No. 19-956

In the
Supreme Court of the United States

DONALD E. CRAIG, ET AL.,
Petitioners,
v.

JANET TURNER O'KELLEY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HARLEY TURNER, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. 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 Supreme Court of the United States, the United States Courts of Appeals, and State supreme and appellate courts.

Members of IMLA regularly advise municipalities and their law enforcement agencies on issues pertaining to the Fourth Amendment and qualified immunity. Given the Eleventh Circuit's unrealistic ruling that effectively requires IMLA's members, regardless of their size and resources, to immediately and continuously review case law pertaining to law enforcement and provide up to the minute training and policy guidance to their police departments, IMLA has a strong interest in this dispute.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. IMLA has obtained the written consent of all parties to file this Brief pursuant to Supreme Court Rules 37.2(a) and 37.3(a). Notice of the intent to file this Brief was sent to all parties on February 20, 2020.

IMLAs is equally concerned with the need to protect police officers charged with enforcing the nation's laws and ordinances from the second-guessing of their reasonable actions and choices in the heat of a swiftly evolving situations. IMLA is committed to preserving qualified immunity from further erosion as it ensures that reasonable and well-trained officers can perform their duties without risking the financial, reputational, and administrative burdens associated with defending a civil rights lawsuit. As a representative of local governments committed to effective and responsible policing and committed to providing training for police officers, IMLA urges this Court to grant certiorari or in the alternative, to summarily reverse the Court of Appeals' decision.

SUMMARY OF THE ARGUMENT

The hallmark of qualified immunity is fair notice to public officials that "what they are doing in the circumstances" violates the law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1984); *Malley v. Briggs*, 475 U.S. 335 (1986). In this case, the Eleventh Circuit held for the first time that a panel decision, *Moore v. Pederson,* 806 F.3d 1036, 1061 (11th Cir. 2015), with significant factual dissimilarities to those at issue here, decided a mere nine days prior the conduct in question, was a sufficient amount of time to provide notice to law enforcement officers in rural Georgia that seeking to arrest a suspect within the curtilage of his home without a warrant who they had probable cause to believe had committed a violent felony was unconstitutional. This Court should summarily reverse the lower court based on its failure to follow this

Court's precedent and repeated admonitions that lower courts should not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018).

Compounding its errors, the Eleventh Circuit also ignored this Court's opinion in *County of Los Angeles v. Mendez*, 137 S. Ct. 1538 (2017), in which this Court held that a single alleged constitutional violation will not create liability for some other subsequent alleged violation under what the Ninth Circuit dubbed, the "provocation rule." Here the Eleventh Circuit found these officers could be held liable for their use of force which caused the death of Mr. Turner without analyzing whether their response to his opening fire on them was objectively reasonable under *Graham v. Connor*, 490 U.S. 386, 388 (1989). Indeed, the court wholly fails to even cite to *Graham* and instead entirely focuses the question on whether the initial trespass onto the decedent's property seeking to arrest him was lawful. The court omits from its analysis the fact that Mr. Harley shot his firearm at the officers, which prompted them to open fire and kill him. This is precisely the "provocation rule" that this Court rejected in *Mendez* and justifies this Court summarily reversing the Eleventh Circuit for reconsideration under the proper legal standard.

Similarly, the Eleventh Circuit failed to properly analyze whether the conduct of these officers was lawful. These officers possessed probable cause to investigate either of two violent crimes under Georgia

law. This Court's precedent makes clear that officers have the authority to conduct an investigation when they have probable cause. On the basis of the complaint, these officers acted in an objectively reasonable manner, justifying this Court reversing the Eleventh Circuit.

In addition to the stark departure from this Court's clear precedent, public policy supports the application of qualified immunity to this case. According to the U.S. Department of Justice, approximately 35% of law enforcement officers serve communities of less than 50,000 citizens.[2] Police departments are stretched to the breaking point and instantaneous dissemination of legal cases is entirely unrealistic. The unprecedented and unreasonable conclusion by the Eleventh Circuit that a panel decision of that court "clearly established" the law immediately after it was decided flies in the face of this Court's decision in *Harlow*, squarely splits from the Third and Fifth Circuits, and is entirely divorced from the realities of providing training and education to law enforcement in the nation's small and rural communities. *Amicus* agrees with the petitioner that this Court should grant certiorari to provide clarity as to how much notice is required to clearly establish the law and submits that additional policy concerns underscore the need for this Court's intervention.

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[2] *See* Brian A. Reaves, Local Police Departments, 2013: Personnel, Policies, and Practices, U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, Table 3, available at: http://bit.ly/2wfzZXu (last visited Feb. 27, 2020).

ARGUMENT

I. THE DECISION BY THE ELEVENTH CIRCUIT IGNORED THIS COURT'S CLEAR PRECEDENT ON QUALIFIED IMMUNITY AND THIS COURT SHOULD GRANT *CERTIORARI* AND SUMMARILY REVERSE

A. The Eleventh Circuit Should be Reversed Because it Conducted its Analysis of "Clearly Established" Law at Too High a Level of Generality

In stripping these officers of the protections of qualified immunity, the Eleventh Circuit relied on another panel decision that was only nine days old at the time these officers encountered Mr. Turner. The situation faced by these officers is so materially different from that addressed in *Moore v. Pederson*, 806 F.3d 1036 (11th Cir. 2015), however, that it could not have provided fair warning to them that the law governing their conduct was "clearly established." *Kisela v. Hughes*, 138 S. Ct. 1138, 1152 (2018); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *Hope v. Pelzer*, 536 U.S. 730, 731 (2002). A closer review of *Moore* reveals the multiple material factual dissimilarities between that case and the situation these officers faced, and therefore the reversible error in the Eleventh Circuit's analysis.

First, the officer in *Moore* was confronting a non-violent situation—he had responded to a call about a parking lot altercation which the caller explicitly characterized as non-violent. *Moore*, 806 F.3d at 1040. In contrast, the Pickens County officers were responding to a threat of violence by an unseen agitator

that hunters lawfully on adjoining property were trespassing and would suffer bodily harm. *O'Kelley v. Craig*, 781 F. App'x 888, 891 (11th Cir. 2019).

Second, in *Moore*, the person who opened the door after the officer knocked was not armed, whether with a firearm or anything else—he was standing in arm's reach of the officer, wearing nothing more than a towel, and remained at the doorway during the entire dialog. *Moore*, 806 F.3d at 1040. In contrast, the Pickens County officers confronted a man some distance away, brandishing a pistol, who sometimes carried the pistol in his hand, who refused to put his gun down despite repeated requests by law enforcement to do so, and who disappeared into a residence and reemerged, at one point also carrying a flashlight. *Craig*, 781 F. App'x 891-92. There was no way to know what other weapons he might have been secreting. *Id.*

Third, the *Moore* officer instituted an arrest shortly after arriving, without any specific incident that required action—there was no evidence of the situation spiraling out of control and no imminent danger to the officer or anyone else. *Moore*, 806 F.3d at 1040. In contrast, the Pickens County officers had already expended approximately 30 minutes simply trying to get an increasingly agitated and obviously unpredictable suspect to drop his weapon, and had placed an unarmed colleague directly in his line of fire in an effort to defuse the situation. *Craig*, 781 F. App'x 892.

Fourth, the officer in *Moore* had no arguable probably cause to arrest, or even to conduct a *Terry* stop—he was responding to allegations of a now-ended

parking lot argument. *Moore*, 806 F.3d at 1040. The grounds for arrest he incorrectly relied upon arose only after the man in the doorway was noncompliant. *Id.* In contrast, the Pickens County officers were responding to an armed, unstable, potentially dangerous suspect who had already committed various violations of Georgia criminal law and had refused repeated orders to put his weapon down. *Craig*, 781 F. App'x 891-92.[3]

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[3] Ga. Code Ann. § 16-5-21 (aggravated assault) provides, in pertinent part:

> (a) A person commits the offense of aggravated assault when he or she assaults:
> (1) With intent to murder, to rape, or to rob;
> (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury;
> (3) With any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in strangulation; or
> (4) A person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.

Ga. Code Ann. § 16-11-37 (terroristic threats) provides in pertinent part:

> (b)(1) A person commits the offense of a terroristic threat when he or she threatens to:
> (A) Commit any crime of violence;
> (B) Release any hazardous substance; or
> (C) Burn or damage property.
> (2) Such terroristic threat shall be made:
> (A) With the purpose of terrorizing another;
> (B) With the purpose of causing the evacuation of a building, place of assembly, or facility of public transportation;
> (C) With the purpose of otherwise causing serious public inconvenience; or

Fifth, the *Moore* officer physically reached into the residence to handcuff the suspect, again on questionable grounds. *Moore*, 806 F.3d at 1040. In contrast, the Pickens County officers simply crossed into the edge of Mr. Turner's yard and never moved beyond the curtilage. *Craig*, 781 F. App'x 892.

Finally, and most instructive, the Court in *Moore* relied on its own precedent—**premised on virtually identical legal indicia**--to reach its conclusion that the officer had transgressed "clearly established" law:

> [I]n McClish v. Nugent, 483 F.3d 1231 (11th Cir. 2007), we held that an officer who, without a warrant, or probable cause along with exigent circumstances or consent, "reached into [a] house, grabbed [the plaintiff], and forcibly pulled him out onto the porch" in order to arrest him, violated the plaintiff's Fourth Amendment rights.

Moore, 803 F.3d at 1043-1044.

To reiterate the often-repeated maxim, "facts matter." Against this backdrop, it is remarkable that

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> (D) In reckless disregard of the risk of causing the terror, evacuation, or inconvenience described in subparagraph (A), (B), or (C) of this paragraph.
>
> …
>
> (d)(1) A person convicted of the offense of a terroristic threat shall be punished as a misdemeanor; provided, however, that if the threat suggested the death of the threatened individual, the person convicted shall be guilty of a felony and shall be punished by a fine of not more than $1,000.00, imprisonment for not less than one nor more than five years, or both.

the Eleventh Circuit could contort *Moore* into a "clearly established" rule applicable to the Pickens County officers (even if nine days was enough notice to the officers). *Mullinax v. Luna*, 136 S. Ct. 305, 308 (2015); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

This Court has repeatedly admonished lower courts not to seek to "define the clearly established at a high level of generality." *Mullinax*, 136 S. Ct. at 308. Specificity is especially important in the Fourth Amendment context because "it is sometimes difficult for an officer to determine how the relevant legal doctrine [may] apply to the factual situation the officer confronts." *Saucier v. Katz*, 533 U.S. 194, 205 (2001). "The salient question … is whether the state of the law at the time of an incident provided 'fair warning' to the defendants 'that their alleged conduct was unconstitutional.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Hope*, 536 U.S. at 741)).[4] The Eleventh Circuit's fundamental error was to take a factually distinguishable case and apply it at a high level of generality without regard to the particular circumstances faced by the officers in the moment. Given the societal interests in preserving qualified immunity, that error justifies the Court granting *certiorari* and summarily reversing. *See City & Cty. of*

[4] The factual dissimilarities between the two cases underscore the need for more time for proper legal analysis of case law before a case can be considered "clearly established" such that qualified immunity would not apply. Even assuming *arguendo* that these facts were similar enough to "clearly establish" the law for the purposes of qualified immunity (which they are not), local government attorneys would then need time to disseminate that information to thousands of police officers in the Eleventh Circuit.

S.F. v. Sheehan, 575 U.S. 600 n.3, 135 S. Ct. 1765, 1774 (2015) (noting because of the importance of qualified immunity "to society as a whole… the Court often corrects lower courts when they wrongly subject individual officers to liability.")

B. The Circuit Court Applied the Provocation Rule Rejected by this Court in *County of Los Angeles v. Mendez*

In *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), this Court unanimously rejected the Ninth Circuit's "provocation rule." As described by this Court, the provocation rule applies to render the officer's use of force unreasonable as a matter of law when "the officer intentionally or recklessly provoked a violent response" and "that provocation is an independent constitutional violation." 137 S. Ct. at 1545. Under this now-invalidated rule, a reasonable use of force by the officers became unreasonable because of an earlier Fourth Amendment violation. *Mendez v. County of Los Angeles*, 813 F.3d 1178, 1193 (9th Cir. 2016). Without so much as a nod in the direction of this Court's precedent, the Eleventh Circuit committed the same error as the Ninth Circuit, two years after this Court had rejected this rule.

It is undisputed that Mr. Turner drew his pistol and fired at officers causing them to return fire. *Craig*, 781 F. App'x at 892. Similarly, it is undisputed that *Tennessee v. Garner* authorizes police officers to defend themselves when fired upon. 490 U.S. at 11-12. Mr. Turner's conduct in drawing and returning his pistol to its holster, refusing to obey officer's commands to disarm, acting erratically, and having threatened

people in the woods all justified the officers' continued efforts to control the scene and disarm a potentially dangerous person. The Eleventh Circuit's conclusion that the officers' alleged unjustified intrusion beyond the fence and gate created potential liability for the death of Mr. Turner who opened fire on the officers with his pistol is the same error that the Ninth Circuit had made in *Mendez*. As this Court recognized, officers may have committed a Fourth Amendment violation by entering the shack at the back of the house without a warrant, but when they observed Mendez holding the BB gun, they acted reasonably in firing their weapons. *Mendez,* 137 S. Ct. at 1547. As Justice Alito simply put it, "[a] different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure." *Id*. at 1544.

In this case, the Eleventh Circuit held that because the officers allegedly improperly crossed into the curtilage of the home to conduct an investigation of a crime, the officers were liable for all acts, including the shooting of Mr. Turner that was indisputably a justified use of force given that he shot at the officers after they tried to disarm him with non-lethal force. That conclusion cannot stand in light of *Mendez*, and this Court should summarily reverse and require the Eleventh Circuit to reconsider its analysis under the proper constitutional standard.

C. The Eleventh Circuit's Failure to Consider the Reasonableness of the Officers' Conduct under *Tennessee v. Garner* and *Graham v. Connor* Demands Reversal

In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court addressed the circumstances under which the use of deadly force by law enforcement officers was justified. The Court held that the use of deadly force would be authorized to "seize" a person under the Fourth Amendment so long as officers possessed a reasonable belief that the subject had committed a crime "involving the infliction or threatened infliction of serious physical harm." *Garner,* 471 U.S. 11-12. Whether the use of force is appropriate is determined by the Fourth Amendment's objectively reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989). The Eleventh Circuit took no notice of *Garner* or *Graham*, failing to even mention either in passing, while denying these officers qualified immunity for this encounter with Mr. Turner that ultimately led to Mr. Turner's death.

It should be beyond dispute that a police officer may seize a person if he has probable cause to believe that person committed a crime. *United States v. Watson*, 423 U.S. 411 (1976); *Carroll v. United States*, 267 U.S. 132, 154 (1925). As the Court articulated in *Watson*, "[t]he necessary inquiry, therefore, is not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest." *Watson*, 423 U.S. at 417. This Court has recognized that always requiring a warrant "would constitute an intolerable handicap for legitimate law enforcement."

Gerstein v. Pugh, 420 U.S. 103, 113 (1975). Here, there is ample reason admitted in Plaintiffs' complaint and relied upon by the Eleventh Circuit to find probable cause for the arrest of Mr. Turner.

The Eleventh Circuit relied heavily on language from this Court's opinion in *Florida v. Jardines*, 569 U.S. 1 (2013), that the home is a first among equals for purposes of Fourth Amendment analysis. *Craig*, 781 F. App'x at 894. In *Jardines*, there is no indication that the officers possessed actual (much less arguable) probable cause that a crime had been or was actively being committed within the residence. They possessed merely an "unverified tip" that marijuana was being grown at the residence. *Jardines*, 569 U.S. at 3. Based on the tip alone, the officers took a drug sniffing dog onto the porch of the residence and sought to determine if there was the odor of marijuana present. *Id*. at 3-4. When the dog alerted, officers sought and obtained a warrant and a subsequent search pursuant to that warrant discovered growing marijuana plants. *Id.* at 4. Neither those facts, nor this Court's analysis, justifies the Eleventh Circuit's conclusion in this case. Indeed, as the Court recognized in *Jardines*, an officer may approach a home and knock because any citizen can do the same thing. *Id.* at 8. These officers approached the gate and sought to speak with Mr. Turner. *Craig*, 781 F. App'x at 891-92. Even possessing probable cause, the officers respected the gate until Turner repeatedly resisted their instructions to disarm so they could safely speak with him. *Id.*

Where the lower court deviated from this Court's well-worn Fourth Amendment jurisprudence was to

conclude, based on the complaint before them, that officers who received a credible complaint, identified the subject of that complaint, observed the subject to be armed and who refused officers' repeated commands to disarm, and observed the subject to be acting erratically and aggressively against perceived "trespassers"[5] could not be lawfully arrested merely because he was behind a locked gate. That has never been the law as articulated by this Court. *Id*. This Court's jurisprudence demonstrates that even in the absence of clear probable cause (which was not the case here) a seizure is lawful when there is a palpable threat to the officers or the community. *Garner*, 471 U.S. at 8-9 ("[T]he question [is] whether the totality of the circumstances justified a particular sort of search or seizure.")

Further undermining the Eleventh Circuit's analysis, in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), this Court held that a custodial arrest based on probable cause that a nonviolent misdemeanor has occurred is justified without a warrant even when the crime for which the person was arrested carries no possibility of jail time. *Atwater*, 532 U.S. at 354. Nonetheless, despite these clear articulations of the power of law enforcement officers to seize suspects

[5] At the time of the initial encounter, all officers were outside the fence crossing the driveway and remained there for most of the encounter. The officers were authorized to seek to interview the subject of the complaint, to get his side of the story and in doing so to seek to ensure their safety by demanding he relinquish his weapon. When he refused, he committed the additional offense of misdemeanor obstruction of an officer in the presence of those officers and was subject to further detention for that offense.

upon probable cause, the Eleventh Circuit created one of those "ifs, ands, and buts" rules the Court rejected in *New York v. Belton* when it stripped these officers of their qualified immunity. 453 U.S. 454, 458 (1981) (overruled on other grounds by *Arizona v. Gant*, 556 U.S. 332 (2009)). The Eleventh Circuit erroneously concluded that qualified immunity did not apply and ignored this Court's holding in *Pearson v. Callahan*, 555 U.S. 223 (2009), that "the protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." 555 U.S. at 231.

Finally, this Court held in *Kentucky v. King*, 563 U.S. 452, 455 (2011),[6] that a warrantless entry into an apartment is appropriate to prevent destruction of evidence because the officers did nothing wrong that caused the exigent circumstances there. The same analysis applies to this matter: Officers observed their suspect armed and acting erratically while they were standing outside the fence. He was accused of threatening violence against lawful hunters. App'x at 3a. All of the conduct of the officers was lawful and appropriate given that Mr. Turner presented as an imminent risk of harm to himself or others. Mr. Turner's conduct escalated the situation and justified the seizure and lawful demand that he disarm.

The breadth of this Court's precedent refutes the conclusion by the Eleventh Circuit that these officers did not act reasonably based on clearly established law.

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[6] Again, this case was neither cited nor discussed by the Circuit Court's opinion.

This Court should summarily reverse the Eleventh Circuit for failing to analyze the case under the proper legal framework.

II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ELEVENTH CIRCUIT'S DETERMINATION OF "CLEARLY ESTABLISHED" NINE DAYS AFTER ITS ORIGINAL DECISION IGNORES THE PRACTICAL REALITIES OF LOCAL GOVERNMENT LAW ENFORCEMENT

As the Petition highlights, there is a circuit split as to how much time is required to clearly establish the law for the purposes of qualified immunity. *See* Petition, at 14-21. Indeed, if this incident had occurred in the Township of Scott, Pennsylvania or in Tulia, Texas, the Third and Fifth Circuits would have likely concluded that the law was not clearly established with only nine days' notice. *See Bryan v. United States*, 919 F.3d 356, 363 (3d Cir. 2019); *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1559 (5th Cir. 1984). In contrast, law enforcement in Pickens County, Georgia or Pulaski County, Virginia would have been deemed on notice of a panel decision issued a mere days before the incident. *See Arebaugh v. Dalton*, 730 F.2d 970, 971 (4th Cir. 1984); *Craig,* 781 F. App'x 888. And for the hundreds of thousands of local government officials in the other circuits, it is unclear whether they would be found liable or not. The state of confusion and square circuit split on this issue warrants this Court's intervention as do significant policy concerns associated with the Eleventh Circuit's ruling.

In a perfect world, a Fourth Amendment pronouncement from a United States Circuit Court of

Appeals would be "clearly established" when issued, and practiced immediately by officers on the front line. But that utopia ignores a number of realities, including the mechanisms required to interpret an opinion and translate it into actionable policies, the logistics involved in internalizing those policies, and the resources needed to expedite the process.

First is the question of "clarity" implicit in "clearly established." In some cases, it is easy to identify the clear, bright-line precedential maxim that will dictate future law enforcement behavior. In many more instances, however—including in the present scenario—the facts and circumstances are exceedingly specific, leading to a highly nuanced opinion. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (explaining "[s]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts."), *quoting Mullinax v. Luna*, 136 S. Ct. 305, 308 (2015). Reviewing these decisions requires thoughtful and deliberate consideration by a seasoned legal professional to discern the larger ambit, if any, of such a holding. That consideration is costly and time-consuming. It is not at all obvious, for example, that the *Terry*-stop in *Moore*, involving an officer's investigation of a disturbance in a parking lot for which there was no probable cause that a crime was committed, was sufficiently similar to clearly establish the law applicable to the facts presented to the officers in this case, where they did have probable cause to arrest. Local government attorneys need time to

analyze whether *Moore's* holding was fact specific to protect the sanctity of the interior of the home or whether it would extend to the curtilage. Indeed, as argued above, *Amicus* believes the Eleventh Circuit committed a legal error on this point in determining that these cases were factually similar, but at the very least, it should be undisputed that local governments need sufficient time to review and analyze decisions for factual similarities.

Second is the question of "establishing" the newly drawn parameter, once its contours are more clearly understood. The evolution from legal interpretation by a local government attorney into specific guidelines to be followed by a police force is not instantaneous. The metes and bounds of the reconfigured law must be fully explained through the chain of command in a process allowing for ample discussion and comprehension. The new principle, while carrying the undeniable provenance of a federal Circuit Court, must nevertheless compete at the local level with myriad other legal developments, including state Supreme Court opinions, changes imposed by federal or state law, new administrative regulations, and the operation of local ordinances. The officer is responsible for understanding and implementing all of these. That implementation is time-consuming.

Against this reality, the Third Circuit found that a Circuit Court's pronouncement, even where based on a virtually identical fact pattern involving the very same law enforcement force, could not reasonably become "clearly established" among uniformed officers in a two-day period:

> When such a ruling is made, a ruling which affects the procedures used in border searches, **it is beyond belief that within two days the government could determine what was "reasonable suspicion" and what new policy was required to conform to the ruling, much less communicate that new policy to the CBP officers**. We can only conclude that as of September 5, 2008, it was not clearly established in either the Third Circuit or the First Circuit that a search of a cruise ship cabin at the border had to be supported by reasonable suspicion. Accordingly, under the circumstances that Officer Ogg confronted, he did not violate clearly established law by entering lookouts for the three passengers the day after we issued our decision in Whitted. He is entitled to qualified immunity.

Bryan v. United States, 919 F.3d 356, 363 (3d Cir. 2019) (emphasis added).

The *Bryan* opinion reflects the judicial recognition of factors which are far more pronounced at the local level than in the United States Customs and Border Patrol, a multi-billion-dollar federal law enforcement behemoth.[7] Most of the thousands of municipal law enforcement departments across the country are

[7] The 2020 Fiscal Year proposed budget for United States Customs and Border Patrol is $18.2 Billion. United States Executive Office of the President, "Border Security-2020 Budget Fact Sheet," https://www.whitehouse.gov/wp-content/uploads/2019/03/FY20-Fact-Sheet_Immigration-Border-Security_FINAL.pdf (last accessed Feb. 20, 2020).

located in small communities.[8] They are predominantly modest operations, confined by tight budgets and challenged to serve ever-expanding needs of their constituents. The "new normal" facing police officers includes spikes in terrorism, active shooter incidents, homelessness, mental illness, opioid addiction and other infirmities, increasingly antagonistic public protests and free speech battles and the like. Pickens County, Georgia, a rural community of less than 33,000 people, is within that cohort.[9] Against this increasingly hostile and complex environment, the Pickens Sheriff's Office budget for "Education and Training" of uniformed officers was $4,000 for fiscal 2019.[10]

Facing these realities, local governments and the municipal lawyers who advise them endeavor in good faith to integrate developing law into the daily practices of officers on the front line. But the preponderance of America's localities cannot afford

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[8] The National League of Cities states that more than 90% of America's municipal governments serve populations of less than 25,000. "Number of Municipal Governments & Population Distribution," https://www.nlc.org/number-of-municipal-governments-population-distribution (last accessed Feb. 27, 2020).

[9] The complexities facing Pickens County law enforcement is exemplified in a crisis the County faced in October 2019: "Georgia School District Reverses Its Decision on Transgender Bathroom Policy After Receiving Death Threats," Slate.com, Oct. 17, 2019, https://slate.com/news-and-politics/2019/10/georgia-school-transgender-bathroom-policy-death-threats.html (last accessed Feb. 19, 2020).

[10] www.pickensgasheriff.com/wp-content/uploads/2020/02/December-2019-Financials.pdf (last accessed Feb. 24, 2020).

dedicated, full-time legal resources continuously poised to interpret up-to-the-minute legal developments. It is not reasonable, whether measured in available hours or dollars, to mandate that a nuanced decision transmogrifies, in six business days, into "clearly established" edict. Such a ruling would require the expenditure of inordinate sums and the devotion of hours each day to ensure that personnel immediately integrate late-breaking legal developments. Even that outlay, which is wholly unrealistic for the many thousands of small local governments around the country, would likely not achieve the timeframes implicit in the Eleventh Circuit's ruling in this case.[11] A more achievable approach would allow a reasonable,

[11] The problem is further exacerbated by ambiguity about what authority, aside from the Supreme Court, can "establish" the law for the purposes of qualified immunity. *See Carroll v. Carman*, 574 U.S. 13, 17 (2014) (assuming without deciding that Circuit precedent establishes the law for purposes of qualified immunity). While the Eleventh Circuit has provided more guidance than most circuit courts on this front, many other circuits utilize nebulous tests to determine how the law can be established, indicating that a "robust consensus of authority" can do the job. *Compare Shumpert v. City of Tupelo*, 905 F.3d 310, 320 (5th Cir. 2018) (district courts may rely on "a robust consensus" of other circuit court precedent to "clearly establish" law for purposes of qualified immunity) *with Martinez v. City of Clovis*, 943 F.3d 1260, 1275 (9th Cir. 2019) (clearly established law can be found from consensus of state courts, district courts, or other circuit courts). In those circuits, it would seem an impossible task to train law enforcement as to "clearly established" law, given that virtually any district court decision could be as construed to form a "robust consensus of authority."

prompt interval for opinions to be reduced to formal policy and integrated into practice.[12]

IMLA and its members wholeheartedly confirm the primacy of "clearly established" law, particularly where it emanates from the Supreme Court or a United States Circuit Court. We do not seek a bright line determination as to when "clarity" is "established." But we do advocate for a construct incorporating realistic temporal and fiscal limitations on law enforcement's ability to integrate new law. Nine days is patently insufficient for the Pickens County Sheriff's Office to complete that task under the circumstances of this case. This Court should grant certiorari to resolve this important question which the circuit courts are intractably divided on.

CONCLUSION

This Court should grant *certiorari* and reverse the Court of Appeals for the Eleventh Circuit. While this Court is not a court for the correction of errors, the analytical and material mistakes made by the Circuit Court here justify the Court returning this matter for further review. In the alternative, this Court should grant certiorari to resolve the deep circuit split on the issue of how much time is required to clearly establish the law for the purposes of qualified immunity.

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[12] *See, e.g.*, Seattle Police Department Manual, Title 6-"Arrests-search and seizure," available at www.seattle.gov/police-manual/title-6---arrests-search-and-seizure/6180---searches-general (last accessed Feb. 21, 2020).

Respectfully submitted, this 2d day of March 2020.

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