No. 21-57

In The
Supreme Court of the United States

LEVI FRASIER,

Petitioner,

v.

CHRISTOPHER EVANS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF LEGAL SCHOLARS OF QUALIFIED IMMUNITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ALAN K. CHEN
Counsel of Record
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 E. Evans Avenue
Denver, Colorado 80208
303-871-6283
achen@law.du.edu

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE *AMICI CURIAE*

Amici curiae, listed below, are scholars at universities across the United States with expertise in the law of qualified immunity and police accountability and reform.[1] *Amici* have previously advocated for a comprehensive reconsideration of the standards governing qualified immunity. In this case, they argue that the Court should clarify an important component of the doctrine's "clearly established law" standard so that the standard is better aligned with the policy goals underlying the doctrine and promotes both the rule of law and the aims of 42 U.S.C. § 1983.

Amici curiae are:[2]

Karen M. Blum
Professor Emerita and Research Professor of Law
Suffolk University Law School

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. In compliance with Rule 37.2, *amici* notified counsel of record for all parties of their intention to file this brief at least ten days prior to the due date. Petitioner Levi Frasier filed a blanket consent to the filing of all amicus briefs in support of certiorari on July 21, 2021. Through their counsel, all respondents have provided written consent to the filing of this brief.

[2] Titles and institutions are listed for identification purposes only. The listing of these affiliations does not imply any endorsement by those institutions of the views expressed in this brief.

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished
Professor of Law
University of California, Berkeley School of Law

Alan K. Chen
Thompson G. Marsh Law Alumni Professor
University of Denver Sturm College of Law

Barry Friedman
Jacob D. Fuchsberg Professor of Law
NYU School of Law

Sheldon Nahmod
University Distinguished Professor Emeritus
IIT Chicago-Kent College of Law

John F. Preis
Professor of Law & Associate Dean
for Academic Affairs
University of Richmond School of Law

David Rudovsky
Senior Fellow
University of Pennsylvania School of Law

Joanna C. Schwartz
Professor of Law
UCLA School of Law

Seth W. Stoughton
Associate Professor of Law
Associate Professor (Affiliate) of Criminology
& Criminal Justice
University of South Carolina

INTRODUCTION AND SUMMARY OF ARGUMENT

Protecting Americans against abuses of government power was a critical concern of the Founding generation—reflected in the Bill of Rights. In the aftermath of the Civil War, and the adoption of additional constitutional amendments, Congress enacted 42 U.S.C. § 1983 to establish a remedy to vindicate those constitutional protections.

Nearly a century later, this Court recognized a qualified immunity defense to Section 1983 damages claims, holding that Congress's creation of the cause of action should be construed to incorporate the good-faith defense that, the Court stated, was then available to government officials at common law. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967). Later, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held government officials immune "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 818. The Court further explained in *Harlow* that officials are entitled to qualified immunity only when they "*neither knew nor should have known* of the relevant legal standard." *Id*. at 819 (emphasis added).

In recent years, the qualified immunity doctrine has been subject to extensive scholarly critiques based in part on historical and empirical research that suggests that the doctrine is neither properly based in the common law nor advances any of the policy goals it is

said to serve.[3] Based on this research, *amici* have submitted briefs to this Court in several cases calling for a comprehensive reconsideration of qualified immunity.[4]

Notwithstanding the substantial problems associated with qualified immunity, this Court can implement meaningful and valuable incremental reforms without entirely revisiting the doctrine. It can promote greater accountability for police by confining the scope of qualified immunity to better align with its policy goals.[5] An important step in reforming qualified

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[3] *See*, *e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 55 (2018); Pfander, James E., Alexander A. Reinert, Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. 561 (2020); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912 (2014); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1811-13 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 60 (2017).

[4] Several current and former Members of this Court also have questioned the current qualified immunity standard. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871-72 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Wyatt v. Cole*, 504 U.S. 158, 171-72 (1992) (Kennedy, J., joined by Scalia, J., concurring); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (Sotomayor, J., joined by Ginsburg, J., dissenting). Indeed, Justice Thomas has stated that "[i]n an appropriate case," the Court "should reconsider our qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1872. Similar sentiments have been expressed by a number of lower court judges.

[5] For example, just last month, Justice Thomas suggested the need to reconsider whether the identical qualified immunity standard ought to apply to all public officials without regard to the scope of their responsibilities. *Hoggard v. Rhodes*, 141 S. Ct.

immunity would be for the Court to define the "clearly established law" standard more precisely. This case presents an opportunity to do so.

In this case, the Tenth Circuit granted qualified immunity to the Respondent police officers ("officers") who knew and should have known their conduct violated the law. At the time the officers retaliated against Levi Frasier for filming them engaged in an arrest and using force against a criminal suspect, not only had four federal circuits already declared that citizens have a First Amendment right to record officers who are carrying out their duties in public, but also the Denver Police Department had provided these officers with repeated trainings informing them that such a right existed. Nor did these admonitions fall on deaf ears. As the district court found, "each of the defendant officers acknowledged at their respective depositions that *they understood the First Amendment protected citizens' right to record them*." (Pet. App. 66a) (emphasis added).

Nonetheless, the Tenth Circuit declared that even when police training is consistent with the consensus of existing case law, such training is categorically irrelevant to the clearly established law inquiry. It held that "[j]udicial decisions are the only valid interpretive source of the content of clearly established law; *whatever training the officers received concerning the First Amendment was irrelevant* to the

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2421 (2021) (Statement of Justice Thomas respecting the denial of certiorari).

clearly-established-law inquiry." (Pet. App. 20a) (emphasis added). Furthermore, the court refused to consider the officers' own admissions that they knew that the First Amendment protected the right to record because it wrongly concluded that qualified immunity can never turn on whether an officer subjectively believed that his conduct violated the Constitution. (Pet. App. 22a).

These rulings are inconsistent with this Court's own practices in applying the clearly established law standard, fail to further the policy goals underlying qualified immunity, and undermine the accountability of police who knowingly violate the Constitution.

ARGUMENT

This Court Should Clarify That Courts May Consider Police Department Policies and Training Materials as Well as Officers' Actual Knowledge of Existing Constitutional Rights in Adjudicating the Qualified Immunity Defense.

In the thirty-nine years since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court has never definitively stated what sources may be relied upon in applying the "clearly established law" standard. This case presents the Court with an opportunity to focus on a discrete but important element of the qualified immunity doctrine and to prevent its extension to officers who knowingly violate the Constitution. A decision clarifying

what sources are relevant to determining whether a constitutional right has been "clearly established" would be welcomed by lower courts, civil rights plaintiffs, local police departments, and law enforcement officers alike.

A. Both This Court and the Lower Courts Have Repeatedly Considered Police Training and Policies in Determining Whether the Law Is Clearly Established.

The Tenth Circuit's decision categorically barring consideration of police policies and training under qualified immunity analysis conflicts with the actual practice of this Court and many lower courts, which have on multiple occasions considered such policies and training in assessing whether the law is clearly established. These prior decisions expressly indicate that police training materials and departmental policies are relevant to the objective qualified immunity inquiry—that is, to whether a reasonable officer would have known that his conduct violated the Constitution.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), for example, this Court rejected the qualified immunity defense asserted by state prison guards who ordered a prisoner to remove his shirt, bound him to a hitching post for seven hours in the direct sun, gave him no bathroom breaks, and provided him with water only once or twice, while taunting him about his thirst. *Id*. at 734-35. This Court's decision in *Hope* explicitly held that the Eighth Amendment rights at issue in that case

were clearly established "in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a [United States Department of Justice] report informing the ADOC of the constitutional infirmity in its use of the hitching post." *Id*. at 741-42; *see also id*. at 744 (explaining that the DOJ report provided to the ADOC "buttressed" its conclusion that reasonable officers would have known their practices violated the Constitution).

Indeed, the Court held that the correctional officers in *Hope* were on notice even though nothing in that case's record indicated "that the DOJ's views were communicated to [the defendants]." *Id*. at 745. In contrast, here it is undisputed that the officers received training on citizens' First Amendment right to record the police and understood that training because they admitted this at their depositions. (Pet. App. 66a).

Similarly, in *Groh v. Ramirez*, 540 U.S. 551 (2004), this Court examined a constitutional tort claim against an agent of the federal Bureau of Alcohol, Tobacco, and Firearms[6] who executed a search warrant that was "plainly invalid" because it failed to state with particularity a description of the evidence sought. *Id*. at 557. In rejecting the agent's qualified immunity defense, this Court concluded that the Fourth Amendment's

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[6] Because *Groh* involved suit against a federal officer, it was brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), rather than Section 1983. This Court has made it clear that the same qualified immunity standard applies to both Section 1983 and *Bivens* claims. *Butz v. Economou*, 438 U.S. 478, 504 (1978).

particularity requirement was clearly established and that a reasonable officer would have known that the warrant was invalid. Moreover, it observed that "*the guidelines of [the officer's] own department placed him on notice* that he might be liable for executing a manifestly invalid warrant." *Id*. at 564 (emphasis added).[7]

Police training and department guidance are particularly important where, as here, those materials are so closely in harmony with the existing case law. *See* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 Fla. L. Rev. 1773, 1824 (2016) (observing that "[u]se of force policies bear striking similarity to the constitutional proscriptions against excessive force."). Thus, consistent with what this Court and lower courts have indicated, such materials would only "*inform* the clearly established analysis" and "would only be relevant to that review when they buttress case law. . . ." *Id*. (emphasis added).

This Court has also recently considered policy guidance as relevant to the *merits* of an excessive force claim under the Fourth Amendment. In *Lombardo v. City of St. Louis*, 141 S. Ct. 2239 (2021), the Court reviewed an excessive force claim against three police officers who in responding to Nicholas Gilbert's apparent suicide attempt, subdued him by bringing him "down to a kneeling position over a concrete bench and handcuff[ing] his arms behind his back." *Id*. at 2240. After

[7] The Court has also suggested that in a case where the case law is *not* clear, it "was not unreasonable for law enforcement officers to look and rely on their [agency's] policies." *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

Gilbert resisted, other officers placed him in leg shackles and moved him to a prone position on the floor. *Id*. While three officers held down his shoulders, biceps, and legs, another officer "placed pressure on [his] back and torso" despite Gilbert's protests that "It hurts. Stop." *Id*. After fifteen minutes, Gilbert's breathing became abnormal and he stopped moving, and later died after being taken to a hospital. *Id*.

Although this Court found that there were material fact disputes requiring the case to be remanded, it found it relevant for Fourth Amendment purposes that the officers placed pressure on Gilbert's back in conflict with department policy. The evidentiary record in *Lombardo* included "well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed" because of the risk of suffocation. *Id*. at 2241. The guidance also indicated that "the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands." *Id*. This Court concluded that "[s]uch evidence, when considered alongside the duration of the restraint and the fact that Gilbert was handcuffed and leg shackled at the time, may be pertinent to the relationship between the need for the use of force and the amount of force used, the security problem at issue, and the threat—to both Gilbert and others—reasonably perceived by the officers." *Id*. *See also Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (assessing reasonableness of officer's actions "in light of his training," which put him on notice that his conduct "produced a substantial risk of death" and therefore

constituted deadly force); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir. 1998) ("[I]t may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned."); *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) ("police department guidelines . . . are relevant to the analysis of constitutionally excessive force.").

If evidence that officers were trained about and aware of departmental guidance advising them not to use a particular detention tactic is relevant to whether their behavior was reasonable for purposes of a substantive Fourth Amendment claim, surely it stands to reason that consideration of a department's policy and training is equally relevant to the reasonableness of an officers' conduct for purposes of qualified immunity.

The Tenth Circuit's decision here deeming police training materials to be categorically irrelevant to the qualified immunity analysis is also out of step with decisions in several other circuits, which have expressly evaluated training materials and other departmental guidance, in conjunction with existing case law, in determining whether the law was clearly established. These decisions have closely examined training materials as part of qualified immunity's reasonableness inquiry.

The Ninth Circuit, for example, has repeatedly held that police training materials may be considered in deciding whether officers violated clearly

established law. As it held in *Vazquez v. County of Kern*, 949 F.3d 1153 (9th Cir. 2020), "[t]raining materials and regulations are also relevant, although not dispositive, to determining whether reasonable officers would have been on notice that their conduct was unreasonable." *Id*. at 1164-65. *See also Valenzuela v. City of Anaheim*, 2021 WL 3362847, at *2 (9th Cir. Aug. 3, 2021) ("to the extent that training materials are also relevant to the inquiry . . . , the officers in this case were trained not to apply the carotid hold for longer than 30 seconds or attempt the hold more than twice within 24 hours, and they knew that an improper hold could lead to asphyxia or death."); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003) ("Anaheim's training materials are relevant not only to whether the force employed in this case was objectively unreasonable . . . but also to whether reasonable officers would have been on *notice* that the force employed was objectively unreasonable.").

Other circuits have applied the same reasoning in declaring that police training materials, in conjunction with precedent, are relevant to whether the law was clearly established. *See Raiche v. Pietroski*, 623 F.3d 30, 39 (1st Cir. 2010) ("A reasonable officer with training on the Use of Force Continuum would not have needed prior case law on point to recognize that it is unconstitutional to tackle a person who has already stopped in response to the officer's command to stop and who presents no indications of dangerousness."); *Okin v. Village of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 437 (2d Cir. 2009) ("The officers' failure to comply with

their [domestic violence] training and the relevant state law, provides strong support for the conclusion that the officers should have been aware of the wrongful character of their conduct."); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) ("Just as the Supreme Court [in *Hope v. Pelzer*] determined that the Alabama Department of Corrections Regulations and the communications between the U.S. Department of Justice and the State of Alabama put the state on notice about what constituted cruel and unusual punishment, so too here the training these Officers received alerted them to the potential danger of this particular type of excessive force.").

Finally, other circuit court decisions have found that other types of internal guidance, such as departmental policies, regulations, procedures, and other materials that officers are made aware of can affect whether they should have been on notice that about the existing constitutional constraints on their conduct. *See Irish v. Fowler*, 979 F.3d 65, 77 (1st Cir. 2020), *petition for cert. pending* (No. 20-1392) ("A lack of compliance with state law or procedure does not, *in and of itself*, establish a constitutional violation, but when an officer disregards police procedure, it bolsters the plaintiff's argument . . . that 'a reasonable officer in [the officer's] circumstances would have believed that his conduct violated the Constitution.'") (emphasis added); *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 546 (4th Cir. 2017) ("Our conclusion that a reasonable person would have known, . . . of the [constitutional] violation is buttressed by the South Carolina Department

of Correction's internal policies") (citation and internal quotation marks omitted); *Maye v. Klee*, 915 F.3d 1076, 1087 (6th Cir. 2019) ("MDOC had amended and disseminated a new policy regarding Eid that was revised in accordance with the district court's findings, which served to place its officials on notice of this change."); *Furnace v. Sullivan*, 705 F.3d 1021, 1027-28 (9th Cir. 2013) ("'[p]rison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established.'"); *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002) (same); *Barker v. Goodrich*, 649 F.3d 428, 436 (6th Cir. 2011) ("A defendant's deviation from normal practice and prison policies can also provide notice that his actions are improper.").

Furthermore, training materials are not just valuable for determining whether the law is clearly established. They are also an important vehicle for fostering police accountability by providing officers with current information about the law and for influencing their actual on-duty conduct. Following the killing of George Floyd in May 2020, and in response to multiple other incidents of unjustified police violence toward citizens (many of them documented by people exercising their right to record), the country has been engaged in intensive public discourse about comprehensive police reform. Among other reform ideas, this has led to increasing calls for enhanced and more effective police training. *See*, *e.g.*, Matt Vasilogambros, *Training Police to Step In and Prevent Another George Floyd*, PEW TRUSTS STATELINE, https://www.pewtrusts.org/en/

research-and-analysis/blogs/stateline/2020/06/05/training-police-to-step-in-and-prevent-another-george-floyd (June 5, 2020).

Professional police training can reduce the frequency of conduct that may lead to constitutional violations, promoting the interests of both citizens and local law enforcement agencies. One study has demonstrated that police academies provide an average of 86 hours of legal education, the fourth most extensive topic among all of their training. Reaves, B. A. (2016), *State and Local Law Enforcement Training Academies, 2013*, Bureau of Justice Statistics 5. In addition, peer-reviewed, empirical studies have provided evidence that tactical training can result in a reduction in officers' use of force. *See* Klinger, D. A. (2009). *Can police training affect the use of force on the streets? The Metro-Dade violence reduction field experiment*, in C. McCoy (Ed.), Holding Police Accountable (pp. 95–107). Washington, DC: Urban Institute Press; Fyfe, J. J. (1987). *The Metro-Dade police/citizen violence reduction project:* Final report. Washington, DC: Police Foundation. The Tenth Circuit's decision in this case inappropriately diminishes the importance of such professional training for law enforcement officers not only for qualified immunity purposes, but also in relation to police accountability and reform.

While police training alone cannot necessarily provide officers with notice that a constitutional right is clearly established, Cover, 68 Fla. L. Rev. at 1824, when training materials are consistent with "a robust 'consensus of cases of persuasive authority,'" *Ashcroft v.*

al-Kidd, 563 U.S. 731, 742 (2011) (citation omitted), it is difficult to draw any conclusion other than that a reasonable officer would understand that such a right governs his conduct. This Court has articulated the consensus of persuasive authority standard, *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and courts in every federal circuit have applied it in their clearly established law inquiries. *See*, *e.g.*, *Irish v. Fowler*, 979 F.3d 65, 77 (1st Cir. 2020), *petition for cert. pending* (No. 20-1392); *Sloley v. Vanbramer*, 945 F.3d 30, 40 (2d Cir. 2019); *Mammaro v. N.J. Div. of Child Prot. & Permanency*, 814 F.3d 164, 169 (3d Cir. 2016); *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538-39 (4th Cir. 2017); *Shumpert v. City of Tupelo*, 905 F.3d 310, 320 (5th Cir. 2018); *Kent v. Oakland Cnty.*, 810 F.3d 384, 395 (6th Cir. 2016); *Reed v. Palmer*, 906 F.3d 540, 547 (7th Cir. 2018); *Kelsay v. Ernst*, 933 F.3d 975, 979 (8th Cir. 2019) *cert. denied*, 140 S. Ct. 2760 (2020); *Tuuamalemalo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019); *Ullery v. Bradley*, 949 F.3d 1282, 1292 (10th Cir. 2020); *Teel v. Lozada*, 826 Fed. Appx. 880, 888 (11th Cir. 2020), *petition for cert. pending* (No. 20-1471); *Jones v. Kirchner*, 835 F.3d 74, 84 (D.C. Cir. 2016).

In the present case, the robust consensus of persuasive authority shows that there was a clearly established First Amendment right for citizens to record police officers while they are performing their duties in public places. First, by August 2014, when the incident in this case occurred, the First, Seventh, Ninth, and Eleventh Circuits had definitively declared a First

Amendment right to record the police. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000). Though not relevant to what the law was in 2014, two other circuits have subsequently recognized a First Amendment right to record. *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017).

Furthermore, the reasoning of other circuit court decisions had suggested that the recording of public officials engaged in their duties was protected under the First Amendment. *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999) (recognizing right to record local government meeting and in the hallway outside that meeting). *Blackston v. State of Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (upholding right to record state supreme court advisory committee meeting).

These lower court decisions are also firmly rooted in this Court's precedents. Although the Court has not directly addressed the First Amendment question at issue here, at least two of its pre-2014 decisions provide a doctrinal foundation for a right to record. In *Sorrell v. IMS Health Inc.*, this Court applied First Amendment scrutiny to a Vermont law because "the *creation* and dissemination of information are speech within the meaning of the First Amendment." 564 U.S. 552, 570 (2011) (emphasis added). In doing so, this Court affirmed its commitment to the idea that the First Amendment protects not only ideas, but also

information. Similarly, in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), the Court invalidated a state law prohibiting the sale or rental of violent video games to minors. *Id*. at 805. In rejecting the State's claim that its law did not violate the First Amendment because it did not prohibit the creation of such games, this Court observed that "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference" for First Amendment purposes. *Id*. at 792 n.1.

B. The Tenth Circuit's Decision Categorically Disregarding Police Policies and Training Materials and Officers' Actual Knowledge of the Law Directly Conflicts with the Qualified Immunity Doctrine and Its Underlying Policy Justifications.

The Tenth Circuit's decision also erred in applying this Court's decisions when it refused to consider the officers' actual knowledge that the First Amendment protects the right to record the police while they are performing their duties in public. (Pet. App. 22a). As this Court has defined it, the qualified immunity defense excuses officials from civil rights suits when they "neither knew nor should have known" the state of the law. *Harlow*, 457 U.S. at 819.

In this case, the officers knew their conduct violated the First Amendment right to record because they were provided with extensive and repeated departmental trainings on the subject *and* because they

acknowledged that they understood this right. The undisputed evidence showed that the City of Denver implemented a policy of training its officers regarding the First Amendment rights of citizens to record officers.[8] (Pet. App. 66a). Indeed, as the district court found, "not only did [the City] have such a policy in place many years before the defendant officers encountered Mr. Frasier [beginning with a 2007 Training Bulletin], but that each of the defendant officers had received both formal and informal training regarding the subject." (Pet. App. 66a). Where the police training is consistent with the consensus of existing case law it certainly must be relevant to the claim that the officers were on notice about the scope of the First Amendment.

Furthermore, there is undisputed evidence that the officers understood the citizens' right to record to be the state of the current law at the time of the incidents at issue in this case. In fact, the district court expressly rejected the officers' claim that the Denver policy was more protective of First Amendment rights than the Constitution, finding that from the officers' testimony, "it appears clear they believed the DPD policy was consistent with that constitutional imperative." (Pet. App. 69a-70a). The district court also found persuasive the City's evidence that four of the officers

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[8] This evidence was provided to the district court by the City of Denver to demonstrate that it could not be held liable for its officers' conduct because those officers were not acting pursuant to an official policy or custom, *Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978), and that the City had not been deliberately indifferent to an obvious need for training. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989).

completed a training course in 2013 that "advised officers that 'The Civil Rights Division of the Justice Department . . . declar[ed] that citizens have a First Amendment Right to videotape the actions of police officers in public places and that seizure or destruction of such recordings violates constitutional rights.' " (Pet. App. 70a). *Cf. Hope v. Pelzer*, 536 U.S. at 744 (holding that in addition to case law, the conclusion that reasonable correctional officers would have known their conduct violated clearly established law was "buttressed by the fact that the DOJ specifically advised [the state Corrections Department] of the unconstitutionality of its practices before the incidents in this case took place."). Moreover, the district court found that "each of the defendant officers acknowledged at their respective depositions *that they understood the First Amendment protected citizens' right to record them*." (Pet. App. 66a) (emphasis added).

In reaching its erroneous conclusion that these police training materials and the officers' actual knowledge were irrelevant to determining whether the officers were entitled to qualified immunity, the Tenth Circuit appears to have mistakenly conflated consideration of an officer's subjective good faith with an officer's subjective *knowledge* that his conduct violated the Constitution. (Pet. App. 20a-23a). In *Harlow v. Fitzgerald*, the Court eliminated what had previously been a subjective good faith component to qualified immunity because of its concern that plaintiffs could too easily allege that an officer acted in bad faith, thereby preventing disposition of the case on summary judgment.

457 U.S. at 815-16. But the subjective good faith that concerned the Court in *Harlow* "refers to 'permissible intentions,'" *id*. at 815, not to an officer's *awareness* of the law. It is an entirely different matter for a plaintiff to have available facts that an officer knew that his conduct violated the Constitution and nonetheless went ahead with it. Unlike assertions of bad faith, the defendants' actual knowledge of the law cannot be so easily inserted into a civil rights complaint to block disposition on summary judgment. The Tenth Circuit's misreading of *Harlow* in this manner led it to its extreme conclusion that an officer's knowledge about a specific constitutional right can never be part of the qualified immunity analysis.

Not only does the Tenth Circuit's decision barring consideration of police policies and training and the officers' actual knowledge of the law conflict with this Court's articulation of the doctrine, *Harlow*, 457 U.S. at 819 (officers are entitled to qualified immunity when they "neither knew nor should have known" their conduct violated the Constitution), but it is also inconsistent with the fundamental policy justifications for qualified immunity.

This Court has long suggested that qualified immunity involves a balancing of the interests of the victims of governmental abuses of power and the interests of the government and its officials. On the government's side of the balancing, the Court has expressed concern that allowing officials to be subjected to civil rights suits for their actions without immunity would: (1) be unfair given the uncertain scope of

existing constitutional rights, *Wood v. Strickland*, 420 U.S. 308, 319 (1975); (2) cause "overdeterrence" because officials would be too inhibited by the fear of such suits to fully carry out their duties, *Harlow*, 457 U.S. at 814; and (3) result in substantial social costs, including out-of-pocket litigation costs and the distraction of officials from their jobs. *Id*. Where none of those interests is implicated, however, that balance must be struck in the favor of injured plaintiffs.

Qualified immunity is designed to provide officials "ample room for mistaken judgments" about the law, *Malley v. Briggs*, 475 U.S. 335, 343 (1986), but not to protect "those who knowingly violate the law." *Id*. at 341. It is only where the meaning of the Constitution is substantially unclear that the fairness, overdeterrence, and social cost rationales arguably manifest themselves.

But surely it cannot be the case that it is unfair to hold accountable officers who were directly trained on multiple occasions that the First Amendment protects a person's right to record and admittedly knew that the Constitution protected the right to record. (Pet. App. 66a). Nor can it be reasonably said that officers who ignore their actual knowledge of the existence of a constitutional right are likely to be over-deterred from performing their duties. Likewise, the fact that the Denver Police Department provided extensive training to the officers beginning seven years before the incidents in this case also provided sufficient notice, thus ameliorating any fairness or overdeterrence concerns here. *See* Cover, 68 Fla. L. Rev. at 1825 ("To the extent

the Court propounds fair notice as the basis for its clearly established law standard, incorporating local policies in the analysis raises no concern.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALAN K. CHEN
Counsel of Record
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 E. Evans Avenue
Denver, Colorado 80208
303-871-6283
achen@law.du.edu

Counsel for Amici Curiae

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