No. 24-616

IN THE

Supreme Court of the United States

OFFICER BENJAMIN M. BAUER,

Petitioner,

v.

ETHAN DANIEL MARKS,

Respondent.

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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January 13, 2025

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 21.2(b), the International Municipal Lawyers Association ("IMLA") respectfully requests leave to submit a brief as amicus curiae in support of the petition for writ of certiorari filed by Officer Benjamin Bauer.

Rule 37.2 requires that amici notify all parties' counsel of their intent to file an amicus brief in support of a petition for certiorari at least ten days before the due date, and further that the due date is thirty days after a response is called for. A response was called for on December 12, 2024, requiring a response on January 13, 2025. On December 18, 2024 the Court granted respondent's motion to extend the response deadline to February 3, 2025.

Timely notice of the intent to file the amicus brief was provided to petitioner's counsel and petitioner's counsel has consented to the filing of this amicus brief. However, due to amicus's oversight, respondent's counsel was notified of the intent to file the amicus brief on January 6, 2025, seven days before the January 13, 2025 due date for the amicus brief. This oversight does not prejudice any party. Respondent will have ample time to respond to any points raised herein given the 21-day extension of the deadline for his response. Amicus requested respondent's counsel to consent to the filing of this amicus brief notwithstanding the late notice but no response was received as of January 12, 2025.

IMLA is a nonpartisan, nonprofit, professional association of counsel owned by its members. Its membership encompasses more than 2,500 local government entities (including cities, counties, and

subdivisions thereof), represented through their chief legal officers, state municipal leagues, and individual attorneys. IMLA writes to express concerns regarding the far-reaching implications of the Eighth Circuit's holding and the uncertainty it creates for its members regarding the scope of the legal protections upon which they rely. IMLA respectfully submits that the perspectives shared in this brief regarding the significant negative impacts the decision below will have on local governments will be helpful to this Court's consideration of whether to summarily reverse or grant certiorari.

Accordingly, IMLA respectfully asks the Court to grant it leave to file this amicus brief.

Respectfully submitted,

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Interest of *Amicus Curiae*

The International Municipal Lawyers Association ("IMLA") has a significant interest in this decision.[1] Founded in 1935, IMLA is a nonpartisan, nonprofit, professional association of counsel owned by its members. Membership comprises more than 2,500 local government entities (including cities, counties, and subdivisions thereof), as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an advocate and international clearinghouse for legal information relevant to municipal matters. IMLA advocates for the responsible development of municipal law and presents the collective viewpoint of local governments around the country in lawsuits that affect their interests.

Officer Benjamin Bauer responded with a small group of other officers to aid two seriously injured protestors during the 2020 George Floyd protests. One victim had been stabbed, the other struck by a baseball bat. The rescue of these victims occurred three days after George Floyd's murder, and the protests had grown more violent each day. Officer Bauer and his colleagues entered a hostile crowd of over 500 people. They were met with rocks and other dangerous projectiles. Despite the serious risk of injury, Officer Bauer and his colleagues were duty-

[1] No counsel for a party authored the brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than IMLA, its members, or counsel made such a monetary contribution. Counsel for the parties received notice of intent to file this brief as set forth in the accompanying motion for leave to file the amicus brief.

bound to enter the fray—to protect and serve. As Officers Bauer and Pobuda got closer to aiding the victim struck by a baseball bat, they were met with another potential danger: Ethan Daniel Marks, a six-foot, two-hundred-pound man of unknown capabilities or intent.

The law requires courts to keep this hostile environment top of mind when resolving Fourth Amendment matters like the instant case. The Eighth Circuit failed to do so when it held that Officer Bauer had unreasonably seized Marks and that Officer Bauer was not entitled to qualified immunity because the law clearly established his conduct was unlawful at the time of the incident. The Eighth Circuit did so in a split decision that relied on cases with factually dissimilar circumstances and ignored this Court's decision in *Torres v Madrid*, 592 U.S. 306 (2021).

IMLA is deeply invested in this case because the Eighth Circuit's erroneous holding concerning what is a seizure and what constitutes "clearly established law" generates uncertainty for IMLA's members on what legal protections they can rely upon. Now, Eighth Circuit district courts must conclude that police officers seize someone every time force is used, regardless of the officer's intent. Yet, intent matters for police officers in the Eleventh Circuit and elsewhere in the nation, as mandated by *Torres*. Moreover, the Eighth Circuit has eroded the "clearly established law" standard in qualified immunity cases, now allowing district courts to toss aside the protection when a plaintiff can cobble together a few helpful cases that involve the same broad category of force used—in this case, the shooting of a potentially lethal projectile. This Court should not tolerate such disparate application of the law as applied to this

nation's police officers, nor should the Court ignore this egregious departure from precedent.

Law enforcement officers and the municipalities that hire, insure, and indemnify them depend on the courts to appropriately apply the doctrine of qualified immunity to protect them from the burdens of personal-liability lawsuits. If the Eighth Circuit's decision is left undisturbed, then the message to police officers is clear: "even in the absence of a clearly controlling legal rule, think twice before acting, regardless of whether your own life or [another's] is at stake, because a court may step in later and second-guess your decision." *Marks v. Bauer*, 107 F.4th 840, 854 (8th Cir. 2024) (Stras. J., dissenting) (internal citation and quotation omitted). Local governments are already facing great difficulty in recruiting suitable candidates for law enforcement, as well as immense staffing shortages and dwindling insurance options. Against this backdrop, the Eighth Circuit's decision puts the public at great risk by dissuading officers from swiftly responding to the most critical calls for assistance and adding pressure to municipalities' already strained resources.

IMLA respectfully submits this brief to emphasize the significant negative impact that the decision below will have on local governments and to encourage this Court to either summarily reverse or grant certiorari.

Summary of the Argument

This Court's test set in *Torres v Madrid*, 592 U.S. 306 (2021), sought to provide a workable and just standard for courts to use in determining whether police seize individuals by force in the Fourth

Amendment context. Unfortunately, the question as to when an individual is seized under the rule articulated in *Torres* has spawned confusion in the lower courts. Here, the *Marks* court incorrectly chose to disregard *Torres*, instead applying an erroneous and unforgiving per se rule that puts police officers, the municipalities that employ them, and the public, at unacceptable risk. Without providing clarity, police officers will hesitate, or may not act at all, in situations where they have courageously proceeded in the past. Situations ranging from those involving active shooters to those involving people suffering from mental health crises. Because the *Marks* decision promotes a per se rule, police officers are left with significant uncertainty in what amount of force they may use to protect and serve the public—uncertainty likely to lead to inaction and harm.

The Eighth Circuit's decision also unacceptably erodes the tried-and-true guardrails of this Court's qualified immunity doctrine. This Court's qualified immunity jurisprudence strikes the correct balance between giving police officers the appropriate latitude needed to respond to dangerous and uncertain situations while ensuring that egregious civil rights violations do not go unremedied. Yet, lower courts seemingly have no hesitation in deviating from this Court's clear standards. The Eighth Circuit's decision below is but one more example where lower courts have denied a law enforcement officer immunity for his split-second decision to protect himself and others when confronted with a serious threat. The effects of decisions that reduce qualified immunity protections are being felt across the country—and the trajectory is alarming.

Being a police officer is a stressful and dangerous job, but a vital one. Recruiting and retaining qualified personnel willing to bear the risks and requirements of this critical role is not easy. Today, police departments around the country are facing severe staffing shortages. Without adequate qualified immunity protections, police departments will continue to struggle to recruit and retain qualified officers. That will only exacerbate existing issues and place the public unnecessarily at risk.

This Court should grant review and either reverse on the merits or summarily reverse, quelling the Eighth Circuit's attempt to disregard *Torres* and to undermine the firmly established precedent that guides the qualified immunity doctrine.

Argument

I. The Lack of Clarity around the Application of *Torres* Will Result in Injured Police Officers and A Less Safe Public

This Court was unequivocal when it stressed that the central element of a Fourth Amendment seizure analysis was "whether the challenged conduct *objectively* manifests an intent to restrain." *Torres*, 592 U.S. at 317. However, as the petition notes, lower courts are divided on its application when force is used "for some other purpose" than to restrain an individual. *See* Pet. p. 16-22. Local governments and the law enforcement officers they employ need clarity in this important and recurring area of the law.

The *Marks* holding does what the *Torres* dissent feared: it disregards the nuance of the objective

standard paired with the "mere touch" rule for determining whether a seizure occurs. The Eighth Circuit has set a minority rule of law that "a Fourth Amendment 'seizure' takes place whenever an officer 'merely touches' a suspect," with no regard for the intent of the seizure. *Torres*, 592 U.S. at 325 (Gorsuch, J., dissenting).

The January 6 attack on the U.S. Capitol serves as but one example of how the *Marks* holding puts police officers and the public at risk. The events and damage wrought on the Capitol on January 6 are well-understood and need not be repeated. Following the January 6 attack, the U.S. Government Accountability Office (GAO) surveyed officers deployed during the attack. The GAO found that almost 20% of officers "felt discouraged or hesitant to use force because of a fear of disciplinary actions." U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104829, CAPITOL ATTACK: ADDITIONAL ACTIONS NEEDED TO BETTER PREPARE CAPITOL POLICE OFFICERS FOR VIOLENT DEMONSTRATIONS i to ii (2022) [hereinafter JANUARY 6 REPORT].

The Eighth Circuit's opinion has the potential to bring policing to a standstill. This Court has recognized that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The *Marks* holding injects dangerous hesitation into those split-second decisions that police officers must make. One result of such hesitation is the havoc experienced at the U.S. Capitol and the deaths of multiple people, including a police officer. Such hesitation could have resulted in serious injury

to Officer Pobuda but for the actions of Officer Bauer. And such hesitation could result in the injury or death of the next person police try to aid who is trapped in the middle of a hostile crowd that once resembled a peaceful protest.

II. The Lower Court's Loosening of the "Clearly Established Law" Standard Erodes the Qualified Immunity Doctrine and Puts the Public and Municipal Governments in Jeopardy

The Eighth Circuit's disregard for *Torres* and its mandated consideration of a police officer's objective intent is alone serious cause for granting Officer Bauer's petition. But *Marks*'s holding makes the public more vulnerable with a one-two punch. Its overbroad rule transforms most physical interactions police have with the public into seizures *and* subjects over 37,000 police officers in the Eighth Circuit to liability using a less scrutinizing qualified immunity standard inconsistent with Supreme Court precedent.[2] Allowing *Marks* to remain undisturbed puts individual police officers, their families, the municipalities they serve, and the public at unacceptable risk.

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[2] *Police Officers by State 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/police-officers-by-state (last visited December 31, 2024).

1. Without qualified immunity, officers face personal and financial impediments that undermine public safety

America's police officers put their lives on the line every day. They are willing to imperil their physical safety for the protection of us all, routinely facing the possibility of grave harm or even death. Restricting qualified immunity imposes enormous financial and personal costs that put these officers and their families at risk. The prospect of protracted litigation and personal financial liability makes the commitment to serve in law enforcement ever more problematic.

Appropriate qualified immunity protection is essential to modern law enforcement. The doctrine of qualified immunity "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity is designed to protect officials from the burden of litigation unless their actions in the line of duty violate "clearly established" law. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). In other words, unless a government official "knowingly violate[s] the law," or acts in a way that is "plainly incompetent," he is entitled to qualified immunity and a suit against him should be promptly dismissed. *Stanton v. Sims*, 571 U.S. 3, 6 (2013).

When qualified immunity is denied, officers must defend themselves in court, which is often prohibitively expensive. The median cost of being a

defendant in federal court is nearly $30,000. *See* Emery G. Lee III, *National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* 37 (2009) (finding the median cost to be $20,000, nearly $30,000 once adjusted for inflation). When extensive discovery is involved, the median cost triples to $87,000. *Ibid.* (adjusted for inflation). And those numbers only escalate in cases alleging police misconduct. The median annual total cost for payouts, legal defense, and settlements in police officer cases was *$12 million per city* for twenty major American cities during fiscal years 2014–2016. Michael Maciag, *City Lawsuit Costs Report*, GOVERNING (Oct. 27, 2016), https://www.governing.com/archive/city-lawsuit-legal-costs-financial-data.html. In stark comparison, the median annual salary of police officers is only $72,280. *Occupational Employment and Wages, May 2023: 33-3051 Police and Sheriff's Patrol Officers*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/oes/current/oes333051.htm (last visited Jan.8, 2025).

It used to be that law enforcement officers who were sued for their alleged violations while fulfilling their duties could depend on their employers to indemnify them. No more. Some municipalities have stopped indemnifying officers altogether. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y. UNIV. L. REV. 885, 906 (2014); *see also* Whitney K. Novak, CONG. RSCH. SERV., LSB10492, *Policing the Police: Qualified Immunity and Considerations for Congress* 4 (updated Feb. 21, 2023). Other local governments withhold indemnification on a case-by-case basis, forcing officers to put their lives on the line without any certainty of financial protection. Schwartz, *supra*, at 906; Teresa E. Ravenell & Armando Brigandi, *The*

Blurred Blue Line, 62 VILL. L. REV. 839, 847 n.45 (2017). And in some states, legislators have sought to force officers to shoulder the cost of their own insurance. S. 8676, 2019-2020 Leg. Sess. (N.Y. 2019); H.R. 440, 2021-2022 Leg., 92d Sess. (Minn. 2020); H.R. 1808, 88th Leg. (Tex. 2023). With law enforcement salaries already low, these additional costs create significant obstacles for municipalities attempting to recruit and retain qualified public safety officers.

Even when officers are the potential recipients of indemnification, they may still face the prospect of personal liability if punitive damages are imposed. And even the *threat* of punitive damages can have an immediate, real-world impact. For example, prospective borrowers must disclose all pending litigation on Fannie Mae's Uniform Residential Loan Application. *See Uniform Residential Loan Application* § 5b.I, FANNIE MAE (2021), https://singlefamily.fanniemae.com/media/7896/display. So, a police officer named as a defendant in even a meritless lawsuit may have to disclose the possibility of liability for exemplary damages just to try to get a home or car loan. Officers might also have to surrender their personal privacy and disclose their personal finances during discovery, as such information can be relevant to a punitive damage assessment. *See, e.g.*, *P. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Another likely result of the dismantling of qualified immunity is a decrease in public safety. As this Court has recognized, the threat of personal liability "induce[s]" officers "to act with an excess of caution." *Forrester v. White*, 484 U.S. 219, 223 (1988). That excess of caution has a tangible effect. The January 6 attack discussed above is a salient example.

But possibly the most harmful effects are felt for the victims of everyday crimes. The longer it takes officers to respond to a situation, the more likely a victim is to get hurt. *See* Gregory DeAngelo et al., *Police Response Time and Injury Outcomes*, 133 ECON. J. 2147, 2147 (2023). One need look no further than recent mass shootings to recognize the need for rapid law enforcement response. Yet, officers worried about personal liability might (unconsciously or even consciously) fail to act with the swiftness and decisiveness necessary to protect the public. *See* Daniel L. Schofield, *Personal Liability: The Qualified Immunity Defense*, 59 FBI L. ENF'T BULL. 26, 26 (1990). Under the fear of liability, officers "may become overly timid or indecisive and fail to arrest or search." *Ibid.* Police departments have also grown hesitant to respond to potential suicide situations, fearing allegations that their presence caused "suicide by cop," resulting in liability. Anita Chabria, *Police Fear "Suicide by Cop" cases. So they've stopped responding to some calls,* L.A. TIMES (Aug. 9, 2019), https://www.latimes.com/california/story/2019-08-09/suicide-calls-california-cops-stopped-responding. These scenarios are but some of the reasons that eroding qualified immunity protections leads to less safety for the entire public.

In addition, every minute an officer is distracted by the litigation process is a minute the officer cannot spend doing the job. America's police force is already understaffed and overworked. *See* Bryan Vila, *Sleep Deprivation: What Does It Mean for Public Safety Officers?* 262 NAT'L INST. JUST. J. 26, 27 (2009). When officers are required to produce documents; respond to discovery requests; prepare, attend, and participate in depositions; assist counsel

in developing case strategies; and prepare for and attend trial, these officers are necessarily not doing what they were hired to do: protect the public. Decreasing qualified immunity protections leads directly to this result.

This Court has correctly recognized the need for a balanced system of qualified immunity. Without it, officers, municipalities, the general public, and even the victims of alleged police misconduct are left with an unsustainable system. The Eighth Circuit's decision to deviate from the balance this Court has struck will have far-reaching consequences, ultimately placing everyone at risk.

2. Eroding qualified immunity may lead to staffing shortages, endangering our communities

Without qualified immunity, individuals who are otherwise able to serve as police officers may not raise their hands for the job. Instead, only the "most resolute or the most irresponsible" will don the uniform. *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998). Accordingly, this Court's precedent promotes rather than deters "able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). As circuit courts have begun deviating from that balance, as the Eighth Circuit did in the decision below, the deterrent effect of personal liability is on full display.

Law enforcement hiring is down throughout the country. Ryan Young et al., *'We Need Them Desperately': US Police Departments Struggle with Critical Staffing Shortages*, CNN (July 20, 2022), https://www.cnn.com/2022/07/19/us/police-staffing-

shortagesrecruitment/index.html. The average national police officer-to-resident ratio is 2.4 officers per 1,000 residents—Minneapolis's ratio is 1.4 per 1,000 residents, the second lowest in the country. Liz Sawyer & Jeff Hargarten, *Minneapolis police staffing levels reach historic lows amid struggle for recruitment, retention*, MINN. STAR TRIBUNE, (Sept. 16, 2023), https://www.startribune.com/minneapolis-police-staffing-levels-reach-historic-lows-amid-struggle-for-recruitment-retention/600305214. And for every one Minneapolis police officers hired, two retire. Deena Winter, *Minneapolis police overtime expected to hit $26 million this year*, MINN. STAR TRIBUNE, (Oct. 25, 2024), https://www.startribune.com/minneapolis-police-overtime-expected-to-hit-26-million-this-year/601169561. This phenomenon is endemic in the Eighth Circuit and throughout the nation. More than 25 percent of budgeted officer positions in the St. Louis Police Department remain vacant. Laura Barczewski, *St. Louis and St. Louis County police discuss staffing shortages*, NBC 5 ST. LOUIS, (Aug. 2, 2024), https://www.ksdk.com/article/news/local/st-louis-and-county-police-discuss-staffing-shortages/63-289bcbfa-56eb-4365-a596-7bfb56ebb9d8. Dallas is short 550 officers, Los Angeles needs an additional 533, and Baltimore is searching for another 532 to fill its ranks. Young, *supra*; Eric Leonard & Andrew Blankstein, *Fewest Cops in a Generation: LAPD Shrinks Below 9,000 Officers*, NBC 4 L.A. (Aug. 8, 2023), https://www.nbclosangeles.com/investigations/lapd-staffing-levels-employement-la-police/3201372; Rebecca Pryor, *Baltimore Police Turn to 'Drastic Measures' Amid Severe Staffing Shortages*, FOX 28 SAVANNAH (Aug. 2, 2023), https://fox28savannah.com/

news/nation-world/baltimore-police-turn-to-drastic-measures-amid-severe-staffing-shortages-high-crime-rates-patrol-officers-baltimore-city-police-department-understaffed-districts-gun-violence-juvenile-crime. In Washington, D.C., the "Metropolitan Police Department hasn't been this small in about 50 years," with hundreds of officers departing just in the last three years. Ted Oberg, *Chief: DC Police Staffing at Its Lowest in Decades*, NBC 4 D.C. (Feb. 23, 2023), https://www.nbcwashington.com/news/local/chief-dc-police-staffing-at-its-lowest-in-decades/3286158.

The hiring tide appears to be turning for medium and small departments, but large cities have yet to overcome these shortages. Claudia Lauer, AP, (April 28, 2024), *Police officer hiring in US increases in 2023 after years of decline, survey shows*, https://apnews.com/article/police-staffing-increases-2023-shortage-7e39156a80de2d75e22bd554adc8f887. Decisions like *Marks* are likely to stagnate the improvements in police hiring over the last several years.

These staffing shortages put the public at risk. Adequate numbers of officers lead to quicker response times and correlate with more successful prosecutions. Jordi Blanes I. Vidal & Tom Kirchmaier, *The Effect of Police Response Time on Crime Clearance Rates*, 85 REV. ECON. STUDS. 855, 855 (2018). They also make a significant difference in domestic violence situations, particularly when the victim is a woman. DeAngelo, *supra*, at 2147. It comes as no surprise then, that recent staffing shortages have directly coincided with an increase in violent crime. *See* Ivana Saric, *Police Departments Struggle with Staffing Shortages*, AXIOS (Aug. 8, 2022), https://www.axios.com/2022/08/08/

police-department-staff-shortage.

The effect on local communities is noticeable. Alexandria, Virginia, responded to a 10% drop in its police force by no longer sending officers to a scene if it appears there is no imminent danger to the public. Press Release, City of Alexandria, *Alexandria Police Department Makes Changes to Service Delivery* (June 2, 2022), https://www.alexandriava.gov/news-apd/2022-06-02/apd-makes-changes-to-service-delivery. Seattle, Washington has 100 fewer detectives working on sexual assault cases, meaning some reports simply cannot be investigated at all. Deedee Sun, *Staffing Shortages Take Toll on Sexual Assault Unit at Seattle Police Department*, KIRO 7 (June 1, 2022), https://www.kiro7.com/news/local/staffing-shortages-take-toll-sexual-assault-unit-seattle-police-department/NIN75P5HARF2BPY7U2UUTA5PDY. In Tulsa, Oklahoma, a city with a violent crime rate twice the national average, there are 160 vacant officer jobs that need filling. Daphne Duret & Weihua Li, *It's Not Just a Police Problem, Americans Are Opting Out of Government Jobs*, MARSHALL PROJ. (Jan. 21, 2023), https://www.themarshallproject.org/2023/01/21/police-hiring-government-jobs-decline. And in Minneapolis, Minnesota, the police "department is frequently unable to meet minimum staffing goals for each shift, which often results in the decision to leave front desks vacant at local precincts." Liz Sawyer & Jeff Hargarten, *Minneapolis Police Staff Levels Hit Historic Lows Amid Struggle for Recruitment, Retention*, MINN. STAR TRIBUNE, (Sept. 16, 2023), https://www.startribune.com/minneapolis-police-staffing-levels-reach-historic-lows-amid-struggle-for-recruitment-retention/600305214..

These staffing shortages contribute to increasing public distrust of law enforcement. Americans' confidence in the police has declined significantly in recent years, bringing with it "serious consequences." *Race, Trust and Police Legitimacy*, NAT'L INST. JUST. (Jan. 9, 2013), https://nij.ojp.gov/topics/articles/race-trust-and-police-legitimacy#; Jeffrey M. Jones, https://nij.ojp.gov/topics/articles/race-trust-and-police-legitimacy; *Confidence in U.S. Institutions Down; Average at New Low*, GALLUP (Jul. 5, 2022), https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx. Public distrust "undermines the legitimacy of law enforcement, and without legitimacy police lose their ability and authority to function effectively." NAT'L INST. JUST., *supra*. And because public satisfaction with the police depends on rapid response time, staffing shortages will only further damage the public's current negative perception of law enforcement. J.H. Auten, *Response Time – What's the Rush?*, 11 L. ORDER 24, 24-25 (1981); *see also* DeAngelo, *supra*, at 2147-48 (2023) (noting that response time is often employed to measure police department effectiveness, leading to praise or criticism). These two factors together form a vicious cycle. The staffing shortages amplify the lack of public confidence, which in turn further dissuades potential recruits from applying, which in turn causes greater staffing shortages, and so on. *See* Jaewon Jung, *Negative Public Perception Has Ripple Effect on Local Law Enforcement Agencies*, ABC 9 EUGENE (Feb. 19, 2022), https://www.kezi.com/news/negative-public-perception-has-ripple-effect-on-local-law-

enforcement-agencies/article_dfbcc65a-9127-11ec-9ecc-bb4afaf6bee4.html.

One of the specific concerns animating this Court's qualified immunity jurisprudence is ensuring that capable candidates continue serving in important government positions. *See Harlow*, 457 U.S. at 814. The erosion of qualified immunity protections in recent years has borne out the wisdom of that concern. Without firm protection from personal liability, individuals are leaving law enforcement in droves or never signing up in the first place. These staffing shortages have correlated with an increase in crime throughout the country, leaving America less safe.

3. Limiting qualified immunity diminishes local governments' ability to serve their communities

Many states require local governments to maintain a balanced budget. *See, e.g.*, Colo. Rev. Stat. § 29-1-103(2) (2023); Ga. Code. § 36-81-3 (2016); Ky. Const. § 157B; N.C. Gen. Stat. § 159-8(a) (2023); Or. Rev. Stat. § 294.388 (2023); Tenn. Code § 9-21-403 (2023); Wash. Rev. Code § 35.33.075 (2023). At the same time, "states have granted local governments very limited revenue-generating authority, even as compared to other home rule powers." Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 296 (2016). And on top of that, local governments frequently find themselves subject to unfunded mandates from both state and federal governments. *See* Joel Griffith, NAT'L ASS'N OF CNTYS., *Doing More with Less: State Revenue Limitations and Mandates on County Finances* 1

(2016). A sudden increase in legal costs, therefore, poses a significant obstacle to municipalities that are trying to supply necessary services to their constituents while operating under tight budgetary constraints.

Against this backdrop, police departments are being asked to do more with less. While already struggling to retain officers and fill depleted ranks, departments face threats of defunding and, simultaneously, demands to handle the nuances of a broad range of societal issues—homelessness, mental illness, drug addiction, and beyond—in a more humane and compassionate manner. The erosion of qualified immunity diverts the scarce financial resources of police departments away from addressing societal ills to defending against personal liability lawsuits.

A "driving force" behind the creation of the qualified immunity doctrine was a desire to ensure that "insubstantial claims against government officials [are] resolved prior to discovery" so that officers can focus on serving and protecting the public. *Pearson*, 555 U.S. at 232; *see also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (explaining that qualified immunity protects officials from the "demands customarily imposed upon those defending a long drawn out lawsuit"). Yet, with the erosion of qualified immunity, the litigation burdens imposed on officers and the localities that employ them are discouraging the assertion of meritorious defenses. "[M]ore than half" of all cases alleging police misconduct are settled out of court." Larry K. Gaine & Victor E. Kappeler, *Policing in America* 346-47 (9th ed. 2021). And settlement amounts are growing dramatically. Billions of dollars are paid to settle police misconduct

cases each year. *See* Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL STREET J. (July 15, 2015), https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834. Just in the first half of 2024, New York City spent $82 million to settle police related lawsuits. *NYPD Misconduct Lawsuits Have Cost Taxpayers Over $82 Million in 2024*, L. AID SOC., https://legalaidnyc.org/news/nypd-misconduct-lawsuits-82-million-2024. Chicago alone spent $50.1 million in 2021 to settle lawsuits against its police department. CITY OF CHICAGO DEP'T OF LAW, *City of Chicago's Report on Chicago Police Department 2021 Litigation* 7 (2022). A Washington Post investigation found more than $3.2 billion spent over the past decade to resolve nearly 40,000 claims at 25 of the nation's largest police and sheriffs' departments. Keith L. Alexander et al., *The Hidden Billion-Dollar Cost of Repeated Police Misconduct*, WASH. POST (Mar. 9, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements.

With defense costs gobbling up operating funds, local governments have no choice but to cut services and reduce staff. That means fewer teachers, firefighters, sanitation workers, and police officers: a dollar spent on an insurance premium or settlement payout is a dollar not spent on training, equipment, or schools. And while local governments of all sizes feel the impact of qualified immunity's erosion, smaller jurisdictions are impacted disproportionately because they have the least give in their budgets even though the cost of defending against a lawsuit is essentially the same as for a larger jurisdiction. Ultimately, the "resulting financial loss" from the costs of litigation, as

well as the lack of services and safety, is "borne by all the taxpayers" of the municipality. *Owen v. City of Independence*, 445 U.S. 622, 655 (1980).

These rising costs have rendered public law enforcement services almost financially infeasible. As lawsuit settlement costs have increased, so have insurance premiums. Some departments find it impossible to get insurance at all and are actually forced to cease operating. *See* Kimberly Kindy, *Insurers Force Change on Police Departments Long Resistant to It*, WASH. POST (Sept. 14, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-insurance-settlements-reform. Their communities are left relying on state troopers or the magnanimity of neighboring departments.

Another dangerous side effect of qualified immunity's decline is the active role insurance companies now play in shaping police department policies. *Ibid.* Insurance companies have, for example, mandated that some departments limit their chase rules, making it more difficult to catch speeding drivers. *Ibid.* Jurisdictions stuck with such policies experience an uptick in excessive speed violations, and there is nothing they can do about it. *Ibid.*

As insurance companies gain more control over department policies, officers may soon be forced to stop responding to domestic violence and suicide calls—high-risk situations for insurers. An insurance company's goal "is to have no injuries or accidents" even though "that isn't realistic, and that isn't policing." *Ibid.* Effective law enforcement requires officers to take risks and do dangerous things. But that very conduct hurts insurance profits.

If the threat of liability may induce government officials "to act with an excess of caution or otherwise to skew their decisions," *Forrester*, 484 U.S. at 223, then what sort of incentives does it place on insurers whose only goal is to minimize payouts? This Court has described law enforcement as "fulfill[ing] a most fundamental obligation of government to its constituency." *Foley v. Connelie*, 435 U.S. 291, 297 (1978). Insurers do not necessarily share that interest.

Ultimately, the rise of insurance companies' role in department policy underscores this Court's concern that exposing government officials to the same legal standards as ordinary citizens "may detract from the rule of law instead of contributing to it." *Forrester*, 484 U.S. at 223. When lives are at stake, the cost to local government should not play a role in deciding whether and how to respond. But if lower courts can flaunt this Court's existing qualified immunity precedent, payouts will only continue to increase. Local governments will be left with even fewer resources to provide for their communities, and insurance companies will increase their control over department policies. Nothing about that scenario protects America's communities.

III. This Case Demonstrates the Need to Clarify *Torres* and Uphold This Court's Qualified Immunity Doctrine in Place for Over Forty Years

The majority in *Marks* portrays the law in a Norman Rockwell-esque manner which provides a poignant, straightforward, and easy-to-interpret

framework for determining whether it was "clearly established" that Officer Bauer acted unlawfully. But the relevant law is not so clear and more closely resembles the work of Jackson Pollock—an abstract representation requiring careful discernment of the swirls of color on the canvass in hopes of finding some unifying theme.

The qualified immunity doctrine, as currently articulated by this Court, strikes the proper balance between protecting the public from egregious misconduct while also providing law enforcement sufficient space to operate without fear of financial devastation. Under its current scope, officers are supposed to have "breathing room to make reasonable but mistaken judgments." *Pearson*, 555 U.S. at 231. Only those who "knowingly violate the law" or act in a way that is "plainly incompetent" are supposed to face the enormous burden of litigation. *Stanton*, 134 S. Ct. at 5. "[A]voiding unwarranted timidity on the part of those engaged in the public's business … [e]nsur[es] that those who serve government do so with the decisiveness and the judgment required by the public good." *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012).

The facts of this case make the decision's consequences particularly concerning. Police officers ordinarily do not have the time to "err on the side of caution." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). In a high-intensity situation where police officers are outnumbered and surrounded, one of the officers has been attacked, and there is an injured victim nearby, the need for a quick reaction is especially critical. And when police are slow to respond to them, people die. *See, e.g.*, JANUARY 6 REPORT i to ii; Jaclyn Diaz, *The Tragic History of Police Responding Too Late to Active Shooters*, NPR (June 6, 2022),

https://www.npr.org/2022/06/06/1102668326/uvalde-police-response-school-shootings. Officers worried about incurring personal liability for the slightest misstep will only continue to act hesitantly in these volatile situations.

In this case, Officer Bauer was confronted with a "six-foot-tall, 200-pound man" who had just battled Officer Pobuda. *Marks*, 107 F.4th at 852. There was no reason apparent to Officer Bauer why Marks attacked Officer Pobuda. And corrugated pipe was near Marks—pipe that could have been used as a weapon against Officer Pobuda or nearby people. *See* Petition for Writ of Certiorari, *Bauer v. Marks*, (No. 24-616), at 7. Officer Bauer did not sit back and leave his fellow officer in danger. He acted assertively and discharged his duty to keep the public and his fellow officers safe. All in a fraction of a second. *See ibid.*

Even if that decision was mistaken, it was undoubtedly "reasonable." *Pearson*, 555 U.S. at 231. Officer Bauer, and the taxpaying residents of the city he agreed to protect, should not be punished for a split-second judgment call where innocent lives were at stake. But that is exactly the result of the Eighth Circuit's decision. In its wake, the public is left at greater risk than ever before.

Qualified immunity seeks to avoid having court decisions affect "numerous practices that have long been considered permissible exercises of the police power." *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. 302, 335 (2002). If the Eighth Circuit's decision is allowed to stand, that is exactly what will happen. Officers will be disincentivized from quickly responding to any incident where they might have to use force. Incidents in large crowds of people. Incidents where other police officers are in danger.

Incidents filled with highly charged and emotional people. The precise situations in which rapid intervention is most critical. Financial considerations will make officers think twice before getting involved in the exact situations where they are most desperately needed. With the multitude of deleterious consequences that will undoubtedly unfold should this decision stand, this Court should grant review and either summarily reverse or hear this case on its merits.

Conclusion

This Court should grant review and reverse.
Respectfully submitted,

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