No. 21-16706

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DeJuan Markeiss Hopson,

Plaintiff–Appellee,

v.

Jacob Alexander, Brandon Grissom,

Defendants–Appellees.

On Appeal from an Order of the
United States District Court for the District of Arizona
Case No. 2:20-cv-128, Hon. Susan M. Brnovich

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* URGING EN BANC REVIEW ON BEHALF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT, THE AMERICAN CIVIL LIBERTIES UNION OF HAWAI'I, AND THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

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Jan. 26, 2022

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

The above-captioned proposed *amici curiae* request leave of the Court to file a brief in support of Appellant and urging en banc rehearing. *See* Fed. R. App. P. 29(b); Local Rule 29-2. The proposed brief addresses the wider and recent context of qualified immunity law in this Court, other Circuits, and the Supreme Court, and helps explain the importance of the legal questions at stake here. The proposed brief is attached to this motion. In support of the Court granting leave, the proposed *amici curiae* state as follows:

1) Counsel for Appellees consents to the proposed *amici curiae* brief.
2) Counsel for Appellant does not consent to the proposed *amici curiae* brief.
3) The National Police Accountability Project was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers.
4) NPAP has approximately 550 attorney members practicing in every region of the United States, including over one hundred in

California. Every year, NPAP members litigate the 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 resources for non-profit organizations and community groups working on police and correction officer accountability issues.

5) NPAP frequently participates as *amicus curiae* to protect the interests of these communities, both in the Supreme Court and before this Court. Most recently, at this Court, NPAP has participated as an *amicus curiae* in *Coalition on Homelessness v. City and County of San Francisco*, No. 23-15087; *Parker v. County of Riverside*, No. 22055614; *A.B. v. County of San Diego*, No. 20-56140; *Ohlson v. Brady*, No. 20-15656; and *Fenty v. Penzone*, No. 21-71351.

6) The American Civil Liberties Union ("ACLU") of Hawai'i and Arizona are non-profit organizations dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this Nation's civil rights laws. They work to

advance civil rights and liberties in the courts, in legislative and policy arenas, and in the community.

7) The work of the ACLU and its affiliates includes efforts to hold government actors, including the police, accountable for the constitutional violations they commit. As part of these efforts, the ACLU has long fought to reform the doctrine of qualified immunity, which too often shields police officers from accountability.

8) Proposed *amici curiae* and their members have perhaps more experience litigating issues of qualified immunity in federal appellate courts, including this one, than any other members of the plaintiffs' bar.

9) Proposed *amici curiae* have an interest in this case because the panel decision undertakes an unwarranted expansion of qualified immunity doctrine, departing from Supreme Court precedent and other recent precedents of other Circuits. Proposed *amici* have a particular interest in ensuring that civil rights laws that protect people from police misconduct continue to protect them without the obstacle of expanding qualified immunity doctrines.

10) Proposed *amici curiae* seek this Court's permission to submit the attached brief to urge rehearing en banc.

For these reasons, proposed *amici curiae* respectfully request that this Court grant them leave to appear as *amici curiae*, and to file the attached brief for consideration of the Court.

Respectfully submitted,

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Date: Aug. 8, 2023

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion for Leave filed by Jim Davy was served upon all counsel of record for parties and *amici*, via CM/ECF, on Aug. 8, 2023. All participants in this case are registered CM/ECF users and will be served electronically via that system.

Respectfully submitted,

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BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT, THE AMERICAN CIVIL LIBERTIES UNION OF HAWAIʻI, AND THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA AS AMICI CURIAE URGING EN BANC REVIEW

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Aug. 8, 2023

CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them. No Amici has a financial interest in the outcome of this litigation.

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INTERESTS OF THE AMICI CURIAE[1]

The National Police Accountability Project was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including over one hundred in California. Every year, NPAP members litigate the 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 resources for non-profit organizations and community groups working on police and correction officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as amicus curiae in cases, such as this one, presenting issues of particular importance for its members and their clients.

Amici the American Civil Liberties Union ("ACLU") of Hawai'I and Arizona are non-profit organizations dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this Nation's civil rights laws. They work to advance

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[1] *Amici* file this brief with the consent of only the Appellees, as Appellants do not consent to the filing of this brief. This brief has been authored entirely by *Amici* and their counsel, and no Party or any other person has contributed money to fund the preparation of this brief.

civil rights and liberties in the courts, in legislative and policy arenas, and in the community. The work of the ACLU and its affiliates includes efforts to hold government actors, including the police, accountable for the constitutional violations they commit. As part of these efforts, the ACLU has long fought to reform the doctrine of qualified immunity, which too often shields police officers from accountability.

INTRODUCTION

This Court should reconsider the panel decision in this case en banc not merely because it is wrong, but because it presents a question of exceptional importance and marks a divergence from recent precedent in other Circuits. In reversing the District Court to grant qualified immunity in this situation, the panel has expanded that questionable doctrine even while other Courts increasingly recognize its lack of foundation in the text or original understanding of 42 U.S.C. § 1983. Worse, the panel's expansion comes in a case involving deliberate decision-making on the part of the Defendant-Appellant officers—circumstances that fall clearly outside of the split-second decision making that the Supreme Court has repeatedly explained can support the application of qualified immunity because of the specific nature of those situations. The panel decision, if left undisturbed, risks stripping away important civil rights protections for people across the Circuit. Because it expands qualified immunity by diverging from Supreme Court precedent and ignoring the increasing recognition of the flawed foundation of the doctrine by this Court's sister Circuits, this Court should reconsider it en banc, and affirm the District Court denial of qualified immunity.

ARGUMENT

I. The panel decision is not merely wrong, but doubles down on qualified immunity's foundational flaws in the face of both Supreme Court and recent Circuit precedent to the contrary.

There are "many reasons to rehear this case en banc." *United States v. Washington*, 864 F.3d 1017, 1033 (9th Cir. 2017) (O'Scannlain, J., dissenting from denial of rehearing en banc). For one thing, the panel opinion expands qualified immunity despite recent scholarship, recognized by federal appellate courts, that calls the very foundations of the qualified immunity doctrine into question. For another, the panel opinion diverges from Supreme Court precedent about the purposes and application of qualified immunity. This case, unlike those where the Supreme Court applies the doctrine, does not implicate split-second decisions by law enforcement officers. Under the circumstances, this case presents the "question of exceptional importance" that warrants rehearing. Fed. R. App. P. 35(a)(2).

A. The panel opinion doubles down on a fatally flawed doctrine.

Even in cases involving its arguably justified application, qualified immunity rests on fatally flawed foundations. The doctrine's origins date to 1967, when the Supreme Court made qualified immunity available to officers in actions under § 1983 based upon similar "good faith" defenses available to officers in common law applications for false arrest. *See*

Pierson v. Ray, 386 U.S. 547, 557 (1967). The Supreme Court assumed that Congress, in enacting § 1983, had not "meant to abolish wholesale all common-law immunities." *Id.* at 554. Following *Pierson*, the "good faith" defenses available at common law evolved into the modern doctrine of qualified immunity that looks more like how we know it today. *E.g. Harlow v. Fitzgerald*, 457 U.S. 800, 806-07 (1982); *Filarsky v. Delia*, 566 U.S. 377, 383-84 (2012) (invoking common law background of qualified immunity). In *Harlow* and all the subsequent expansions of qualified immunity case law, the Supreme Court has relied and built upon the assumption in *Pierson* that Congress did not intend to abrogate the good faith (or other) defenses available at common law when it enacted § 1983. This has two problems. One is that at the enactment of § 1983, there likely was not a good faith defense to constitutional claims or common law torts. But second, and more foundationally: in enacting § 1983, Congress did intend to abolish those supposed defenses.

First: the good faith defense that purportedly underpins the qualified immunity doctrine did not exist even in the pre-§ 1983 common law as described by the *Pierson* Court and endorsed in subsequent decisions. "[L]awsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the republic." William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 55 (2018). Even good faith reliance on unfairly confusing Presidential directives could not excuse an officer from liability. *Little v.*

Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804). This remained true at the time of § 1983's enactment by Congress. *See* James E. Pfander, *Constitutional Torts and the War on Terror* 16-17 (2017); *see also* Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801-02 (2018) (noting that "[w]hen the Civil Rights Act of 1871 was passed, government officials could not assert a good faith defense to liability").

Second, and more importantly: to whatever extent such defenses existed, the Congress that enacted § 1983 specifically intended to impose liability without regard to such defenses. The *Pierson* assumption otherwise, which continues to underpin the doctrine, relies on a mistake of transcription. The Ku Klux Klan Act of 1871, though which Congress enacted § 1983, contained "additional significant text" that did not make it into the contemporary verbiage of the U.S. Code. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 235 (2023). The current text reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall

> not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983. Crucially, however, in the original statute as passed, Congress included a clause in between "shall" and "be liable." In the original text, the law said that government officials "shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable" for damages under § 1983. Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added); *see also* Reinert, 111 CAL. L. REV. at 235. And since "notwithstanding" retains the same meaning today that it had in ordinary public usage in 1871, the meaning is clear: any then-existing common law could not prevent people acting under color of law from facing liability under § 1983. Indeed, given the number of former Confederate veterans serving as judges in Southern states in 1871, "it would have been passing strange . . . for Congress to permit liability under Section 1983 to be limited by judge-made law created by state court judges." *Id.* at 241.

Judges of this Court and its sister Circuits have begun joining with scholars and advocates of all stripes to recognize this foundational error. "A strange-bedfellows alliance of leading scholars and advocacy groups of every ideological stripe—perhaps the most diverse amici ever assembled—had joined forces" along with "a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir.

2019) (Willett, J., concurring in part and dissenting in part); *Cole v. Carson*, 935 F.3d 444, 470 (5th Cir. 2019) (Willett, J., dissenting) (decrying the "judge-invented qualified immunity regime"). On this Court, Judge Hurwitz has noted courts' "struggle" to apply the "ill-conceived" and "judge made doctrine of qualified immunity, which is found nowhere in the text of § 1983." *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part). Judge Ho, also of the Fifth Circuit, observed that "[n]othing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement." *Horvath v. City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in the judgment and dissenting in part). And indeed, as Judge Willett noted, Justices from different ideological wings of the Supreme Court have written opinions urging reform to the qualified immunity doctrine. *See Kisela v. Hughes*, 138 S.Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *Ziglar v. Abassi*, 137 S.Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

But in the face of the clearly flawed foundation lacking any basis in the text, and the increasing recognition of Judges and Justices that the doctrine presents enormous problems as-is, the panel opinion below

expands it. The Court should grant en banc rehearing to address that question of exceptional importance.

B. Courts of Appeals—including this Court—have distinguished constitutional violations occasioned by split-second decisions, and those committed after lengthy deliberation.

Regardless of expanding qualified immunity despite recent scholarship into the doctrine's fatally flawed foundations, the panel also diverged in critical respects even from Supreme Court precedent that applies the doctrine. As the Supreme Court has articulated, the purpose of qualified immunity is to protect officers who make split-second decisions in challenging, fast-paced situations. Consistent with the Supreme Court's explanation of the doctrine, the Courts of Appeals have applied qualified immunity to protect officers when they are confronted with split-second decisions and face imminent threats to their safety or the safety of others. By contrast, Courts are united in their reticence to grant qualified immunity to law enforcement officers who commit constitutional violations when they had time to consider different options and formulate a course of action. Indeed, numerous opinions of the Courts of Appeals explicitly consider whether an officer was responding to an urgent threat in their qualified immunity analysis. The panel opinion here diverges substantially from this line of precedent.

First: even in cases that approve of the qualified immunity doctrine, the Supreme Court has repeatedly explained that the purpose of qualified

immunity is to shield officers who do difficult work and must make split-second decisions in situations that challenge their safety or the safety of others. As the Supreme Court has explained, "a proper analysis must allow for the fact 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." *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014). Indeed, this is why the Supreme Court's qualified immunity decisions often involve fact-intensive and rapidly shifting situations that give rise to excessive force claims. *See id.*; *see also Saucier v. Katz*, 553 U.S. 194, 206 (2001) (discussing the doctrine's purpose "to protect officers from the sometimes hazy border between excessive and acceptable force") (cleaned up); *see also Kisela*, 138 S.Ct. at 1152-53 (involving excessive force). Indeed, Justice Thomas has specifically contrasted "officers, who have time to make calculated choices about enacting or enforcing unconstitutional polices" with those who do not have such time; the former should not "receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting[.]" *Hoggard v. Rhodes*, 141 S.Ct. 2421, 2422 (2021) (Thomas. J., dissenting from denial of certiorari).

Following that lead, this Court has denied qualified immunity to officers who had time to think before they acted. For instance, this Court reversed a grant of qualified immunity to officers who pepper sprayed an inmate for sticking his fingers in a food port. *Furnace v. Sullivan*, 705

F.3d 1021, 1030 (9th Cir. 2013). This Court acknowledged that while qualified immunity was premised on the "important interest" of "allow[ing] officials to take action with independence and without fear of consequences" (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir. 2000)), this interest was less compelling when an officer could reflect upon or consult prison-issued guidance. *Id.* Critically, this Court held that "barring urgency or exigent circumstances," a government employee can ensure compliance with the law by following their employer's policies and guidance. *Id.* This Court again considered the amount of time officers had to assess a situation and make a decision when it denied qualified immunity to officers who used unreasonable force despite having more than two minutes to reassess the need for continued force. *Hyde v. City of Willcox*, 23 F.4th 863, 873 (9th Cir. 2022). In rejecting qualified immunity in *Hyde*, this Court held that "we are generally loath to second-guess law enforcement officers' actions in a dangerous situation . . . [b]ut here, [defendants] had two minutes to realize that" the plaintiff did not pose a threat. *Id.* Whether a law enforcement officer had time for deliberation has always influenced this Court's analysis of qualified immunity and this Court has been less willing to let law enforcement officers off the hook when they have time to think before deciding to commit a constitutional violation.

Courts of Appeals across the country apply qualified immunity in the same way, looking to urgency as a touchstone and expressly evaluating

an officer's time to consider their course of action when deciding whether to grant immunity. *E.g. Jones v. Treubig*, 963 F.3d 214, 236 (2d Cir. 2020); *Reedy v. Evanson*, 615 F.3d 197, 224 n.37 (3d Cir. 2010) ("qualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions . . . there were no 'split-second' decisions made in this case"); *Dean v. McKinney*, 976 F.3d 407, 419-20 (4th Cir. 2020); *Griggs v. Brewer*, 841 F.3d 308, 316 (5th Cir. 2016) (noting that qualified immunity was "designed to protect" split-second decisions); *Mullins v. Cyranek*, 805 F.3d 760, 766 (6th Cir. 2015) ("qualified immunity is available only where officers make split-second decisions in the face of serious physical threats to themselves and others"); *Smith v. Finkley*, 10 F.4th 725, 748 (7th Cir. 2021) ("[t]he events and the speed at which they occurred here certainly implicates the qualified immunity defense"); *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021) (acknowledging difference between split-second decisions and government actions that result from deliberation); *Reavis v. Frost*, 967 F.3d 978, 988 (10th Cir. 2020) (noting the lack of any immediate threat facing officer when denying qualified immunity); *Scott v. Battle*, 688 F. App'x 674, 677 n.6 (11th Circ. 2017) (noting officer's force was "not a split-second judgment but an act of frustration" in qualified immunity analysis). Several of this Court's sister Circuits disfavor immunity for officers who have time to provide a warning or reassess the level of force they decide to use. For instance, the

Fifth Circuit seized on the fact that an officer had time to provide the plaintiff with a warning prior to deploying force when finding that the officer's conduct met the rarely-applied obviousness standard of clearly established law as set out in *Hope v. Pelzer*. *Cole*, 935 F.3d at 453 ("[T]he 'Officers had the time and opportunity to give a warning and yet chose to shoot first instead.' This is an obvious case."). The Sixth Circuit found a similar violation of clearly established law under its own circuit precedent where an officer had time to provide a verbal warning or command prior to taking down a suspect. *Harris v. City of Circleville*, 583 F.3d 356, 366 (6th Cir. 2009).

So, both this Court and its sister circuits look at an officer's time to deliberate, reconsider, and formulate a better plan in assessing that officer's entitlement to qualified immunity. Quite sensibly, as qualified immunity—to whatever extent it has any justification—does not protect constitutional violations an individual had time to contemplate. If an officer has time to think about a constitutional violation, holding him responsible for the violation makes more sense. But by contrast, the panel diverges from that common understanding of this Court and other Courts of Appeals regarding how to apply the Supreme Court's qualified immunity precedents.

C. The rationale that underpins qualified immunity has no application to this case.

This Court should grant en banc not only because of the exceptional question posed by the panel's expansion of qualified immunity despite its fatally flawed foundation. Because of how the panel diverged from the Supreme Court precedent and the opinions of this Court and its fellow Courts of Appeal, "en banc consideration is necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). Based on the uniform Circuit consensus characterizing qualified immunity as a protection for officers making split-second decisions, the panel should not have granted qualified immunity to Defendant-Appellants because they did not face an urgent situation when they used unconstitutional force. The officers in this case took significant time to choose the unconstitutional conduct they engaged in—a luxury they had because they faced no immediate threats compelling them to act in the moment. A brief analysis of the facts here both illustrates why the panel decision is wrong, and why it is not merely wrong, but diverges from the settled precedent described above about applying qualified immunity.

First, Appellants did not make the decision to use force in a "split-second." Instead, they crafted their unconstitutional plan for at least twenty minutes after Appellant Alexander first observed activity that allegedly raised his suspicions that an armed robbery could take place. The officers had time to decide how they would confront the possible

threat of a robbery and reevaluate whether it was reasonable to suspect that a robbery, or any other crime, was about to be committed. Despite having more than fifteen minutes to develop a constitutional course of conduct, they decided to: (1) assemble a group of six officers; (2) swarm the vehicle in which Mr. Hopson was sitting; and (3) violently extract Mr. Hopson from the vehicle at gunpoint without identifying themselves or giving him the opportunity to comply with verbal commands. The force Appellants chose followed a quarter of an hour of planning, not a split-second reaction to an immediate threat of violence. Given that significant time lag, their deliberation does not implicate the purposes of the qualified immunity doctrine.

Worse, however, Appellants had no catalyst to react as they did, when they did. Even operating under their unreasonable theory that Mr. Hopson was going to commit armed robbery, nothing suggested that such an event was imminent. Neither Mr. Hopson nor his friend made any movements that would suggest they were preparing to exit the vehicle. There was no indication that they would do anything other than continue to sit in their car when Respondents deployed force. Respondents were not acting out of urgent necessity—as evidenced by them not doing anything for fifteen minutes—and could have taken more time to think about the best course of action.

Accordingly, the panel decision is not merely wrong, but implicates the other key basis for this Court to grant en banc reconsideration. The panel

decision ignores the key distinction in qualified immunity precedent: Appellant officers took time to deliberate before using unconstitutional force, rather than making a split-second decision that could support qualified immunity. By diverging from the precedent of the Supreme Court, this Court, and the Courts of Appeals that delineate those two categories of official action, the panel decision was not merely wrong, but should be reconsidered en banc to maintain uniformity of precedent.

CONCLUSION

The judgment of the panel should be vacated, and this case reheard en banc.

Respectfully submitted,
/s/ Jim Davy

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Aug. 8, 2023

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g)(1), I certify that this brief:

(i) complies with the type-volume limitation of Circuit Rule 29-2 because it contains 3,503 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.75, set in Century Schoolbook 14-point type.

/s/ Jim Davy

Jim Davy

CERTIFICATE OF SERVICE

I certify that on Aug. 8, 2023, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Jim Davy

Jim Davy