No. 23-617

In The
Supreme Court of the United States

CASONDRA POLLREIS, ON BEHALF OF HERSELF AND HER MINOR CHILDREN, ON BEHALF OF W.Y., ON BEHALF OF S.Y.,

Petitioner,

v.

LAMONT MARZOLF; JOSH KIRMER,

Respondents.

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

BRIEF OF *AMICUS CURIAE* LAW ENFORCEMENT ACTION PARTNERSHIP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers' bureau numbers more than 300 criminal justice professionals advising on police-community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

This case presents an important opportunity to ensure that officers who abuse their power to use force are held accountable. That accountability is essential to maintaining the integrity of law enforcement, building trust in the police, and ultimately keeping the public safe. LEAP and its members thus have an interest in ensuring that the courts remain open to victims of police misconduct and that individuals enjoy robust protections against the use of excessive force.

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[1] No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than LEAP or its counsel contributed money intended to fund preparing or submitting this brief. This brief has been filed earlier than 10 days before the due date, and so notice to counsel of intent to file an amicus brief is not required.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Qualified immunity is an expansive, difficult hurdle that makes civil rights actions against law enforcement more costly and less effective. The doctrine has been long criticized for protecting bad actors among police and law enforcement. This criticism has become more salient as media coverage of and public outcry against police violence have increased in recent years. By shielding law enforcement from civil consequences of excessive force, qualified immunity erodes public trust in law enforcement. As an organization of law enforcement officials with real-world experience, *Amicus* knows that a lack of trust is dangerous for both officers and civilians alike. It also fails to discourage bad actions from a handful of "bad apples" among law enforcement's ranks, which in turn endangers and reflects poorly upon the majority of law abiding, rational peace officers across the nation.

Evidence in the record shows that when Casondra Pollreis ("Pollreis") encountered officer Lamont Marzolf ("Officer Marzolf") pointing a gun at her two minor children, she remained calm and sought to deescalate the situation. Yet Officer Marzolf responded by forcibly detaining her with a taser. This and other evidence in the record indicates that Officer Marzolf's action was unreasonable under the circumstances, yet the panel majority found that he acted reasonably as a matter of law, granting summary judgment in his favor on qualified immunity grounds. By making this fact-based determination despite competing evidence, the Eighth Circuit panel shifted the burden of proof in favor of the movant on summary judgment. This inadvertently expanded the already steep qualified immunity hurdle. As law

enforcement professionals concerned with sound police practices and standards, *Amicus* proposes that the Court grant certiorari to reverse this decision and avoid expanding the qualified immunity doctrine.

ARGUMENT

I. The Eighth Circuit's Approach Drastically Expands Qualified Immunity's Excessive Burden on Civil-Rights Litigants.

Law enforcement misconduct is a key public concern with real and tragic consequences. Police shootings kill over 1,000 people annually in the United States, with an increase in frequency—and news coverage—in recent years. See Julie Tate et al., *Fatal Force*, Wash. Post, May 16, 2023.[2] And the number of deaths pale in comparison to tens of thousands of injuries annually. Nathan DiCamillo, *About 51,000 People Injured Annually By Police*, Newsweek, Apr. 19, 2017.[3] Police, trained to presume danger, may overuse physical force and aggression in even routine police stops. David D. Kirkpatrick, et al., *Why Many Police Traffic Stops Turn Deadly*, New York Times, Oct. 31, 2021.[4] Because of the severity of consequences, excessive force, including the non-deadly force here, must be scrutinized to ensure the safety of citizens and law enforcement.

Yet officers are seldom held accountable for excessive force. Criminal charges are exceedingly rare. Kimberly Kindy & Kimbriell Kelly, *Thousands*

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[2] *Available at* https://www.washingtonpost.com/graphics/investigations/police-shootings-database/.

[3] *Available at* https://bit.ly/2gTs1bo.

[4] *Available at* https://nyti.ms/3oqKimS.

Dead, Few Prosecuted, Wash. Post, Apr. 11, 2015 ("[A]mong the thousands of fatal shootings at the hands of police since 2005, only 54 officers have been [criminally] charged.").[5] And internal discipline often falls short. See, e.g., U.S. Dep't of Justice, Investigation of the Ferguson Police Department, (Mar. 4, 2015) ("Even when individuals do report misconduct, there is a significant likelihood it will not be treated as a complaint and investigated.");[6] Ashley Southall et al., *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished*, New York Times, Nov. 15, 2020 (finding reductions or rejections of over 70% of recommendations for stiff discipline of N.Y. P.D. officers).[7]

Because other tools of accountability so often fail, civil actions are often the last resort for victims like Pollreis. See 42 U.S.C. § 1983. But civil plaintiffs face a near insurmountable barrier to success—the qualified immunity doctrine. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (the Court's "one-sided approach to qualified immunity" has "transform[ed] the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"). Qualified immunity makes civil actions against law enforcement more costly and far less successful. Qualified immunity shields officer conduct that would otherwise be indefensible, which "provides a judicial blessing for departments to keep unethical officers on the force—leaving good cops in bad company." James Craven, et al., *How Qualified Immunity Hurts Law Enforcement*, Cato Institute,

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[5] *Available at* https://wapo.st/43oSumw.

[6] *Available at* https://bit.ly/3BXTJ00.

[7] *Available at* https://bit.ly/3ojXCJT.

Feb. 15, 2022 [hereinafter *Qualified Immunity Hurts*].[8] And because of the excesses of the doctrine, studies show that most (63–66%) Americans support repealing qualified immunity. *Ibid.*

Yet despite the already substantial qualified immunity shield, the panel majority inadvertently *expanded* the doctrine. The majority held that Officer Marzolf did seize Pollreis, meaning the only issue to avoid qualified immunity dismissal was whether "the force applied was objectively unreasonable under the totality of the circumstances." Pet. App. 6a (citing *Clark v. Clark*, 926 F.3d 972, 977 (8th Cir. 2019)). In deciding this issue, the court was to view all evidence "in the light most favorable" to Pollreis and give her "the benefit of all reasonable inferences." Pet. App. 5a (quoting *Goffin v. Ashcraft*, 977 F.3d 687, 690–91 (8th Cir. 2020)). And the court recognized record evidence that Pollreis was not suspected of any crime, was not resisting, "commendably remained calm and nonthreatening," and that she "moved to the side" when commanded to get back. Pet. App. 9a. The court was also presented with video evidence that showed Pollreis could not physically comply with a command to "get back" as she was directly in front of a parked police car, and that her sideways movement was an attempt to comply.[9] Yet despite these facts, the court made several inferences in favor of Officer Marzolf, finding that his actions were objectively reasonable because he was alone, it was nighttime, he was detaining "two potentially armed suspects" (despite obvious indications that the "suspects" were children), and Pollreis did not "immediately" comply with his order. Pet. App. 9a. By finding that Officer Marzolf did

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[8] *Available at* https://bit.ly/3q4SlWU.

[9] *Video available at* https://bit.ly/3OBlYcI.

not act unreasonably as a matter of law despite evidence weighing against his reasonableness, the court misapplied the summary judgment burden of proof, thereby strengthening and expanding the already expansive qualified immunity doctrine. The majority asserted its holding was appropriate because the facts themselves were not in dispute. *Id.*, at 10a. However, as pointed out by Judge Kelly, whether Pollreis complied was a disputed fact, as officers must provide civilians a reasonable opportunity to comply with commands before using force. *Id.*, at 12a (citing *McReynolds v. Schmidli*, 4 F.4th 648, 653 (8th Cir. 2021)).

Indeed, Judge Kelly's dissent noted that viewing the evidence in the light most favorable to Pollreis, "a reasonable jury could find that drawing a taser on a nonthreatening bystander who was complying or attempting to comply with an officer's orders was not objectively reasonable." Pet. App. 15a. The already expansive nature of qualified immunity has grave consequences of police violence for both communities and law enforcement. *Amicus* thus submits that the Court should grant certiorari to properly view the evidence in the light most favorable to Pollreis.

II. The Eighth Circuit's Expansion of Qualified Immunity Harms Law Enforcement by Eroding Public Trust, Undermining the Rule of Law.

As an organization made up of current and former law enforcement professionals, *Amicus* urges that building trust in law enforcement is important. Key to building trust is transparency and accountability. By shielding officials from suit—and thus consequences—for official misconduct, qualified immunity damages these goals. See *Qualified*

Immunity Hurts. Building trust is critical, as activists call to "defund the police" and the public clamors for change. Maya King, *How 'Defund the Police' Went from Moonshot to Mainstream*, Politico, June 17, 2020 (noting that two-thirds of Americans support major police reform).[10] Yet here, the lower court's path further erodes public trust and shields bad actors among law enforcement from consequence and scrutiny.

A mother should not be forcibly detained for calmly asking why an officer was pointing a gun at her children. The majority acknowledged the difficult position Pollreis was in by recognizing her calm demeanor as "commendabl[e]." Pet. App. 9a. Judge Kelly's dissent in this matter points out that "Pollreis was not suspected of committing any crime, was not resisting arrest, and was calm and nonthreatening." *Ibid.* And the Eighth Circuit has recognized that "[f]orce may be objectively unreasonable when a plaintiff does not resist, lacks an opportunity to comply with requests before force is exercised, or does not pose an immediate safety threat." *Wilson v. Lamp*, 901 F.3d 981, 989 (8th Cir. 2018). Video of the encounter shows that Pollreis could not step "back" as directed by the officer because the police car was in the way. It is apparent from analyzing the video that Pollreis (1) approached Officer Marzolf respectfully, (2) sought to comply with his command despite a physical barrier rendering literal compliance impossible, and (3) tried to de-escalate the situation by providing key identifying information about her two sons. In this circumstance it was inappropriate

[10] *Available at* https://bit.ly/45twaKo.

and unjust to conclude as a matter of law that Pollreis did not comply.

By finding that Pollreis did not comply, the Eighth Circuit panel tipped the evidentiary balance against Pollreis and future plaintiffs facing an already unbalanced qualified immunity doctrine. Doing so here, where Pollreis remained calm, compliant, and promoted de-escalation, discourages civilians from following Pollreis's commendable lead. It sends the message that no matter what, police may pursue violence against them if they cannot literally comply with an impossible order. It also encourages police to issue impossible orders, as placing civilians in impossible situations can justify otherwise indefensible physical force. Further, and perhaps most dangerous to public safety, the lower court's approach deters citizens from pursuing de-escalation. Here, the court found that even when a civilian calmly complies and seeks to avoid violence, that the police are justified to use force. This conveys that civilians are on their own in protecting themselves from police overreach. In turn, bad actors among police are encouraged to engage in increasingly dangerous shows of force against even compliant civilians with the peace of mind that the officers will face no consequences. As police shootings and other shows of force against civilians become increasingly common, judicial action that discourages peaceful interactions with police should be avoided.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for writ of certiorari. Failure to rein in excessive expansion of qualified immunity will damage public trust in law enforcement and potentially discourage civilians from acting reasonably to deescalate police encounters.

Respectfully submitted,

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