No. 23-1374

IN THE

Supreme Court of the United States

KEYVON SELLERS,

Petitioner,

v.

JERRY NELSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DECEASED EDDIE LEE NELSON, JR., AND MICHELE DUSHANE, AS SURVIVING SPOUSE OF EDDIE LEE NELSON, JR.,

Respondents.

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

BRIEF OF AMICI CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, GEORGIA MUNICIPAL ASSOCIATION, AND ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF AMICI 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. IMLA is 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 situation. 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 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

1. No contributions by any party, or counsel for any party, has been made to draft, assist, or fund the preparation or submission of this brief, whether in authorship or financially. Counsel for all parties received timely notification of the intent to file this brief by Amici curiae. S. Ct. R. 37.2.

urges this Court to grant certiorari or in the alternative, to summarily reverse the Court of Appeals' decision.

The Association County Commissioners of Georgia ("ACCG") is a nonprofit instrumentality of Georgia's county governments formed in 1914, which serves as the consensus-building, training, and legislative organization for all 159 Georgia county governments. The constituency of ACCG includes more than 800 county commissioners; at least 426 appointed county clerks, managers, administrators, and attorneys; and almost 85,000 full-time and part-time employees. ACCG also serves as administrator for the ACCG-Interlocal Risk Management Agency, which provides liability insurance to 119 Georgia counties and 60 county authorities.

Georgia counties are the primary funding source for law enforcement activities in the state of Georgia, including the funding of county jails. If not reversed, the decision of the Eleventh Circuit in the present case will dramatically increase the cost of maintaining county jails due to the increased need for inmate segregation. At the same time and as described in this Brief, the decision below significantly increases liability risks for Georgia counties and law enforcement officials as they seek to thread the needle between the safety of potential "victim" inmates and the civil rights of potential "aggressor" inmates.

The Georgia Municipal Association ("GMA") is an organization serving the interests and positions of its member cities in the State of Georgia. Founded in 1933, GMA is a nonprofit corporation created and existing for the purpose of improving municipal government in Georgia. Membership consists of the Georgia cities, towns,

and consolidated governments whose governing bodies have chosen to become members. Its current membership of 537 cities represents 100% of the citizens of Georgia who live in incorporated areas and approximately 44% of the population of the State.

GMA has several purposes: to exchange and disseminate information and ideas for the most efficient administration and conduct of local government affairs; to represent the collective interests of its members to the executive, legislative, and judicial branches of the state and federal governments; to facilitate improvements in local government within the State by providing appropriate technical assistance, publications, and expert advice to members; and to promote the general welfare of local governments and urban areas of this State as authorized by the corporation's Board of Directors.

GMA also offers a mutual liability insurance plan to its members through the Georgia Interlocal Risk Management Agency ("GIRMA"). GIRMA's insurance plans provide defense and indemnity coverage to suits against member cities. Defense costs paid to outside counsel comprise the largest component of expense to GIRMA's operating costs. GMA periodically files amicus curiae briefs in cases like this one, which are of statewide interest, will have a substantial impact on municipalities and the citizens they serve, and which may potentially have a national impact. GMA and their members have a significant interest in this action because the decision by the Eleventh Circuit directly impacts its membership by increasing the costs and burdens of hiring and retaining qualified correctional officers and subjecting already strained local budgets to the increased costs of litigation and potential adverse judgments.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit fundamentally misapplied qualified immunity and ignored the important policies behind the doctrine. Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Former Correctional Officer Keyvon Sellers is neither of those. He simply did not have enough information to believe that inmate Jayvon Hatchett continued to be a threat. Hatchett may have acted on his biases in the past, but that did not lead to the inevitable and obvious conclusion that he would continue to act on those prejudices in the future.

Apparently assuming, without any analysis or evidence and contrary to the experience of corrections officers and officials that arrestees often do not tell the truth, the court below accepted without comment the reason proffered by Hatchett for the attack that led to his arrest.[2] From this statement the panel presumed that Hatchett remained a danger to all white people, without articulating any basis for that conclusion. Then to compound the court's error, it completely ignored or substantially discounted Hatchett's own explanation for why he attacked his cellmate more than a week after they were placed in the same cell together; namely that his cellmate put a hair in Hatchett's sandwich—a reason that had nothing to do with the cellmate's race or any other immutable characteristic.

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2. Even Judge Abudu in the concurrence below noted that there was "barely more than a scintilla" of evidence and she referred to the record as "bare bones." Nelson v. Tompkins, 89 F.4th 1289, 1300 (11th Cir. 2024) (Abudu, J., concurring).

The result of the Eleventh Circuit's opinion is that every jail in the Southeastern United States will have to be segregated. Inmates who come to the jail wearing "88" tattoos (signifying allegiance or alliance with Adolf Hitler and representing the HH in Heil Hitler, the 8th letter of the alphabet), or "WP" for white power, or lightning bolt "SS" tattoos will have to be segregated from persons of color in the same jail or prison. Similarly, arrestees or inmates who have tattoos for "MS13", the "Bloods", or the "Crips" criminal organizations will have to be segregated to avoid running afoul of the Circuit Court's improper analysis. Under this standard, with increasingly heightened racial tensions in society, there is no clear line for corrections employees to follow. What statements made by arrestees would run afoul of this analysis and what statements would not? Corrections employees would be required to segregate arrestees lest they risk a Section 1983 lawsuit. With this additional required separation, already overcrowded jails will quickly run out of bed space.

The scant evidence relied upon by the court below should not have been sufficient to pass even cursory review if the case had been decided on a motion to dismiss and these were the only facts alleged in the complaint. This Court's precedent requires a much higher bar than the Eleventh Circuit found sufficient to find that an official acted with deliberate indifference, let alone strip the officer of qualified immunity. A pleading must amount to plausible reality, not mere speculation or innuendo. The facts accepted (and those ignored) by the Eleventh Circuit do nothing to establish that Officer Sellers acted with deliberate indifference to a known risk of harm.

The Eleventh Circuit's conclusion that a jailor has lost his immunity on this paltry record is, as noted in the concurrence, groundbreaking and fundamentally ignores the fifty years of this Court's precedent that qualified immunity allows for mistakes even in tragic circumstances. This Court should accept review of this matter given the high stakes for every correctional facility official in the Eleventh Circuit. The decision also splits from the Seventh and Ninth Circuit on the issue, further meriting this Court's review.

ARGUMENT

I. The Court's Decision Below Risks an Evisceration of Qualified Immunity in the Eleventh Circuit and Must be Reversed.

The opinion of the Eleventh Circuit in this case ignores this Court's most powerful justification for qualified immunity: it allows government employees to "unflinchingly discharge . . . their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). In few circumstances is qualified immunity more important than at the intersection between freedom and incarceration in our city and county jails. Intake officers know almost nothing about the circumstances that bring an arrestee to their desks. Additionally, intake officers interact with large numbers of arrestees through the scope of their employment. As a result, intake officers, like law enforcement professionals everywhere, must often make "singularly swift, on the spot, decisions." *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring). Even with the information an officer does have, whether based on the demeanor of the arrestee, information from the transportation

officer (who may not be the arresting officer), comments by the arrestee or others, and/or their own personal observations, their insight as to future violence, including whether an inmate is a danger to themselves or others, is equivocal and unclear.

Here, the Eleventh Circuit ignored this Court's directive that allows officers to make reasonable decisions in these high-pressure and uncertain situations, without fear of being second-guessed by a judge if their decisions later prove to be mistaken or incorrect. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). These protections are important to "society as a whole." *Harlow*, 457 U.S. at 814. Without qualified immunity, the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," would hinder, if not cripple, the operations of local government. *Id.*

The deterrence concern is even more pronounced given the current law enforcement staffing crisis. Five years ago, before the George Floyd murder and Black Lives Matter protests in 2020 and 2021, the Police Executive Research Forum reported that sixty-three percent of law enforcement respondents in a 2019 survey said that the number of applicants applying for full-time officer positions either decreased significantly or slightly compared to 2014.[3] Many departments expanded (read lowered) their minimum standards in education, fitness,

3. Police Executive Research Forum, The Workforce Crisis, and What Police Agencies Are Doing About It, (September 2019), https://www.policeforum.org/assets/WorkforceCrisis.pdf (last visited July 20, 2024).

and past drug use in order to enlarge the candidate pool.[4] While those numbers made something of a rebound in 2023,[5] in each of the years of the pandemic, agencies lost more officers than they could hire, and reported a fifty percent increase in resignations in 2022 compared to before the pandemic.[6]

Judge Wilkinson's dissent in *Harris v. Pittman*, 927 F.3d 266 (4th Cir. 2019) is an appropriate indictment of the lower court's opinion in this case:

> At some point a pattern of Court decisions becomes a drumbeat, leaving one to wonder how long it will take for the Court's message to break through . . . The majority has used the summary judgment standard once more to eviscerate qualified immunity protections. In the majority's hands, every dispute becomes genuine and every fact becomes material. Qualified immunity fades to the end of every discussion, its values reserved for lip service until little enough is left.

927 F.3d at 283. By contrast, this Court's support and buttressing of the importance of qualified immunity

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4. *Id.*

5. Police Executive Research Forum, New PERF Survey Shows Police Agencies Have Turned a Corner With Staffing Challenges (April 27, 2024), https://www.policeforum.org/staffing2024 (last visited July 20, 2024).

6. Police Executive Research Forum, New PERF Survey Shows Police Agencies Are Losing Officers Faster Than They Can Hire New Ones (April 1, 2023), https://www.policeforum.org/staffing2023 (last visited July 20, 2024).

has been increasingly unsubtle. *See Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021) (*certiorari* granted and judgment reversed without dissent); *City of Tahlequah v. Bond*, 595 U.S. 9 (2021) (*certiorari* granted and judgment reversed without dissent).

Despite this Court's unwavering support for qualified immunity protecting law enforcement officers, the lower court missed the memo by misapplying this Court's clear precedent and erroneously denying summary judgment to Officer Sellers. Because the doctrine of qualified immunity exists to protect officials in these circumstances and because the court's decision below risks a complete erosion of the doctrine in the Eleventh Circuit, this Court should grant certiorari and reverse.

II. The Decision Below Places Federal Courts in the Role of Managing the Day-to-Day Operations of Jails and Prisons and Flies in the Face of Principles of Federalism.

It is not the role of the federal courts to micromanage local facilities. *See Brown v. Plata*, 563 U.S. 493 (2011) ("power of federal courts to restructure the operation of local and state governmental entities is not plenary"); *see also Horne v. Flores*, 557 U.S. 433, 455 (2009); *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring) ("Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems"). This Court recognized the importance of judicial deference in the context of correctional administration:

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security . . . But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Bell v. Wolfish, 441 U.S. 520, 547–48 (1979).

Yet, despite this Court's clear directive, under the Eleventh Circuit's ruling, lower courts throughout Georgia, Florida, and Alabama will be injecting themselves into the day-to-day administration of the hundreds of correctional facilities in those States.[7] A finding of deliberate indifference in this circumstance means that federal courts are now in the role of supervising and managing the intake process for the thousands of arrests

7. The National Institute of Corrections indicates that, in 2021 (the last year data is available) Georgia has 189 jails across its 159 Counties, while Florida has 83 local facilities across 67 Counties, and Alabama has 107 jails in 67 Counties. The National Institute of Corrections, *Corrections State Statistics Information—2021 National Averages*, https://nicic.gov/resources/nic-library/state-statistics/2021/alabama-2021 (last visited July 29, 2024).

processed through every jail each day in the Circuit.[8] This is no small undertaking. The intake process involves conclusively identifying the arrestee; since they may have given a false name, fingerprints are taken and submitted to the National Automated Fingerprint Identification System ("NAFIS").[9] Once identity is confirmed, the intake officer can check the arrestee's background through the National Crime Information Center/Georgia Crime Information Center ("NCIC/GCIC") for information on pending warrants, immigration status, or prior charges and convictions. *Id.* A detailed medical history must be obtained to see if the arrestee has any medical conditions that require observation, treatment, or consideration in housing. *Id.* Information on the reason for the arrest also informs the housing decision as jails try (sometimes more successfully than others) to keep violent arrestees away from non-violent ones. *Id.* Photographs and identification cards are taken and made so the arrestee can be identified

8. According to available crime and arrest data from each state, Georgia processed 27,887 arrests for index crimes in 2022. See Georgia Bureau of Investigation, 2022 Summary Report Uniform Crime Reporting (UCR) Program Georgia Crime Information Center, p. 17, available at: https://gbi.georgia.gov/services/crime-statistics. Florida law enforcement made over half a million arrests in 2020. Florida Department of Law Enforcement, Crime in Florida, Annual 2020 Florida Uniform Crime Report (09/2022), available at: https://www.fdle.state.fl.us/CJAB/UCR/Annual-Reports/UCR-Arrest-Data/TABC/Total_Arrests_by_County_2020.aspx. And in Alabama, there were 123,399 arrests in 2022. Hudnall, M., Lewis, D., Parton, J. (July 2024). Crime In Alabama, available at: https://crime.alabama.gov (all sites last visited July 29, 2024).

9. See, Sarah Williams, *Police Booking Procedure*, FindLaw (April 15, 2023). https://www.findlaw.com/criminal/criminal-procedure/booking.html (last visited July 29, 2024).

for count, meals, or other procedural needs (including court appearances). *Id.* Clothing and personal property are taken and inventoried followed by issuing the arrestee jail attire. *Id.* The arrestee will then be assigned to a block and a cell during the duration of their stay in the facility. *Id.* The court's decision below makes each step of this process subject to federal supervision and micro-management.

No longer are local sheriff's offices or departments able to determine for themselves how to manage their inmate population and/or their operating budgets. Instead, the Eleventh Circuit has delegated that process to the local district courts to determine what process is necessary, what inmates to believe or when to believe them, where to house inmates, and what information must be passed along the booking process no matter how implausible or unreliable it may be. The decision also means that federal courts will be in charge of allocating local resources to jails, as the de facto segregation requirement will strain budgets to the breaking point.

The Eleventh Circuit's finding of evidence sufficient to preserve a constitutionally driven deliberate indifference claim is not only suspect legally and factually; it is divorced from fiscal reality. In a state prison system where 59% of the 51,500 inmates are black, the unsupportable premise that mixed-race incarceration of individuals with possible racial animus will lead to racially based murder is fiscally untenable.[10] Georgia already spends more than $1.2

10. Georgia Department of Corrections, Profile of all Inmates During 2024, 06. (https://gdc.georgia.gov/profile-all-inmates-during-2024) (last visited July 29, 2024).

billion annually on prison facilities[11] and is budgeting $1.5 billion for Corrections in fiscal 2025[12], and cannot afford to insulate inmates of different races—or other individualized characteristics—from one another.

Elected bodies have competing demands for their limited budgets and are loathe to use limited tax dollars for jail improvements or increased capacity. In Georgia's largest County (by population), Commissioners voiced opposition to raising property taxes as a funding mechanism for needed jail improvements.[13] Property taxes in Georgia are the primary source of the County's general fund and fund usual governmental operations like jails, courts, state mandated operations, and employee salaries.[14] With these competing priorities and limited budgetary funds, building a new jail is a bridge too far for many officials.

This is not a situation implicating this Court's mandate that federal courts remedy unconstitutional conditions of confinement. Nonetheless, the Eleventh Circuit has

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11. Incarceration Trends in Georgia (vera.org).

12. Georgia FY2025 Budget (HB 916), p. 43, available at https://www.legis.ga.gov/house/budget-research-office (last visited July 29, 2024).

13. Jim Grimes, *Fulton Commissioners Endorse Jail Plan But Not Funding*, Atlanta Journal Constitution, (Aug 3, 2023) https://www.ajc.com/news/fulton-commissioners-endorse-jail-plan-but-not-funding/XXS4SBATTVEG5HY4AW224GOMYE/ (last visited July 29, 2024).

14. ACCG, Handbook for County Commissioners, Revenues at 2. https://accg.org/docs/handbook/County%20Revenues.pdf (last visited July 29, 2024).

imposed itself as prison administrator by determining that the slightest scintilla of evidence is sufficient to justify federal intrusion and micromanaging. As this Court has said in another context (that is likely to arise if the opinion of the court below is sanctioned), "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Miliken v. Bradley*, 433 U.S. 267, 280 (1977) (reviewing a federal court's order of desegregation of a local school system). The lower court's opinion here creates the very real risk of mandatory segregation of jail populations in order to avoid individual liability of jailors or systemic liability for cities and counties. This Court should grant certiorari to prevent that result.

III. The Facts Relied upon by the Eleventh Circuit to Strip Officer Sellers of Qualified Immunity Would not Withstand Scrutiny Under *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*.

This case comes to this Court from a denial of summary judgment; nonetheless, if facts as found by the Circuit Court to deny qualified immunity to Officer Sellers had been alleged in a complaint, it should not have even survived a motion to dismiss. Nearly twenty years ago, this Court began requiring that pleadings provide plausible reality in order to defeat a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although innocent explanations may support a stated set of facts, such allegations do not suffice to render a complaint adequate. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (other explanations for allegations being more likely, assertions do not plausibly establish intentional

discrimination). The court's opinion in this case defies all logic by concluding that this cursory record—with mere conjecture as to why the inmate attacked the decedent—supports a trial on the merits rather than summary adjudication in favor of the officer.

The Eleventh Circuit claimed that "the underlying offense made the risk of serious harm [Hatchett} posed to white detainees, including Nelson, obvious." *Nelson v. Sellers*, 89 F.4th 1289, 1297 (11th Cir. 2024). That assumption can only be imputed to Officer Sellers if one takes Hatchett's statements to the transporting officer as truthful and then further assumes that past race-based violence equates with likelihood of future race-based violence. It is well-known among corrections personnel that inmates will do anything to manipulate and gain an advantage from officers and staff at jails and prisons. Gary F. Cornelius, *Avoiding Inmate Manipulation*, CORRECTIONS (2011).[15] "To meet the needs of activity, privacy, emotional feedback and safety, inmates may lie, scheme, cheat, steal or play "head games" with [correctional officers]." *Id.* Under the Eleventh Circuit's standard, an astute arrestee not wanting to share a cell with any other person could simply state they have animus to people of every race, including their own.

The court's leap that officer Sellers acted with deliberate indifference also ignores the stated—and very different—explanation for the offense that led to this lawsuit. According to Hatchett himself, Nelson was not

15. https://www.corrections1.com/correctional-psychology/articles/avoiding-inmate-manipulation-hVyL8p4qSyinIWL9/ (last visited July 24, 2024).

killed because he was white; Nelson was attacked because he put a hair in Hatchett's sandwich. For the court below, however, the only "reliable" fact is the lone statement about Hatchett's first offense, a statement made more than a week prior and for which no conviction had occurred at the time of the murder. There was not a single subsequent admission, confession, or behavior that would suggest a continuing racial animus that could lead to violence.

A finding of deliberate indifference must be based on more than innuendo and speculation. *Twombley*, 550 U.S. at 570, *see also Nelson v. Tompkins*, 89 F.4th 1289, 1300 (11th Cir. 2024) (Abudu, J., concurring) (noting evidence establishes "barely more than a scintilla" and referring to the record as "bare bones."). If the court is going to take Hatchett's words as true, it should take all of his words as true. While his initial assault that led to his arrest may have been motivated by racial animus, Hatchett's explanation for the assault that resulted in Nelson's death reveals an entirely different causality: Hatchett took offense when his food was allegedly contaminated by Nelson. In *Iqbal*, this Court concluded that a complaint did not allege improper animus against the FBI director because there were other equally valid explanations for the same facts or occurrences. *Iqbal*, 556 U.S. 681. This second statement by Hatchett, which the Eleventh Circuit ignores, destroys any causal connection between Hatchett's criminal assault on the retail clerk and his later assault on his cellmate.

The facts of this case do not satisfy the significant evidentiary threshold for constitutionally actionable deliberate indifference. That high bar demands more than a showing of mere negligence; it requires evidence of

awareness and foreseeability so compelling that to ignore them would be reckless. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). More than simple negligence is required. 511 U.S. at 835. Instead, the official must act or fail to act with "knowledge of a substantial risk of serious harm." *Id*. The standard takes into account officials' "unenviable task of keeping dangerous men in safe custody under humane conditions." *Id.* at 845. It is tragic that Nelson lost his life, but there is no indication Officer Sellers acted with a deliberate choice to ignore a serious risk of harm. The court's finding of deliberate indifference under such paper-thin circumstances undermines this Court's deliberate indifference rationales for all correctional officers in the Eleventh Circuit.

Here, as the concurrence aptly describes, the Eleventh Circuit accepts as determinative Hatchett's initial statement of racial motivation but ignores his later, much more contemporaneous, statement which makes no mention of race, then melds other unremarkable factors to impute to the defendant substantial certitude of oncoming violence. The basis for the allegedly foreseeable aggression—racial animus so profound that Hatchett's segregation away from white inmates was called for—is unsubstantiated. In no way does it support the majority's conclusion that Sellers "*knew*" that Hatchett posed a special risk to white inmates, much less that he posed a risk of substantial harm to Nelson individually.

IV. The Eleventh Circuit's Decision Splits from the Ninth and Seventh Circuits and this Court Should Resolve the Split.

The Eleventh Circuit's decision creates a circuit split on the question of whether the mere possibility of racial

or gang motivated violence suffices to require segregation of inmates without a further showing that a particular inmate was in danger. In *Labatad v. Corrections Corp. of America*, an inmate had fought with members of an opposing gang. 714 F.3d 1155, 1157 (9th Cir. 2013). But after several days observing peaceful coexistence, prison officials placed him in a common cell with an opposing gang member, where violence arose again. *Id.* In stark contrast to the Eleventh Circuit in this case, the Ninth Circuit refused to find that merely placing the plaintiff with an opposing gang member rose to the level of deliberate indifference even where the inmate had fought with a member of the rival gang three days earlier. *Id.* at 1160-61.

Similarly, the Seventh Circuit rejected a claim that the lack of a policy segregating members of rival gangs constituted deliberate indifference. *See Mayoral v. Sheahan*, 245 F.3d 934, 939 (7th Cir. 2001). The court explained the logistical realities for prison officials and how such a policy would likely lead to additional lawsuits based on racial segregation:

> The number of gang members housed by the CCDOC and the high representation of certain gangs would place an unmanageable burden on prison administrators were they required to separate inmates by gangs. Would the jail be required to have a tier for Gangster Disciples, a tier for Latin Kings, etc.? We were told at argument that there is currently pending a lawsuit to prevent that sort of a housing pattern on the basis that it would, in effect, become a racial separation of inmates. Whether that case presently exists or not, were the CCDOC to

> separate inmates by gang affiliation, and thus effectively by race, it would only be a matter of time before a lawsuit would be filed. Plus, it would be an unmanageable practical burden to manage the jail population. What would happen if there were too many Disciples for a tier and too few Latin Kings.

Id.

While Nelson's estate did not specifically argue that the lack of a policy on racial segregation was deliberately indifferent, that is the practical requirement imposed by the Eleventh Circuit for correctional officers faced with any indicia of racial animus between prisoners.

In contrast to the realities in this case, the Seventh Circuit in *Mayoral* did allow a claim for deliberate indifference to move forward past summary judgment where the inmate who was harmed had notified the official of his need for protective custody and she had "brushed him off." *Id.* at 940. That decision comports with this Court's deliberate indifference requirements. Here, there is zero evidence that Nelson had asked for protective custody or even mentioned he was in any danger. In fact, the case is on all fours with *Labatad* where the assailant had been in general population with the inmate he assaulted for several days before the assault, and here, Nelson and Hatchett had lived together for nine days without incident before Hatchett assaulted Nelson. *See* Petition, p. 9.

The concurrence by Judge Abudu below aptly describes the decision as "groundbreaking" and explains that it "cements the legal principle that incarcerated

individuals may bring a race-based failure to protect claim even on a record as bare bones—again as to motivation—as Nelson's estate presented in this case." *Nelson v. Tompkins*, 89 F.4th 1289, 1300 (11th Cir. 2024) (Abudu, J., concurring). While Judge Abudu's deliberate indifference analysis is legally erroneous, her statement on the magnitude of the case is entirely accurate. Correctional facilities in Georgia, Florida, and Alabama must now racially segregate their prison populations based on "bare bones" allegations lest they risk deliberate indifference claims. But as the Seventh Circuit in *Mayoral* pointed out, that segregation may also lead to additional lawsuits and is entirely unmanageable both in practical and fiscal reality. Because the Eleventh Circuit so sharply divided from the Ninth and Seventh Circuits on such an important question involving this nation's prisons, this Court should grant certiorari.

V. Local Governments Face Significant Burdens When Courts Expand Deliberate Indifference Liability Under Section 1983.

Section 1983 lawsuits can impose significant burdens on municipalities and the public by saddling local governments with tremendous "expenses of litigation" and "diversion of official energy from pressing public issues. *Crawford-El v. Britton*, 523 U.S. 574, 590 & n. 12 (1998). These burdens are warranted when a Section 1983 action is necessary to redress alleged violations of the "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. These significant burdens are not warranted when there is not fair and unequivocal notice to guide the officer's choices.

Unjustified findings of law enforcement misconduct add to an already staggering Section 1983 docket. Nationwide, at least 14,000 civil rights actions are filed in the federal district courts each year, averaging out to about four new civil rights actions each year for every county in the United States. *See* Caseload Statistics, Table C-2 https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2022/03/31; World Population Review, States with the Most Counties 2023, https://bit.ly/3vSDP3j (last visited July 30, 2024) (tallying 3,243 county equivalents nationwide); *see also* Philip Matthew Stinson Sr. & Steven L. Brewer Jr., *Federal Civil Litigation Pursuant to 42 U.S.C. § 1983 as a Correlate of Police Crime*, 30 Crim. Just. Pol'y Rev. 223, 227 (2019).[16]

The bulk of these civil rights cases are Section 1983 actions—and the total number of Section 1983 actions may be even higher, because the numbers above do not include employment discrimination suits or, importantly for the present matter, prisoner petitions. *Id. supra*, at 227 (attributing the "explo[sion]" of Section 1983 litigation in cases alleging police misconduct in part to the availability of attorneys' fees under Section 1988); Thomas A. Eaton & Michael Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 Wm. & Mary Bill Rts. J. 829, 837 (2016) (recognizing the "systemic value [of fees

16. These numbers include all actions in the federal district courts categorized by the Office of the Clerk of Court as "civil rights cases—other" for the years 2014-2022. Caseload Statistics, *supra*, Table C-2. "Civil rights cases—other" exclude actions for voting, employment, housing, welfare, ADA-employment, ADA-other, and education, depending on the year. *Id.* The federal courts do not report Section 1983 cases in their statistical reports. See *id.*; Stinson & Brewer, *supra*, at 226-27.

under §1988] in encouraging litigation"). Given those reinforcing incentives, any judicial expansion of exceptions to the qualified immunity doctrine will increase the already-substantial volume of Section 1983 suits that local governments face.

It is not just the number of Section 1983 cases that burdens local governments but also the potentially massive awards of damages and attorneys' fees if the plaintiffs prevail. The average jury award of liability against a municipality in such cases is estimated to be approximately $2 million, and a "six- or seven-figure award against a city" is "not uncommon." Larry K. Gaines & Victor E. Kappeler, Policing in America 346 (9th ed. 2021). One study of 151 local law enforcement agencies found an average annual legal liability of around $13.8 million. Gaines & Kappeler, *supra*, at 346. To mitigate the risk of such awards, local governments are often forced to secure "extremely expensive" liability insurance, only to find that "premium rates can skyrocket, or companies may refuse to insure" if the local government finds itself litigating multiple suits in defense of itself and its local officials. *Id.*

For cash-strapped local governments, these costs can cause severe financial difficulties by wreaking havoc on local government budgets and diverting funds away from critical local priorities. Moreover, ultimately, the "resulting financial loss" from the costs of litigation, any adverse judgment, and any award of attorneys' fees will be "borne by all the taxpayers" of the local government, who are innocent of any wrongdoing. *Owen v. City of Independence*, 445 U.S. 622, 655 (1980). Faced with the risk of these exorbitant costs, local governments often

make the Hobson's choice to settle even meritless Section 1983 actions. Cf. Gaines & Kappeler, *supra*, at 346-47 (noting that "more than half" of all cases alleging police misconduct are settled out of court"); Stinson & Brewer, *supra*, at 226. Such settlements require local government to "pay [plaintiffs and their lawyers] large sums of money, even in cases" where the local government and its officials, employees and officers might not have been found liable. Gaines & Kappeler, *supra*, at 347. Even worse, settlements entered into to avoid the costs and risks of litigation "can lead to the filing of frivolous lawsuits" aimed at procuring more settlements. *Id.* The end result is that "whether through "enormous awards [or]settlements," Section 1983 actions "have nearly bankrupted some municipalities and townships." *Id.* at 346.

Section 1983 actions impose significant costs and burdens on local governments. These costs and burdens may be justified when state actors have deprived a plaintiff of their Constitutional rights. But they are not justified when a non-State actor's intervening wrongful and, here, criminal conduct causes the harm and there was no showing of deliberate indifference let alone plain incompetence on the part of the officer.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for certiorari.

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Respectfully submitted,

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