No. 24-130

In The
Supreme Court of the United States

DESIREE MARTINEZ.,
Petitioner,
v.
CHANNON HIGH,
Respondent.

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

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

MEAGHAN D. NOWELL
Counsel of Record
CONRAD D. HESTER
WELDON P. SLOAN
Vartabedian Hester & Haynes LLP
301 Commerce Street,
Suite 3635
Fort Worth, Texas 76102
(817) 214-4990
meaghan.nowell@vhh.law

Counsel for Amicus Curiae
Law Enforcement Action Partnership

August 12, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

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 to 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 diverse 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 place victims and innocent citizens in danger 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 have an interest in ensuring that the courts remain open to victims of police misconduct and that individuals enjoy robust protections against the disclosure of sensitive police data to abusers and criminal suspects.

---

[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

Strong qualified immunity protections make the most sense when considering time-pressured situations, where officers need the latitude to make split-second, life-or-death decisions. But rigid application of the same rules in non-urgent scenarios shields bad actors and endangers citizens.

During an argument with his girlfriend, Petitioner Desiree Martinez ("Martinez"), police officer Kyle Pennington ("Officer Pennington") called a friend in the police department, Respondent Officer Channon High ("Officer High"). Pet.App. 44a; see also *id.* at 54a. During the call, Officer High knew that it was three in the morning, Martinez was in the room with Officer Pennington, and Officer Pennington was already on leave pending investigation into domestic violence against an ex-girlfriend. *Id.* at 49a–51a. Yet Officer High, safe from any danger, voluntarily told Officer Pennington that Martinez had herself reported him to the police department for domestic violence. *Id.* at 44a; see also *id.* at 54a. Martinez faced severe consequences for the disclosure, including horrific sexual abuse by Officer Pennington that night. *Id.* at 8a. The Ninth Circuit held that the same rule that protects police officers' split-second decisions shielded Officer High. *Id.* at 22a.

As a group of law enforcement professionals concerned with sound police practices and standards, *Amicus* asks the Court to grant certiorari to reverse this decision. *Amicus* supports a dynamic qualified immunity test that applies a less exacting "clearly established right" standard where the officer had time to consider their actions, to protect both officers and civilians.

ARGUMENT

I. Fair-Notice Standards Should Differentiate between Urgent and Non-Urgent Conditions.

Law enforcement misconduct is a key public concern with real and tragic consequences. Police shootings kill over 1,000 people per year 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 deaths pale in comparison to tens of thousands of yearly injuries. 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, non-violent scenarios. David D. Kirkpatrick, et al., *Why Many Police Traffic Stops Turn Deadly*, N.Y. Times, Oct. 31, 2021.[4] Because of the severity of consequences, officers must be held to the highest standards of conduct to ensure the safety of citizens and law enforcement.

And as technology has progressed, access to sensitive police department data has become increasingly consequential. Due to the nature of police work, law enforcement personnel at all levels have access to this sensitive data at a moment's notice. Sensitive policing data including police reports, victim statements, criminal records, driver's records and

---

[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.

motor vehicle data including driver's license and registration information. *See* Sadie Gurman, et al. *AP: Across US, Police Officers Abuse Confidential Databases*, Associated Press, September 27, 2016.[5] Disclosure of sensitive policing data can—and in this case did—lead to severe consequences for crime victims and others.

At least one nationwide report revealed hundreds of incidences involving police officers misusing these confidential databases, including to get information on romantic partners, business associates, neighbors, and journalists. *Id.* Such misuse ranges from personal vendettas of officers to active participation in crime and bribery schemes. *See id.* But because the report counted only instances of department reporting of known instances, the problem is likely much wider. *See id.*

Yet officers are seldom held accountable. Criminal charges against police officers are exceedingly rare, even when physical violence is involved. Kimberly Kindy & Kimbriell Kelly, *Thousands 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.").[6] And internal discipline often falls short. See, e.g., U.S. Dep't of Just., 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.");[7] Ashley Southall et al., *A Watchdog Accused Officers of Serious Misconduct.*

---

[5] *Available at* https://bit.ly/4fq1Y7N.

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

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

Few Were Punished, N.Y. Times, Nov. 15, 2020 (finding reductions or rejections of over 70% of recommendations for stiff discipline of N.Y.P.D. officers).[8] A culture among law enforcement that they must protect their own—useful in dangerous situations—can at times bleed over into an unjust refusal to apply criminal consequences to officers' behavior.

Because other tools of accountability so often fail, civil actions are often the last resort for victims of officer misconduct. 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 Inst., Feb. 15, 2022 [hereinafter *Qualified Immunity Hurts*].[9] And because of the excesses of the doctrine, studies show that most (63–66%) Americans support repealing qualified immunity. *Ibid.*

Properly applied, qualified immunity should be tailored to prevent chilling necessary government

---

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

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

action. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). The typical qualified immunity framework in the law enforcement context is that the plaintiff must show that an officer (1) violated the plaintiff's constitutional right and (2) the right was "clearly established" at the time of the incident. *Pearson v. Callahan*, 555 U.S. 223, 227 (2009). But as noted in Petitioner's briefing, circuit courts are split on whether application of the second prong is different for time-pressured and non-time-pressured law enforcement decisions. Compare *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019), *A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191, 1199 (10th Cir. 2019), with *Benning v. Patterson*, 71 F.4th 1324, 1334 (11th Cir. 2023); *Dillard v. O'Kelley*, 961 F.3d 1048, 1055 (8th Cir. 2020) (en banc).

Amicus agrees with Petitioner and the Fifth and Tenth Circuits that the second prong should be applied differently to urgent and non-urgent police decisions. *Amicus* knows firsthand that enforcement officers often face life-or-death situations that can escalate with little notice. In time-pressured, urgent situations, strict application of qualified immunity that finds officers liable for violations only of "clearly established rights" makes sense. See, e.g., *Morrow*, 917 F.3d at 876. Officers under time pressure or danger to themselves or others deserve a degree of latitude to engage in split-second decision making. In such circumstances, the law must be so clear that "in the blink of an eye" a reasonable officer would know the constitutionality of his or her conduct. *See id.* This helps ensure that officers do not second guess themselves or others, potentially allowing avoidable harm to arise from officers' delay or inaction.

But every decision and action made by law enforcement is not urgent. Every day, police officers make routine, or even mundane decisions—securing warrants, investigating criminal activity, filing arrest paperwork, and of course, answering phone calls. But given police officers' unique position of trust in society and involvement in citizens' most vulnerable moments, such decisions can still have significant impacts on individuals and the public. Police power can also lead to corruption and a lack of justice. Unjust criminal sanctions, improper detention, and statements about victims to violent perpetrators can directly cause retaliation, as occurred here. Qualified immunity protections thus must be balanced against citizens' rights—and the best way to do so is to differentiate between urgent situations requiring split-second decisions and non-urgent scenarios. This can help to prevent intentional violations of bad actors that skirt existing legal protections.

Officer High's actions are a prime example of a non-urgent decision that led to severe consequences for an innocent crime victim. The Ninth Circuit panel held that Officer High did violate Martinez's due process rights. Pet.App. 13a. In doing so, the court recognized that Officer High engaged in affirmative conduct that exposed Martinez to a foreseeable danger that she would not have otherwise faced, acting with "deliberate indifference" to a known or obvious danger. *Id.* at 14a. Officer High was safely away from the scene of the incident when she received a three-a.m. phone call from her friend, Officer Pennington. *Id.* at 44a; see also *id.* at 54a. The call made clear that Officer Pennington was arguing with Martinez, but rather than deescalate the situation, Officer High disclosed Martinez's confidential victim's report to the Clovis PD and made "disparaging comments" about

Martinez that provoked Officer Pennington and emboldened him to believe that he could retaliate against Martinez with impunity. See *id.* at 15a (quoting *Martinez v. City of Clovis*, 943 F.3d 1260, 1276–77 (9th Cir. 2019)). *Amicus* agrees with the Ninth Circuit's acknowledgment in this case that an officers' open expression of camaraderie with abusers and contempt for a victim can convey to the abuser that he or she "could continue to engage in domestic violence with impunity." See *id.* (quoting *Okin v. Village of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 430–31 (2d Cir. 2009)).

Officer High also knew at the time of the call that Officer Pennington was on leave for investigation for domestic violence involving his ex-girlfriend. *Id.* at 49a–51a. Yet Officer High chose to chime into the argument, disclose a confidential report by Martinez, and embolden Officer Pennington to retaliate and further abuse Martinez. See *id.* at 44a; see also *id.* at 8a. Given that it was the middle of the night, Martinez was at home with Officer Pennington, and an argument was already ongoing, Officer High should have known that sharing the information with Officer Pennington could have placed Martinez in harm's way. See *id.* at 8a. And indeed, Officer Pennington did engage in a brutal sexual attack on Martinez as a direct result of Officer High's disclosure. *Ibid.*

On top of these factual scenarios that should have alerted Officer High that her actions violated Martinez's rights, the Ninth Circuit, which governed the Clovis PD's jurisdiction, had already held that police officers could affirmatively create a danger by telling abusers about victim's allegations against them. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006). While not factually

identical to this scenario, as explained in Plaintiff's briefing, *Kennedy*'s facts should have been close enough to notify a reasonable officer who had time to think about her conduct that disclosing a confidential victim's report to a perpetrator would violate the victim's rights. *See A.N. ex rel. Ponder*, 928 F.3d at 1197.

Because Officer High was not in a time-pressured situation, she should have taken a moment to consider potential consequences for Martinez. Officer High should have reasonably known that telling Officer Pennington, who was already under investigation for domestic violence, that his current girlfriend had issued an additional report against him could have triggered Officer Pennington to engage in more violence. And Officer High should have reasonably known this could constitute a constitutional violation against Martinez. As experienced law enforcement officials, *Amicus* believes that every reasonable police officer knows that a victim should be protected from their attacker, and that disclosing confidential victim reports to domestic violence perpetrators can cause retaliation. Adding to this common-sense notion, the Ninth Circuit has already held it unconstitutional for police officers to disclose a police complaint to its subject and that to do so endangers a victim. *See Kennedy*, 439 F.3d at 1063. Under these circumstances, when Officer High was under no time pressure, she should have known that her actions were wrong, and unconstitutional.

Amicus urges that when there is no time pressure requiring split-second action by the officer to protect him or herself or others, the "clearly established" prong of the qualified immunity test should not

require as high of a factual overlap between a prior precedent and the current case.

II. The Ninth Circuit's Approach to Qualified Immunity Harms Law Enforcement by Eroding Public Trust and Undermining the Rule of Law.

As an organization 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.

When an officer has time to think about the consequences of his or her action, the law should encourage them to do so. The officer should be encouraged to choose a path that protects the public and civilians from unjust and unconstitutional consequences, and officers should face consequences when they fail to do so. To hold otherwise encourages officers to skirt the law. By placing such a high bar on civil prosecution of non-urgent law enforcement decisions, officers are emboldened to think through

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

their constitutional violations in a manner that skirts existing precedent without recourse. When coupled with low levels of legal prosecution for police misconduct, such a scenario presents a breeding ground for corruption and further constitutional violations by a few bad actors.

Yet here, the Ninth Circuit treated Officer High's situation the same as an officer faced with a split-second life-saving decision. The panel held that qualified immunity protected an officer who acted "deliberately indifferent to a known or obvious risk" and whose "affirmative conduct" placed a victim in "actual, foreseeable danger" because existing Ninth Circuit precedent holding officers liable for disclosing a confidential victim report had some distinguishable facts. Pet.App. 13a–14a; see also *id.* at 19a–20a. This holding simultaneously places other victims in danger of intentional disclosures of reports, and will discourage other victims from reporting their abusers, particularly when abusers have friends in the police department—as Officer Pennington so clearly did. *Amicus* believes such a precedent will result in fewer victims coming forward and abuse and violence will continue.

Because the law should discourage bad actors among law enforcement from violating citizens' rights in non-urgent circumstances, *Amicus* ask the Court to adopt a dynamic qualified immunity standard that accounts for the time pressure—or lack thereof—placed on the officer at the time of the alleged constitutional violation.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for writ of certiorari. Failure to correct the Ninth Circuit's misapplication of qualified immunity will damage public trust in law enforcement and potentially discourage civilians from reporting violence and encourage bad actors among law enforcement to engage in rights violations.

Respectfully submitted,

MEAGHAN D. NOWELL
Counsel of Record
CONRAD D. HESTER
WELDON P. SLOAN
Vartabedian Hester & Haynes LLP
301 Commerce Street, Suite 3635
Fort Worth, Texas 76102
(817) 214-4990
meaghan.nowell@vhh.law

Counsel for Amicus Curiae Law Enforcement Action Partnership