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SUPREME COURT OF NEW JERSEY
DOCKET NO. 085028 (A-000059-20)

HAMID HARRIS, Plaintiff-Respondent v. CITY OF NEWARK; NEWARK POLICE DEPARTMENT; DETECTIVE DONALD STABILE; POLICE OFFICER ANGEL ROMERO; JOHN DOES 1-10 et. al., Defendants-Petitioners.	CIVIL ACTION ON PETITION FOR CERTIFICATION FROM: SUPERIOR COURT OF NEW JERSEY: APPELLATE DIVISION DOCKET NO. A-59-20 SAT BELOW: Before the Hon. Heidi W. Currier, J.A.D.

BRIEF OF *AMICUS CURIAE* THE NATIONAL POLICE ACCOUNTABILITY PROJECT

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PRELIMINARY STATEMENT

This brief is submitted on behalf of *amicus curiae*, the National Police Accountability Project ("NPAP"), to address an issue that will significantly impact the enforcement of civil rights protections in New Jersey courts: whether this Court should create a new right permitting defendants to pursue interlocutory appeals of qualified immunity orders when doing so would provide little or no cost savings to the government but would undermine plaintiffs' cases, disrupt trial court proceedings, and burden appellate court resources. An examination of the role that qualified immunity interlocutory appeals have played in federal civil rights litigation reveals that they do not conserve government resources but succeed in inflicting profound delay and harm on plaintiffs and courts. This net negative for litigants and courts counsels against creation of a new right.

Federal courts are also instructive as to the locus of the right to pursue interlocutory appeals on qualified immunity matters. The United States Supreme Court rejected the assertion that interlocutory appeals were essential to preserving the protections of the qualified immunity doctrine. The ability to pursue an interlocutory appeal of a qualified immunity order is a procedural right grounded in 28 U.S.C. §1291 and not a substantive

one related to 42 U.S.C. §1983 ("Section 1983"). Accordingly, nothing in Section 1983 or substantive civil rights law supports the creation of a new right to pursue interlocutory appeals in New Jersey state courts.

Finally, although not squarely within the scope of the question presented in this case, *Amicus* also respectfully requests the Court to apply a critical analysis to the purposed policy justifications and public interest impacts for maintaining the qualified immunity doctrine. The same infirmities that plague policy justifications for qualified immunity interlocutory appeals, apply to the doctrine of qualified immunity as a whole. The marginal benefits government actors inure from qualified immunity are far outweighed by the doctrine's severe harm to New Jerseyans who are victims of government abuse.

STATEMENT OF INTEREST

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement officers through coordinating and assisting civil rights lawyers representing their victims. NPAP has approximately six hundred attorney members practicing in every region of the United States and over one dozen members in New Jersey. Every year, NPAP

members litigate thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and other legal workers, public education and information on issues related to law enforcement misconduct and accountability, and resources for non-profit organizations and community groups that assist victims of such misconduct. NPAP also supports legislative efforts aimed at increasing accountability for law enforcement and detention facilities and appears regularly as *amicus curiae* in cases such as this one presenting issues of particular importance for its member lawyers and their clients.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus adopts the statement of facts and procedural history contained in Plaintiff's briefs.

ARGUMENT

I. PETITIONERS' POLICY RATIONALES DO NOT SUPPORT THE CREATION OF A RIGHT TO PURSUE INTERLOCUTORY APPEALS OF QUALIFIED IMMUNITY ORDERS.

Interlocutory appeals are a rare exception to the general rule requiring a final judgment to seek appellate review because of the significant burdens they impose on both litigants and courts. *Johnson v. Jones*, 515 U.S. 304, 309 (1995)("appeals

before the end of district court proceedings--are the exception, not the rule"); *In re Pa. R.R. Co.*, 20 N.J. 398, 408, 120 A.2d 94 (1956); 19 George C. Pratt, Moore's Federal Practice §201.10[1] (3d Ed. 2009) ("The purposes of the final judgment rule are to avoid piecemeal litigation, to promote judicial efficiency, and to defer to the decisions of the trial court.").

While federal courts permit defendants to pursue appeals on qualified immunity orders in a limited subset of cases, the practice cannot be justified on public policy grounds. An examination of the impact of qualified immunity appeals in federal court shows they do very little to conserve government resources, can stall and diminish the strength of a plaintiff's case, and are inefficient for courts.

A. Qualified Immunity Interlocutory Appeals Rarely Have the Effect of Conserving Government Resources.

Petitioners argue that this Court should create a right to pursue interlocutory appeals of qualified immunity orders in New Jersey Civil Rights Act ("NJCRA") cases to conserve government resources. However, interlocutory appeals have not served this goal in federal civil rights cases. Interlocutory appeals of qualified immunity orders are successful in a relatively small number of cases and the rare appeal that succeeds often disposes of the case when the most burdensome stages of litigation have been completed.

Most interlocutory appeals resolve in affirmance of the lower court orders. *Kurowski v. Krajewski*, 848 F.2d 767, 772-73 (7th Cir. 1988). Qualified immunity appeals are no different. In Professor Joanna Schwartz's multi-district, two-year study of over 1000 federal civil rights cases, lower court orders denying qualified immunity were reversed in their entirety in only 12.2% of cases. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 40-41 (2017). Defendants obtained partial reversal in 7.3% of reviewed cases, allowing the litigation to proceed on other claims. *Id.* This empirical study reveals a strikingly low rate of success for defendants who pursue qualified immunity interlocutory appeals. Therefore, in vast majority of cases where the trial court denies a qualified immunity motion, interlocutory appeals are not sparing the government defendant from any cost or burden.

In fact, the average interlocutory appeal makes a civil rights case more expensive and disruptive for government defendants to litigate when additional costs created by the appeal process are factored in. *See Wheatt v. City of E. Cleveland*, 2017 U.S. Dist. LEXIS 200758 at * 9 (N.D. Ohio 2017). An unsuccessful interlocutory appeal "adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, only for the case to proceed to trial." *Id.* Because overwhelming majority of interlocutory appeals are unsuccessful, they result in

an additional burden to government officials, not a reduced one. *Id.* ("In a typical case, allowing interlocutory appeals actually increases the burden and expense of litigation both for government officers and for plaintiffs"); *see also* Karen Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1907 (2018)(noting interlocutory appeals "have resulted in expensive, burdensome, and often needless delays in the litigation of civil rights claims."); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgement and the Role of Facts in Constitutional Tort Law*, 47 Am. U.L. Rev. 1, 100 (1997)(noting the costs associated with interlocutory appeals had the potential to make immunity litigation "more costly for all involved").

Even in the unusual case where an interlocutory appeal is successful, the burden from which the government official is saved is minimal in comparison to the overall cost and time involved in defending a civil rights case. Courts have acknowledged the fact-intensive nature of qualified immunity inquiries "makes it impossible to resolve a qualified immunity claim" at the beginning of a case. *Newland v. Rehorst*, 328 F. App'x 788, 781 n. 3 (3d Cir. 2009)("it is generally unwise to venture into a qualified immunity analysis at the pleading stage as it is necessary to develop the factual record in the vast majority of cases."); *Turner v. Weikal*, 2013 U.S. Dist. LEXIS 90463 at *9 (M.D. Tenn. Jun. 23, 2013)(collecting cases).

Because at least some factual development is usually needed to determine qualified immunity, it is generally not raised as grounds for dismissal until summary judgment. Schwartz, *supra.*, at 29-30 (finding qualified immunity defense was not raised until summary judgment in 62.2 % of cases). Accordingly, qualified immunity interlocutory appeals typically involve summary judgment orders and "at that point, an interlocutory appeal saves only the distraction and expense associated with trial." *Wheatt*, 2017 U.S. Dist. LEXIS 200758 at *9 (N.D. Ohio 2017).

From a financial perspective, the bulk of litigation expenses have already been paid to cover the costs of discovery by summary judgment. *See* Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery; A Proposal for Three Cost Saving Amendments to the Federal Rules*, 87 Denv. U. L. Rev. 473 (2010)(noting "discovery accounts for the majority of the cost of civil litigation as much as ninety percent in complex cases, according to some estimates."). Many of the most time-consuming tasks of a civil rights case are also completed before summary judgment, particularly when it comes to the demands on the government official being sued.[1] *See Eg.* 5 California Trial Guide § 100.01 (noting that discovery is the

[1] A defendant in a civil rights case participates in discovery and devotes significant time to locating documents, providing and reviewing interrogatory responses, and preparing and sitting for their deposition. While trial and trial preparation also require participation from the defendant, they have already devoted many hours to the case prior to summary judgment.

longest, most time-consuming phase of litigation). Thus, even in the unlikely event a government official prevails on their qualified immunity appeal, few financial or human resources are conserved.

The net impact of qualified immunity interlocutory appeals on defendants is not conservation. Instead, government defendants in federal civil rights cases usually incur unnecessary costs when they pursue an interlocutory appeal. Creating a new right to pursue interlocutory appeals in New Jersey courts will not further public policy aims of conserving government resources, it is more likely have the opposite effect.

B. Any Benefit Qualified Immunity Interlocutory Appeals Would Provide to Government Officials is Far Outweighed by the Harm It Would Inflict on Civil Rights Plaintiffs.

While interlocutory appeals make litigation more expensive for both parties, delays caused by appeals have a uniquely prejudicial impact on plaintiffs. *Mitchell v. Forsyth*, 472 U.S. 511, 544-45 (1985)(Brennan, J., concurring in part and dissenting in part "I fear that today's decision will give government officials a potent weapon to use against plaintiffs, delaying litigation endlessly . . . result in denial of full and speedy justice to those plaintiffs with strong claims on the merits."); Blum, *supra.* at 1890 n. 23 ("concerning the expense and

delay caused by interlocutory appeal . . . [d]elay, of course, works to the defendant's advantage.").

First, delays attendant to interlocutory appeals often have the effect of weakening a plaintiff's case as evidence becomes stale and witnesses fall out of contact. *See Eg.* Alphonse A. Gerhardstein, *Making a Buck While Making a* Difference, 21 Mich. J. Race & L. 251, 264 (2016)("interlocutory appeals cause witnesses' memories to fade or disappear and delay resolution to a plaintiff who is stressed because of a the violation and the litigation"); Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J., 477, 493-494 (2011)(quoting a surveyed plaintiff's attorney that explained "while an appeal is being resolved evidence may become stale, witnesses may disappear, and a client may lose hope").

Additionally, interlocutory appeals also significantly extend the time during which plaintiff must bear the costs of their injury. Many civil rights plaintiffs, particularly victims of police brutality, have tangible injuries in the form of medical expenses, lost wages, and diminished earning capacity. An interlocutory appeal of a qualified immunity order delays trial by an average of 441 days, extending the time a plaintiff must wait to be made whole. Joanna Schwartz, *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev. 1101, 1122 (2020). The daunting additional year plus wait that a plaintiff must endure before trial

may incentivize individuals with limited financial resources to accept inadequate settlement offers. Blum, *supra.* at 1890 n. 23 ("The threat of appeal and delay also works to leverage a settlement with the plaintiff."); David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-Racist Heart of §1983, Weaponizing Interlocutory Appeals & The Routine of Police Violence Against Black Lives*, 98 Denv. L. Rev. 621, 673-74 (2021)(noting that "simply filing the interlocutory appeal wins at least a battle for the defense by forcing a delay and imposing costs on the other side" and that even if the appeal is dismissed that "a couple more years may have passed. The plaintiff may fatigue and feel coerced into accepting a meager settlement.").

Defendants are aware of the unequal pressure that interlocutory appeals impose on plaintiffs and frequently pursue them even where the court lacks jurisdiction. *See Apostol v. Gallion*, 870 F.2d 1335, 1338-9 (7th Cir. 1989)(explaining "defendants may take appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance they may help themselves to a postponement by lodging a notice of appeal"); Michael Avery et. al., *Police Misconduct Law and Litigation*, 3d Edition 3:23, 504 (2021); Blum, *supra.*, 1907 (2018)(noting the frequency with which interlocutory appeals are dismissed for lack of jurisdiction). Qualified immunity interlocutory appeals would not spare government resources but rather would provide defendants

with a procedural device through which they can delay accountability and prejudice plaintiffs who have legitimate claims.

The cost, disruption, and delay caused by interlocutory appeals not only undermine individual cases but threaten future civil rights enforcement actions and the private attorney general function they serve.[2] Some plaintiffs' attorneys have acknowledged that the costs and time demands required to challenge interlocutory qualified immunity appeals have made them reticent to take on civil rights cases even when they appear strong on the merits. Reinert, *supra.* at 492-494 (detailing interviews with civil rights attorneys who had been dissuaded from accepting civil right cases because the costs and delays associated with litigating qualified immunity have made the cases too burdensome to pursue; Schwartz, *supra.* at 1143 (recounting interview with a civil rights attorney who considered expense and time of interlocutory appeals in case selection determinations). The role interlocutory appeals would have in deterring future suits will allow misconduct to go unchecked and fuel cultures of police impunity.

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[2] *See Eg. Urban League of Greater New Brunswick v. Carteret*, 115 N.J. 536, 543, 559 A.2d 1369, 1372(N.J. 1989)(acknowledging that plaintiffs in civil rights cases act not only on their own behalf but "also as private attorney general vindicating the rights of the public.")

The availability of qualified immunity interlocutory appeals often thwart civil rights cases in federal court before they can even be filed. Any abstract policy justification for creating a right to pursue interlocutory appeals is eclipsed by the severe, demonstrable harm these appeals have had on plaintiffs and the broader societal goals of private civil rights enforcement in federal court. *See* Chen, *supra.*, at 101 ("the Court may be exacerbating the social costs of immunity litigation by widening the availability of interlocutory appeals.").

C. Qualified Immunity Interlocutory Appeals Disrupt the Efficient Administration of Justice.

The public interest in conservation of court resources and the efficient administration of justice weigh against the creation of a right to pursue interlocutory appeals on qualified immunity orders. Courts have consistently detailed the disruption and burden interlocutory appeals have on both trial and appellate courts. *Johnson*, 515 U.S at 319; *Flanagan v. U.S.*, 465 U.S. 259, 264 (1984)(noting the importance of limiting interlocutory appeals because "it reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals");*City of New York v. Beretta USA Corp.*, 224 FRD 46, 51 (E.D.N.Y. 2006)(noting that interlocutory appeals "significantly delay and disrupt the course of the litigation, imperiling both the rights of the plaintiff and the interest in

judicial economy generally served by application of the final judgment rule");*In re Lozrepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002)("[I]nterlocutory appeals are generally disfavored as 'disruptive, time-consuming, and expensive' for both the parties and the courts.")

Interlocutory appeals undermine a trial court's ability to manage a case, often a few weeks or months before trial is set to begin. *Johnson*, 515 U.S. at 319 ("rules that permit too many interlocutory appeals can cause harm . . . an interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence."); *Apostol*, 870 F.2d at 1338 (noting that delays from interlocutory appeals "may injure the legitimate interests of other litigants and the judicial system...judges' schedules become more chaotic (to the detriment of litigants in other cases)"). Interlocutory appeals only assist lower courts where they materially advance the resolution of claims. Given the high affirmance rates of qualified immunity denials, *see* Supra. §I(A), interlocutory appeals needlessly interrupt trial court proceedings and complicate district court schedules.

Interlocutory appeals also deplete the scarce resources of appellate courts forcing them to review: (1) the same legal question multiple times; or (2) a question that will eventually

be moot after trial. *Johnson*, 515 U.S. at 319 (interlocutory appeals "risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary"); Bryan Lammon, *Sanctioning Qualified Immunity Appeals*, 2021 U. Ill. L. Rev. Online 130, 133 (2021) ("immediate appellate review thus risks duplicative, overlapping appeals of similar issues—once in the qualified-immunity appeal and again in an appeal after trial.").

In addition to increasing the volume of their dockets, interlocutory appeals often force appellate courts to analyze underdeveloped records and engage in factual rather than legal analysis which they are better suited to perform. *Johnson*, 515 U.S. at 319 (quoting *Pierce v. Underwood*, 487 U.S. 552, 560-561 (1988)(White, J., concurring in part and dissenting in part) (noting that the "special expertise and experience of appellate courts" lies in "assessing the relative force of . .applications of legal norms") ; *See also*, Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful*, 94 Notre Dame L. Rev. Online 169, 175 (2019)(noting the additional burden imposed on appellate courts when they must consider an underdeveloped record).

Even assuming the right to pursue an interlocutory appeal of a qualified immunity order conserved resources for government officials, a proposition disproven by empirical studies, they would still ultimately undermine public policy goals of fairness and efficiency. Courts, like plaintiffs, are severely burdened by interlocutory appeals, and stand to lose much more than defendants purportedly gain by creating a new right to pursue qualified immunity interlocutory appeals.

II. DEFENDANTS IN FEDERAL CIVIL RIGHTS CASES ARE UNABLE TO PURSUE A QUALIFIED IMMUNITY INTERLOCUTORY APPEAL THAT DERIVES FROM 28 U.S.C. § 1291 AND IS NOT A SUBSTANTIVE PROTECTION INTEGRAL TO THE DOCTRINE.

New Jersey courts have looked to Section 1983 to inform their interpretations of the New Jersey Civil Rights Act. *Tumpson v. Farina*, 218 N.J. 450, 474 (N.J. 2014)("The interpretation given to parallel provisions of Section 1983 may provide guidance in construing our [NJCRA]."). This practice extends to Section 1983's qualified immunity doctrine as New Jersey courts apply the same two prong test to determine whether officials are immune from suit under the NJCRA. *Brown v.* State, 230 N.J. 84, 99 (2015). Accordingly, Petitioners insist that interlocutory appeals must be available to NJCRA defendants because New Jersey's qualified immunity doctrine "confers the same benefits" as the federal standard. *See* Brief of Petitioner-Appellant at 7-8. However, interlocutory appeals are not integral to the federal

qualified immunity doctrine and the benefits of qualified immunity are "fully protected" without the right to pursue an interlocutory appeal. *Johnson v. Fankell*, 520 U.S. 911, 921 (1997).

Federal courts have made clear that the right to pursue an interlocutory qualified immunity appeal is tied to federal procedural rules rather than a substantive protection. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985(finding appeals of qualified immunity orders permissible only where they meet collateral order doctrine criteria); *Johnson*, 520 U.S. at 921("locus of the right to interlocutory appeal in §1291 rather than in §1983 itself"). When Idaho officials who had been sued in state court under Section 1983 claimed that the state procedural limits on interlocutory appeals deprived them of the full benefits of qualified immunity, the United Supreme Court squarely rejected the argument, holding the "right to have the trial court rule on the merits of a qualified immunity defense presumably has its source in §1983, but the right to immediate appellate review of that ruling in a federal case has its source in §1291… a federal procedural right that simply does not apply in a nonfederal forum." *Id.* The Court went on to find that the Idaho officials' qualified immunity protections were fully preserved in state court notwithstanding the fact that interlocutory appeals were unavailable. *Id.*

Defendants enjoy the full benefits and protections of

the federal doctrine of qualified immunity when they cannot seek immediate appeal. Therefore, Petitioners cannot cite federal precedent to support their position that interlocutory appeals are essential to preserving qualified immunity. Indeed, this Court will break from federal precedent if it finds New Jersey's qualified immunity doctrine contains a substantive right to pursue immediate appeals.

III. THIS COURT SHOULD CONSIDER ELIMINATING THE FLAWED DOCTRINE OF QUALIFIED IMMUNITY.

The doctrine of qualified immunity is impossible to justify on either common law or historical precedent. Nor can it be justified on account of its advancement of the public interest. This Court should critically consider eliminating the doctrine.

A. The Doctrine of Qualified Immunity Lacks A Common Law or Historical Basis.

"[Q]ualified immunity jurisprudence stands on shaky ground."[3] Accordingly, members of the United States Supreme Court, have acknowledged the *judicial* doctrine should be reconsidered. *Id.* (emphasis added). To the extent New Jersey courts have imported the federal qualified immunity standard and the rationales behind its creation, the state doctrine must be reconsidered as well.

[3] *Hoggard v. Rhodes et al.*, 2021 U.S. Lexis 3587, ____S. Ct. ___ 2021, 2021 WL 2742809 No. 20-1066, Decided July 2, 2021 (Justice Thomas on denial of certiorari).

The Civil Rights Act of 1871, or Section 1983, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. Following the passage of Section 1983, courts continued to hold public officials liable for unconstitutional conduct without any regard to a good-faith defense. *See, e.g., Miller v. Horton*, 26 N.E. 100, 100-101 (Mass. 1891) (Holmes, J.) (holding town board members liable for mistakenly killing an animal when ordered by the government commissioners).[4] It was not until nearly a decade after Section 1983 was enacted that the defense of good faith was incorporated into federal civil rights jurisprudence. *See Pierson v. Ray*, 386 U.S. 547 (1967).

The recognition of immunity for good faith actions could not be traced to the text of Section 1983 or any common law immunity that existed when the law was enacted. "Statutory interpretations . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Importantly, "the statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The key language simply states that any person acting under the color

[4] *See also* Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585 (1927) ("prior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts.")

of state law shall be held liable for violating a protected right of a citizen.

Notwithstanding the fact that qualified immunity is not incorporated in the text of Section 1983, immunity can be available under the statute if it was "historically accorded the relevant official" in an analogous situation "at common law," *Imbler* v. *Pachtman*, 96 S. Ct. 984 (1976), unless the statute provides some reason to think that Congress did not preserve the defense. *See Tower* v. *Glover*, 104 S. Ct. 2820 (1984). Here, those immunities were not available at common law, particularly not to police officers. *Wyatt v. Cole*, 504 U.S. 158, 173 (1992)(Kennedy, J., concurring); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). In short, the text of 42 U.S.C. 1983 ("Section 1983") does not mention immunity and the common law of 1871 did not include any free-standing defenses for all public officials.

Despite this background, the "judicial" doctrine of qualified immunity operates currently as an across-the board defense based on the incomprehensible principles of "clearly established law" standard that was unheard of prior to until these past several decades. Simply put, this judicially enacted doctrine has become what the Court sought to avoid to wit: "a freewheeling policy choice," at odds with Congressional intent in enacting Section 1983. *Malley*, 475 U.S. at 342.

Qualified immunity's departure from any common law or historical foundation has not gone unnoticed by the United States Supreme Court in recent years. *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity … we have diverged from the historical inquiry mandated by the statute.") *Crawford el v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under [Section 1983] has not purported to be faithful to the common-law immunities that existed when {section] 1983 was enacted and that the statute presumably intended to subsume, *Wyatt*, 504 U.S., at 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards.").

Qualified immunity lacks a foundation in the text or history of Section 1983. Its continued application in NJCRA cases cannot be justified.

B. The Doctrine of Qualified Immunity Provides Little Benefit to Government Defendants While Promoting Police Impunity and Depriving Victims of Government Abuse of Needed Remedies.

Just as no government interest in pursuing qualified immunity interlocutory appeals can justify the harm they cause to plaintiffs, the doctrine, as a whole, undermines the principles of fairness and deterrence on which the American civil justice system

is founded. *See* discussion *supra.* § I. Petitioner suggests that qualified immunity is essential to prevent government disruption because it shields government officials from the burdens of defending litigation. *See* Petitioner's Brief at 8. However, qualified immunity rarely disposes of a case prior to the completion of the most burdensome and costly phases of litigation. *See* Schwartz, *supra*, at 9 (finding qualified immunity only raised as a defense prior to the initiation of discovery in 13.9% of cases reviewed and only lead to dismissal in 9% of the cases). Empirical evidence shows the doctrine fails to achieve its principal goal.

While qualified immunity only minimally advances the goals of protecting the government from the costs and disruptions of litigation, it has contributed to a culture of police impunity and blocked victims of constitutional violations from recovering for meritorious claims.

Courts have increasingly noted that qualified immunity has essentially provided law enforcement officers with a carte blanche to engage in misconduct. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (Sotomayor, J., dissenting)(2018)("qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent of the Fourth Amendment"); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 404-5 (S.D. Miss. 2020)("Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officer no matter how egregious their

conduct"); *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019)(Willet, J., concurring in part and dissenting in part)(explaining qualified immunity created a system where "[w]rongs are not righted, and wrongdoers are not reproached.") As Justice Sotomayor explained in her dissenting opinion in *Kisela*, the shield created by qualified immunity "sends an alarming signal to law enforcement officers and the public. It tells officers they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." 138 S.Ct. at 1162. The lack of accountability for law enforcement officers through civil rights is particularly concerning for law enforcement personnel as they rarely face administrative or criminal consequences for their misconduct. *See e.g.*, Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. TIMES (Nov. 18, 2015); *See* Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST. (April 11, 2015)(noting successful criminal prosecutions are few and far between.).

The civil remedy created by Section 1983 exists to make whole citizens whose constitutional rights have been violated and act as accountability process to hold those officials responsible. *Pearson*, 555 U.S. at 231. The New Jersey Civil Rights Act was enacted to advance similar goals in state court. *Tumpson*, 218 N.J. at 474 (citing *S. Judiciary Comm. Statement to S. No.*

1558, 211th Leg. 1 (May 6, 2004). The doctrine of qualified immunity has made civil rights statutes ineffective in providing financial and other injunctive relief necessary to advance the goals and underlying purposes of these statutes. *See Eg. Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part)("this current 'yes harm, no foul' imbalance leaves victims violated but not vindicated.").

New Jersey State Courts have long been a pioneer in expanding protections for its citizens. In fact, many states look to New Jersey case law when construing their own laws. The continued adherence to the judicially created doctrine of qualified immunity serves no valid interests and simply prolongs a citizen's right to seek redress for violation of their constitutional rights.

Some states legislatures, like New Mexico and Colorado have taken the role of abolishing qualified immunity for state constitutional claims. Even though New Jersey may or may not do it statutorily, this Court has the power to refuse to follow a doctrine which is judicial in nature. The powers rests with this Court.

CONCLUSION

For the reasons set forth above, *amicus curiae*, the National Police Accountability Project, respectfully urges that this Court affirm the decision of the Appellate Division,

holding Petitioners do not have a right to pursue an interlocutory appeal of the trial court's denial of qualified immunity. *Amicus* further urges this Court to consider eliminating the defense of qualified immunity in NJCRA cases.

Respectfully,

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