 232. In describing the application of the two prongs this Court used the word "must" in discussing applications of the two step process. *Id.* This Court has never deleted the mandatory language it merely decided that the two steps need not always be sequential.

In *Pearson* this Court permitted lower courts to leave unanswered the constitutional question but continued to mandate consideration of the clearly established prong. Lower courts may skip to the

clearly established prong or may decide not to address that second prong if they find no constitutional harm occurred. However, if the plaintiff makes out a violation of a constitutional right the court must decide whether the right at issue was clearly established at the time of the defendant's alleged misconduct. The operative words are "must decide" in order to fulfill this court's demand for resolving immunity questions at the earliest possible stage in litigation. *Pearson,* 555 U.S. at 232. By ignoring this court's mandate the Second Circuit Court of Appeals has required the defendants to engage in additional unnecessary litigation.

The Circuit's justification for deciding remand rather than conducting the appropriate qualified immunity analysis was that a jury could find based on undisputed facts that the use of might be unreasonable. The court relied on *Phaneuf v. Fraikin*, 448 F3d 591 (2d Cir. 2006), where the district court found a search to be reasonable but did not reach the issue of qualified immunity. The Second Circuit found that the search was unreasonable but articulated that it would leave the qualified immunity issue for the district court. *Id*. at 600. Plaintiff in his brief to the Second Circuit cited *Mitchell v. City of New York*, 841 F.3d 72, 79 (2d Cir. 2016) to support his argument that the Court need not resolve the issue of qualified immunity on appeal. *Mitchell* was a false arrest case. The consequences of the circuit's repeated refusal to apply the second prong of qualified immunity after deciding the underlying act was unconstitutional or may be found to be unconstitutional is further illustrated in a use of force case similar to the present case.

In *Brown v. City of New York*, 798 F.3d 94 (2d Cir. 2015), as in the present case, officers employed several types of less lethal force against a resisting subject. Before each graduated use of force the officers gave warnings asking for compliance. *Id* at 105. As in this case the district court found the use of force was reasonable granting summary judgment. In *Brown* the Second Circuit reversed the district court finding the use of force was unconstitutional. The court then remanded the case to the district court stating, "The assessment of a jury is needed in this case. Even though most of the facts are undisputed, a jury will have to decide whether Fourth Amendment reasonableness was exceeded…" *Id*. at 103. On remand the district court found the officer to be entitled to qualified immunity. The case then returned to the Second Circuit where the court reviewed clearly established law finding the officers were entitled to qualified immunity. *Brown v. City of New York*, 862 F3d. 182 (2d Cir. 2017). The defendants in Brown suffered the unnecessary cost and burdens of an additional 2 years of litigation after the remand. The same fate befalls the defendants in this case and other officials who are denied their fundamental right to have lower courts properly address qualified immunity at the earliest stages of litigation.

II. FAILING TO CONSIDER THE CLEARLY ESTABLISHED LAW PRONG OF QUALIFIED IMMUNITY IGNORES THE PURPOSE AND BENEFITS OF QUALIFIED IMMUNITY

This Court has recognized that qualified

immunity is important to society as a whole. *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015); *White v. Pauly*, 137 S. Ct. 548, 551 (2017). It assures that officers, when confronted with uncertain circumstances, may freely exercise their judgment in the public interest, without undue fear of entanglement in litigation and the threat of potential liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'"). As the Court observed in *Harlow*, failure to 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," as well as "the 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.' " *Id.* at 814.

Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. Qualified immunity shields officials from harassment, distraction and liability when they perform their duties reasonably. *Groh v. Ramirez*, 540 U.S. 551, 567 (2004). These rationales recognize the benefit of providing limited protections for government employees who must make decisions to effectively perform their duties. It is not in the public's interest to have well intentioned public servants afraid or reluctant to act in good faith.

Explaining why it may be better in some cases not to adhere to the rigid *Saucier* two prong analysis the court explained that, "it may result in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case" and waste the parties resources by forcing them to assume the cost of litigating constitutional questions and endure delays attributable to resolving those questions when the suit otherwise could be disposed of more readily. *Pearson*, 555 U.S. at 237. By the same merit refusing to consider the clearly established prong leads to unnecessary and sometimes prolonged litigation. Instead of disposing of the present case at the appellate court, the litigants are forced to return to the district court, thereby wasting scarce judicial resources and forcing the litigants to endure further delays and incur unnecessary costs. "Qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) citing *Saucier*, 533 U.S., at 206. In this case the Second Circuit prevented qualified immunity from operating and the defendants continue to be subjected to suit.

"Because qualified immunity protects government officials from suit as well as from liability, it is essential that qualified immunity claims be resolved at the earliest possible stage of litigation." *Hunter v. Bryant*, 502 U.S. 224, 233-4 (1991). The district court attempted to resolve this case on summary judgment. Plaintiff's appeal temporarily delayed the resolution of the case. The next earliest opportunity to reach a resolution of the case was a determination of qualified immunity

properly brief and argued. Instead of following this Court's mandate and fulfilling its core responsibility to decide this issue the Second Circuit shirked its responsibility and by impermissible inaction has avoided the qualified immunity defense and prolonged litigation of this case.

The courts inaction was not in the best interest of the parties, the courts or taxpayers. An analysis of the clearly established prong serves the interest of the defendants and taxpayers who more often than not bear the costs of unnecessary litigation. Failure to fully decide the qualified immunity issue also burdens the courts with additional litigation. In *Brown v. New York* failure to consider the clearly established law issue resulted in further litigation at the district court and a return to the Second Circuit over a period of two years.

The plaintiff may also be better served by a timely resolution of qualified immunity. A plaintiff opposing qualified immunity is given the benefit of the doubt and has a low burden in overcoming the defense. In responding to a dispositive motion the plaintiff merely has to show based on facts from their perspective that there is a material fact in issue regarding the alleged constitutional violation. In this case McKinney failed to prove a constitutional violation at the district court but convinced the appellate court that a jury might find excessive force.

Once a plaintiff has demonstrated a violation of a statutory or constitutional violation the plaintiff then has to point to a Supreme Court case or a case from their circuit that would put the defendant on notice that his act would violate plaintiff's rights. The crux of the clearly established analysis is

whether officers have fair notice that they are acting unconstitutionally. *Mullenix v. Luna*, 136 S.Ct. 305, 314 (2015). The plaintiff may also turn to clearly established weight of authority from other circuits or may show that defendants should have been on notice given the novel factual circumstances of his case. *Hope v. Pelzer*, 536 U.S. 730 (2002).

At summary judgment, in the qualified immunity context, courts must view the evidence in the light most favorable to the party opposing summary judgment. The court must draw inferences in favor of the non-movement, even when a court decides only the clearly established prong of the qualified immunity analysis. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014). Simply put, the plaintiff in a summary judgment case has a significant handicap in merely proving a viable claim that warrants further adjudication.

In the present case the plaintiff did not cite any clearly established law from the Second Circuit or other circuits in addressing the qualified immunity issue in his brief to the Second Circuit. Employing less lethal force against a violent, disruptive, resisting prisoner can hardly be said to constitute a novel factual circumstance. These are the types of insubstantial cases that *Harlow* called on to be resolved on qualified immunity. There was no justification to intentionally refuse to take up the clearly established law prong. When the district court accepts, as it must, plaintiff's version of the facts and decides based on undisputed facts that no constitutional harm occurred and plaintiff does provide clearly established law putting defendants on notice that their actions were unconstitutional,

the appellate court is required to consider qualified immunity.

The defendants in this case had the option of returning to the district court and reasserting qualified immunity requesting the district court to rule on the clearly established law issue and then possibly a return to the Second Circuit or file this appeal to the Supreme Court. The defendant's appeal to this court serves the purpose of affording this court an opportunity to remind lower courts of their legal responsibility to fully decide qualified immunity at the earliest stages of litigation.

It is not unreasonable to demand that our appellate courts consider the clearly established law prong of qualified immunity as mandated by this court. The burden on the appellate court to rule on qualified immunity when the issue is properly presented pales in comparison to the burdens on the litigants and courts in the subsequent unnecessary litigation. The second prong test to analyze clearly established law has always been required when the constitutionality of government officials' actions are in question. This case demonstrates the need to remind lower courts of this court's mandate to properly and fully address qualified immunity at the earliest stages of litigation.

CONCLUSION

For the foregoing reasons, amicus curiae International Municipal Lawyers Association respectfully submits that the petition should be granted.

Respectfully submitted,

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