No. 16-369

IN THE
Supreme Court of the United States

COUNTY OF LOS ANGELES, et al.,
Petitioners,
v.

ANGEL MENDEZ, et al.,
Respondents.

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

BRIEF AMICUS CURIAE FOR THE GEORGETOWN UNIVERSITY LAW CENTER CHAPTER OF THE BLACK LAW STUDENTS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Black Law Students Association (BLSA) at the Georgetown University Law Center submits this brief as amicus curiae in support of Respondents, urging this Court to affirm the ruling of the United States Court of Appeals for the Ninth Circuit. BLSA is a student run hub for activism and community engagement amongst black law students. BLSA consists of hundreds of current law students and alumni who are dedicated to service, scholarship, and social justice. BLSA has a direct interest in the development of jurisprudence which counters systemic incentives for abuses by law enforcement against members of their community. Consequently, BLSA has a meaningful interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

In the last four years alone, millions of people watched police officers place a black man in a chokehold until he died, an officer gun down a 12-year-old black boy moments after he arrived on the scene of a playground as the boy played with a toy gun, and another officer shoot a middle-aged black man in the back as he fled after a minor traffic

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[1] Pursuant to this Court's Rule 37, this brief is filed with the consent of all parties. Petitioners' consent letter is on file with the Court. Respondents' consent letter is included with the filing of this brief. This brief was not authored in whole or in part by counsel for any party and no person or entity other than Amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

stop. The fact that police officers sometimes commit horrific acts of brutality is nothing new. Poor people and people of color—the disproportionate victims of police violence—have never harbored the illusion that "these sorts of things do not happen here." What is new, perhaps in part because these acts are now on the Internet for all the world to see, are calls for reform including racial diversity programs, sensitivity training, body cameras, and demilitarization. However, the belief that these measures will eliminate racialized police violence misses an important point: the frequency and seeming impunity with which police wield violence is inseparable from this Court's Fourth Amendment doctrine. The doctrine provides that reasonableness of excessive force is analyzed purely from the point of view of the officer, and the qualified immunity defense excuses all manner of excessive force because supposedly every police interaction is a unique, in-the-moment event that has never been litigated or resolved.

With such indeterminate limits on state-sponsored violence against civilians, officers are free to test the bounds of their authority. The legitimization of the "shoot first, ask questions later" approach to law enforcement is most often levied against marginalized groups, particularly minorities in over-policed communities. Communities have accordingly grown distrustful of law enforcement. That distrust coupled with fear of those bound to protect and serve shapes how individuals respond to the very presence of law enforcement. Thus, while uncertainty in the excessive force doctrine under the Fourth

Amendment—compounded by the qualified immunity analysis—allows increasing deference to law enforcement, society's understanding of the limit on police power is warped.

If there is to be a meaningful limit on police power it must necessarily be informed by reasonable civilians as well as reasonable officers. We must ask ourselves what level of force are reasonable civilians willing to condone against themselves and under what conditions do even reasonable officers exceed that authorization. In assessing the reasonableness of an officer's use of force, the Court should step into the victim's shoes to rebalance the societal and governmental interests at play in law enforcement-community interactions. Particularly, the Court should reemphasize that the totality of circumstances analysis articulated in *Tennessee v. Garner*, 471 U.S. 1 (1985), and its progeny includes a balancing of society's interest in freedom from a militarized police state.

ARGUMENT

In the name of law and order, we arm police with handcuffs, batons, electroshock devices, and guns, fully expecting that in interactions both routine and dangerous, they will serve the public and keep the peace without resorting to these violent tools of the trade. But, on occasion—and all too often when it comes to people of color—police wield these weapons, to hold, subdue, maim, and even kill. *Infra*, Part II.C. And when they do, the fundamental constitutional question determining whether the civilian victims or survivors of state-

sanctioned violence will receive any measure of justice is whether the police acted reasonably in placing a pedestrian in a chokehold, tear-gassing a protester, driving a speeding motorist off the road, lobbing stun grenades inside of a residence, or shooting a fleeing suspect in the back. *See, e.g.*, *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). To be sure, "[n]ot every push or shove" translates into a Fourth Amendment violation, but because we invest police with the awful power to inflict pain and even death, ultimately every use of police force, lethal or otherwise, must abide by the Fourth Amendment's reasonableness standard. *Saucier v. Katz*, 533 U.S. 194, 209 (2001).

Weighing the reasonableness of an officer's conduct requires courts to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). In *Garner*, this Court initially acknowledged that in the context of deadly force "the intrusiveness of a seizure . . . is unmatched," and a "suspect's fundamental interest in his own life need not be elaborated upon." *Id.* However, over time the Court's Fourth Amendment jurisprudence has devolved to the point where the reasonableness standard seems to be analyzed exclusively from the perspective of law enforcement to the exclusion of all other considerations, including the viewpoint of the victims and the needs of the public. Indeed, for all of its outward complexity, today's Fourth Amendment jurisprudence on police use of force

fundamentally ignores the person on the receiving end of police violence.

I. In balancing the competing interests of individual liberty and effective law enforcement under the Fourth Amendment, courts have tipped the scale in favor of police use of force.

Since the initial balancing of society's interest in liberty and justice and the government's interest in effective law enforcement in *Garner*, courts have almost exclusively analyzed excessive force in a manner that rationalizes an officer's decision-making. Legitimizing an officer's inadvertent or intentional decision to cause grievous harm in a legal twilight zone immunizes officers from the consequences of even their unlawful actions.

A. Courts reviewing excessive use of force overwhelmingly defer to the officer's perception of danger.

The Court's language establishes a broadly deferential standard of review in excessive force cases that is limited to the officer's perception of danger. *See, e.g.*, *Saucier*, 533 U.S. at 205 (favoring "deference to the judgment of reasonable officers on the scene"); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968) ("The 'reasonableness' . . . must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."); *Garner*, 471 U.S. at 19 (recognizing the "practical difficulties" of assessing a suspect's

dangerousness). Indeed, the Court noted in *Graham* that officers need to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" about the requisite level of force needed in situation. 490 U.S. at 397. The Court subsequently decided that officers are allowed to make reasonable mistakes and use more force than necessary if the officer believed the suspect was likely to fight back. *Saucier*, 533 U.S. at 195.

From 2007 to 2016, the Court considered the use of deadly force in high speed car chases and not only condoned the use of deadly force against a fleeing suspect, but added that officers could shoot at a suspect "until the threat has ended." *See Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *Plumhoff*, 134 S. Ct. at 2020; *Scott v. Harris*, 550 U.S. 372, 378–79 (2007). In response, lower courts may acknowledge the totality of the circumstances evaluation yet simultaneously dismiss an officer's role in creating the dangerous situation. *See, e.g.*, *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005) ("[T]he reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis . . . ."); *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995). Framing the doctrine in terms of a reasonable officer makes the officer the sole credible witness in confrontations with civilians even when officers catalyze ensuing exigent circumstances.

B. The "clearly established law" standard of the qualified immunity defense excuses virtually all excessive use of force by analyzing every police interaction as a unique, in-the-moment event that has never been litigated and resolved.

The excessive force doctrine's failure to protect civilians' Fourth Amendment interests is grounded not just in the nearly blind deference afforded to officers in analyzing the reasonableness of their actions exclusively through the viewpoint of law enforcement, but also in the difficulty of determining what constitutes clearly established law to defeat a qualified immunity defense. *See* John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. C.L. & C.R. 155, 161 (2016). The twilight zone's complexity, unintentionally or otherwise, provides a broad basis for immunity and thereby facilitates justifications for an officer's infliction of harm.

In the first instance, the qualified immunity doctrine sets a high-bar for those wishing to bring suit against a government official. *See City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) ("This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'"). Officials are entitled to qualified immunity unless his or her conduct violates clearly established constitutional or statutory law of which

every reasonable officer would have known. *See, e.g.*, *Mullenix*, 136 S. Ct. at 308. The Court has not required that prevailing precedent be directly on point but it does require a significant degree of particularity. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017). In excessive force cases, the baseline constitutional standard provides that it is reasonable for an officer to use deadly force to prevent the escape of a suspect with a weapon or where there is probable cause to believe the suspect has threatened or inflicted serious physical harm. *Garner*, 471 U.S. at 12. In *Graham*, the Court elaborated on the factors lower courts should consider in determining reasonableness, including the severity of the crime, the immediacy of the threat, the suspect's resistance, and the potential for evasion. 490 U.S. at 396. Notwithstanding *Garner* and subsequent cases, the reasonableness standard continues to operate at a high level of generality. *See Pauly*, 137 S. Ct. at 552 ("Graham, Garner, and their Court of Appeals progeny . . . lay out excessive-force principles at only a general level."); *Plumhoff v. Rickard*, 134 S. Ct. at 2023 (reasserting that *Garner* and *Graham* are "cast at a high level of generality"). Most recently, the Court determined that lower courts must, at the very least, point to a case where officers in similar circumstances were held to have violated the Fourth Amendment. *Pauly*, 137 S. Ct. at 552.

However, the Court's application of the qualified immunity doctrine permits judges to evade the very question of whether the officer's conduct was unreasonably excessive. Unlike the "obvious" case in *Garner*, where the Court held it

was unreasonable to shoot an unarmed, fleeing burglary suspect, the Court has largely justified the use of deadly force by focusing on the distinctiveness of the circumstances without definitively indicating the outer limits of police authority. *See, e.g.*, *Pauly*, 137 S. Ct. at 552 (holding no clearly established law prohibited an officer, arriving late on the scene, from shooting the residents of a home because the ongoing police confrontation presented unique circumstances); *Sheehan*, 135 S. Ct. at 1775 (holding no clearly established law required officers to accommodate a mentally ill patient's disability and therefore the officers who shot the patient were entitled to qualified immunity); *Garner*, 471 U.S. at 19. For instance, if excessive force victims pursue a Fourth Amendment claim, courts may decide the constitutional question of whether an officer's infliction of harm was reasonable under the circumstances as a preliminary matter. *See Pearson v. Callahan*, 555 U.S. 223, 236, 242 (2009) (recognizing the Court's discretion to resolve a case on qualified immunity grounds without deciding whether a Fourth Amendment violation occurred). Alternatively, courts can resolve excessive force claims by determining whether the legality of a particular form and level of force was clearly established prior to the incident. *Id.* at 236. If the illegality of the police conduct was not clearly established, an officer would be entitled to a qualified immunity defense. The latter approach results in a lack of clear standards on what constitutes excessive force. Moreover, each inquiry rests on the viewpoint of an officer on the scene and

courts defer to the judgment of that officer in the event of uncertainty.

For example, some courts scrutinize "the moment" the officer decided to use potentially deadly force, to the exclusion of events preceding the incident. *See* Pet. for Writ. of Cert. 18–22. An officer's assertion that they "feared for their life" or "believed the suspect was armed" has acquired a talismanic quality, whereby recitation of fear for one's life has all but negated other factors in the totality of circumstances analysis. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1518 (2016) (discussing how an officer's assertion of feeling threatened "will often be enough to support the conclusion that the officer acted reasonably").

Alternatively, if officer safety is paramount, courts will amplify the "uniqueness" of the circumstances. But every case presents a unique set of circumstances. *See Pearson*, 555 U.S. at 242; Carbado, *supra*, at 1520–22 (discussing the difficulty in pinpointing clearly established law); Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63 (2016) (noting that in sixteen of eighteen cases, the Court has held officers did not violate clearly established law and were entitled to qualified immunity without ruling on the constitutionality of the officer's conduct). The practical effect is that victims of excessive police force lack any adequate basis to maintain a civil action against an officer if a virtually identical case has not been litigated and resolved on appeal. *See* Carbado, *supra*, at 1522; Stephen R. Reinhardt,

The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 MICH. L. REV. 1219, 1245 (2015).

Coupled with the "hazy border" between excessive and acceptable force in determining whether a constitutional principle was clearly established, broad deference to officers as to the reasonableness of the force leaves plaintiffs with little recourse. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); Reinhardt, *supra*, at 1250 ("The failure to identify constitutional violations allows government officials and law enforcement officers to continue their unconstitutional practices secure in the knowledge that they cannot be called to account for their actions."). To the extent courts avoid the question of what constitutes excessive force, an officer may be granted qualified immunity even though the legality of the officer's conduct remains unsettled. In essence, courts that are unwilling to forge clear standards are signaling to officers that any use of force, including that which is deadly, may be constitutionally justifiable. Little to no attention is given to the reasonableness of a civilian's corresponding reactions because incorporating a civilian's perspective might limit the amount of force the officer can justifiably use to protect himself. The officer's conduct is subsequently rationalized whereas individuals are left to bear the physical, emotional, and monetary consequences of interacting with law enforcement.

II. The "haziness" between excessive and acceptable force empowers officers to operate with impunity, and increasingly violent encounters with officers decrease public confidence in the constitutional limits on state power.

The real world consequence of a laisser-faire jurisprudential doctrine, according to which reasonableness seems to be exclusively in the eye of the officer and qualified immunity justifies virtually every use of force, is that officers are more likely to test the limits of their power, act like a military force, and victimize poor and minority communities. *See* Gross, *supra*, at 162 ("[P]olice officers typically use force offensively rather than defensively and do so with at least some degree of premeditation."); Karen M. Blum, Scott v. Harris*: Death Knell for Deadly Force Policies and Garner Jury Instructions?*, 58 SYRACUSE L. REV. 45, 54–55 (2007) ("Removing 'deadly force' from a special category of force that triggers certain preconditions will encourage police agencies to rewrite policies that currently treat deadly force as different, placing clear restraints on its use."); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1283 (1999).

A. Police officers are more likely to test the limits of their power, giving rise to public mistrust and resentment.

Walter Scott had a broken brake light when Officer Michael Slager pulled him over.[2] The conversation began fruitfully; Scott explained he lacked automobile insurance, but was working towards purchasing the car. Seemingly satisfied, Officer Slager returned to his vehicle. Subsequently, Scott momentarily attempted to decamp from his car, during which time Officer Slager instructed the frightened man to stay put. Scott panicked, exited his car, and took off running.[3] Officer Slager scrambled afterwards in hot pursuit, firing two Taser shots at a fleeing Scott.[4] The chase ensued around parks and pawn shops until Officer Slager ultimately arrived at the

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[2] Andrew Knapp, *Dash video strikes at heart of problem, critics of police say,* POST & COURIER, (Apr. 8, 2015), http://www.postandcourier.com/archives/dash-video-strikes-at-heart-of-problem-critics-of-police/article_2be4b237-cee6-5b08-8945-0b9baf4f0a01.html.

[3] Ashley Fantz & Holly Yan, *Dash cam video shows the moments before South Carolina police shooting*, CNN (Apr. 9, 2015), http://www.cnn.com/2015/04/09/us/south-carolina-police-shooting/.

[4] Mark Berman, Wesley Lowrey, & Kimberly Kindy, *South Carolina police officer charged with murder after shooting man during traffic stop,* WASH. POST. (Apr. 7, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/04/07/south-carolina-police-officer-will-be-charged-with-murder-after-shooting/?utm_term=.a3d72782328c.

fifty-year-old man.[5] Officer Slager again fired his Taser at Scott who responded by bolting. Scott had barely gone fifteen yards when Officer Slager cocked his handgun and fired eight shots. The bullets penetrated Scott's back thrice, lower back, and ear—just off the side of his head. Scott fell forward and died, his heart and lungs irreparably damaged.[6]

Scott's killing at the hands of the police made the news not so much because it was a rare event but because millions of Americans were able to watch on their televisions, computers, or phones the exact awful moment when an officer shot a fleeing man in the back. Some semblance of this tale plays out daily—perhaps with varying degrees of violence—but the effects, and often the fatal outcomes, are largely the same. No doubt the causes of police violence—particularly against people of color—are historically and culturally complex. Yet, it is difficult to escape the conclusion that part of the explanation lies in a laisser-faire police force jurisprudence that has inexorably placed increasing power in the hands of law enforcement by viewing virtually all use of force by the police as inherently reasonable. In effect, the

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[5] Jenny Jarvie, *Jury reports it's deadlocked in the fatal police shooting of Walter Scott in South Carolina*, L.A. TIMES (Dec. 2, 2016), http://www.latimes.com/nation/nationnow/la-na-walter-scott-trial-20161202-story.html.

[6] Chris Dixon & Tamar Lewin, *South Carolina Officer Faces Federal Charges in Fatal Shooting,* N.Y. TIMES (May 11, 2016), https://www.nytimes.com/2016/05/12/us/south-carolina-officer-faces-federal-charges-in-fatal-shooting.html?_r=0.

Court's precedent has let slip Fourth Amendment restraint from the police and the havoc that has ensued is no more and no less than the police testing the boundaries of their power. Walter Scott is not an isolated incident committed by a single rogue officer any more than Michael Brown, Eric Garner, Freddie Gray, Tamir Rice, Samuel DuBose, and so many others were isolated incidents committed by a handful of bad apples. Law enforcement's aggressive culture "facilitates and rewards violent conduct." Barbara A. Armacost, *Organizational Culture and Police Misconduct, 72* GEO. WASH. L. REV. 453, 455 (2004). As a result, society has grown aware—and expectant of—police brutality, and such violent conduct intended to dehumanize and degrade. *See* Bandes, *supra*, at 1276.

B. Increased militarization of the police force has directly contributed to officers' employment of excessive force and resultant police brutality.

Forty minutes past midnight, on May 15th, a Detroit Police Department SWAT team went to a local residence to serve a warrant on a shooting suspect. Wearing black Kevlar vests and armed with military-grade weapons, they appeared headed to war.[7] The plan was straightforward

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[7] *DPD officer involved in Aiyana Jones shooting identified*, WXYZ DET. (May 19, 2010), http://www.wxyz.com/news/region/detroit/detroit-police-officer-involved-in-shooting-death-of-aiyana-jones-reinstated.

enough: create a distraction inside the residence and apprehend the target suspect in the midst of the confusion. Not far behind was an A&E Network reality television show in tow for the military-grade performance.[8] As the operation began, officers outside rocketed a flashbang grenade through the residence's window, capable of inflicting searing damage to all in proximity. *Id*. As the flashbang grenade exploded inside the bedroom, another officer kicked in the front door. They rushed inside and, in the midst of the burning smoke, loud cries, and panic, an officer fired a shot, hitting a child in the head. When the smoke cleared from the hollowed-out and blackened shell of the apartment, the child was dead.[9] Her name was Aiyana Jones; she was seven-years-old. Although charges were pressed, the judge dismissed a manslaughter charge, while the jury deadlocked on other charges resulting in a mistrial. The prosecutor dropped remaining misdemeanor charges.

The SWAT raid that killed Aiyana Jones was routine. The suspect that officers sought to arrest was neither a drug kingpin nor a dangerous terrorist, but rather the run-of-the-mill suspect that police, in large urban areas and small rural

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[8] Elisha Anderson, *Detroit police sued over raid that killed girl, 7,* DET. FREE PRESS (Apr. 2, 2015), http://www.freep.com/story/news/local/michigan/detroit/2015/04/02/aiyana-stanley-jones-weekley/70829364/.

[9] Charlie LeDuff, *What Killed Aiyana-Stanley Jones?,* MOTHER JONES (Nov. 2010), http://www.motherjones.com/politics/2010/11/aiyana-stanley-jones-detroit.

towns, now pursue using the equipment, tactics, and mindset of soldiers at war.

Law enforcement has undergone a dramatic evolution from community peacekeepers to municipal armies, from guardians to warriors. *E.g.,* Gross, *supra,* at 162. Police militarization is in part a consequence of law enforcement feeling justified to employ excessive force without legal constraint. Logically, officers would equip themselves with whatever tools necessary to wield that awesome force. For when society is sent a signal that there is no amount of force left unjustified, police officers will rely on tools that are most deadly.

From the earliest days of officer training, police recruits are steeped in the "warrior mindset," likening officers to soldiers confronting life-threatening perils in the field; officers are instructed that survival is their primary task. *See* Seth Stoughton, *Law Enforcement's "Warrior" Problem,* 128 HARV. L. REV. F. 225, 226 (2015). By extension, the officer is taught that the outside world is unforgiving, hostile, and out to get them. *Id.* at 227. Against this grim backdrop, "Officers learn to treat every individual they interact with as an armed threat and every situation as a deadly force encounter in the making." *Id.* at 228. In this sense, militarization is the physical embodiment and internal mindset of the excessive use of force doctrine.

Further fueling this drastic development, federal government programs have systematically armed local and state level law enforcement agencies. *See* ACLU, WAR COMES HOME: THE

EXCESSIVE MILITARIZATION OF AMERICAN POLICING 4 (2014). In furtherance of President Nixon's War on Drugs, the Reagan administration in 1981 secured passage of the Military Cooperation with Law Enforcement Act. This legislation allowed law enforcement at all levels to access lethal weapons, intelligence and military bases to combat drug-related activities. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 77 (2010) ("That legislation carved a huge exception to the Posse Comitatus Act, the Civil War-era law prohibiting the use of the military for civilian policing."). Subsequently, through the 1033 program—signed into law in 1989 and made permanent in 1996—Presidents George H. W. Bush and Clinton increased the military's transmission of weaponry and combat-style training to law enforcement agencies. *See* ACLU, *supra*, at 18; Alexander, *supra*, at 77. Quite literally, this weaponry came straight from the battlefield, including but not limited to: sniper rifles, military-style rifles, submachine guns, helicopters, and mine-resistant armored vehicles. *See* ACLU*, supra*, at 27. In total, the Department of Defense acting under the 1033 program, has transferred more than $4.3 billion military-grade tools and supplied tens of thousands to law enforcement agencies free of charge. ACLU*, supra*, at 26.

While previously reserved for trench warfare, it is now commonplace to see officers, and even the National Guard, armed to the teeth patrolling America's streets with a ready to strike mindset. RADLEY BALKO, RISE OF THE WARRIOR COP:

THE MILITARIZATION OF AMERICA'S POLICE FORCES 157 (2014); *See also* Mallory Meads, *The War Against Ourselves:* Heien v. North Carolina*, The War on Drugs, and Police Militarization,* 70 U. MIAMI L. REV. 615, 616 (2016). The introduction of SWAT forces to American streets was initially limited to the most dangerous of offenses—those involving hostages and urban trench warfare; today SWAT teams are routinely deployed on "no-knock" drug raids. Haberman, *supra*. More than 80,000 SWAT raids are executed annually in America today, spiking from 3,000 per year in the early 1980's.[10] What began as a misguided militarized effort to curtail drug production and use has permeated day-to-day policing. Meads, *supra*, at 616. Indeed, police have become conditioned to view the community members they serve as an adversary; society has responded in kind with a reciprocal viewpoint. *Id.* at 623.

C. Poor people and people of color are disproportionally victimized by excessive use of police force.

From 1980 to 2005, approximately 9,500 individuals were killed by law enforcement.[11] Other estimates peg killings by police at upwards of 1,000 lives lost annually. Nancy C. Marcus, *From*

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[10] Radley Balko, *Shedding light on the use of SWAT teams,* WASH. POST. (Feb. 17, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/02/17/shedding-light-on-the-use-of-swat-teams/?utm_term=.0dde1e5878b0.

[11] Jeff Kelly Lowenstein, *Killed by the Cops*, COLOR LINES (Nov. 4, 2007), http://www.colorlines.com/articles/killed-cops.

Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform, 12 DUKE J. CONST. L. & PUB. POL'Y 53, 61 (2016). In 2016 alone, 963 civilians were shot by law enforcement,[12] nearly mirroring the 965 lives cut short in 2015. Gross, *supra*, at 178. When law enforcement officers and a suspect have an encounter that results in a death between one of the two parties, the suspect is slain approximately ninety-seven percent of the time.[13]

These alarming statistics are only further compounded by the racial dimension of the killings, as "unarmed victims of police killings tend to disproportionately be people of color." Marcus, *supra*, at 68. An unarmed black man is more than seven times as likely than a white man to be gunned down by a police officer.[14] This travesty occurs despite the fact that, when compared to white Americans, black Americans are more than two times as likely to be unarmed when fatally shot by police. Justin Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 CRIMINOLOGY

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[12] WASHINGTON POST FATAL FORCE DATABASE, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (last visited Feb. 9, 2017).

[13] Gross, *supra*, at 167; Kimberly Kindy, *A Year of Reckoning: Police Fatally Shoot Nearly 1,000,* WASH. POST. (Dec. 26, 2015), http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/.

[14] Sandya Somashekhar, et al., *Black and Unarmed*, WASH. POST. (Aug. 8, 2015), http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/.

& PUB. POL'Y 1 (forthcoming Feb. 2017). Throughout 2015, police ended an unarmed black man's life every nine days.[15] During that same time, a total of 1,134 young black men were killed by law enforcement officers.[16] Indeed, black individuals are significantly overrepresented as victims compared to their overall portion of the population. *See e.g.*, Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 232 (2016). Even though young African American men aged fifteen to thirty-four comprise two percent of the United States, they were more than fifteen percent of the total number of deaths in 2015 at the hands of police. Swaine et al., *supra*. Indeed, nearly one in sixty-five young African American men will be killed by the police for no justifiable reason whatsoever. *Id.* By contrast, only forty-two police officers were shot and killed in 2015, a year which scholars have pointed out has been the safest for police in American history.[17]

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[15] DeNeen L. Brown, *How videos of police shooting unarmed black men changes those who watch them,* WASH. POST. (May 8, 2016), https://www.washingtonpost.com/local/how-videos-of-police-shooting-unarmed-black-men-changes-those-who-watch-them/2016/05/07/da2cceee-d4ed-11e5-9823-02b905009f99_story.html?utm_term=.724f1c6007d5.

[16] Jon Swaine et al., *The Counted: Young black men killed by US police at highest rate in year of 1,134 deaths,* THE GUARDIAN (Dec. 31, 2015), https://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men.

[17] Bill Chappell, *Number of Police Officers Killed by Gunfire Fell 14 Percent in 2015, Study Says*, NPR (Dec. 29, 2015),

While, these alarming statistics have been captured by major news outlets, researchers, and civic organizations, there does not exist a wholly accurate measure of police use of excessive force in the United States.[18] The Federal Bureau of Investigations does operate a national database of lethal law enforcement shootings, but police departments are not required to regularly update the statistics.[19] Law enforcement reported only 2,931 officer killings of civilians between 2003–2009, which the Bureau of Justice Statistics determined included only thirty-six to forty-nine percent of the total homicides. Gross, *supra*, at 177. Re-calculating these reports of excessive force would then mean between 5,979 or 8,118 individuals were victims of law enforcement. *Id*. In response to these glaring deficiencies in accuracy and reporting, within the last several months the Federal Bureau of Investigation has begun developing a database on the use of force nationwide to establish baseline numbers on the

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http://www.npr.org/sections/thetwo-way/2015/12/29/461402091/number-of-police-officers-killed-by-gunfire-fell-14-percent-in-2015-study-says; Gross, *supra*, at 169.

[18] *See generally* Naomi Shavin, *Our Government Has No Idea How Often Police Get Violent With Civilians,* NEW REPUBLIC (Aug. 25, 2014), https://newrepublic.com/article/119192/police-use-force-stats-us-are-incomplete-and-unreliable; Rachel Harmon, *Why Do We (Still) Lack Data on Policing*?, 96 MARQ. L. REV. 1119 (2013).

[19] Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST. (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/.

trendlines.[20] Yet, reporting by law enforcement will still remain voluntary.[21]

How have we gotten to the point where civilian, and in particular minority, loss of life at the hands of the police has become so routine? The literature increasingly points to the role of repeat interactions African Americans have with law enforcement officers. Critically, these recurrent interactions heighten the chance of police violence. Sekhon, *supra,* at 205. Studies have demonstrated thoroughly the corrosive associational link society and thus officers make between black men and violent criminality. *See* Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?,* 51 HARV. C.R.-C.L. L. REV. 159, 172 (2016). Other experiments have demonstrated that witnessing or even hearing about black criminality boosts an individual's support for punitive policing. *See* Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1950–52 (2014). Consequently, if an officer holds these toxic associational links, then a black man's increased interactions with the police only serve to increase the chances the officer

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[20] Press Release, Department of Justice, Justice Department Outlines Plan to Enable Nationwide Collection of Use of Force Data. (Oct. 13, 2016), https://www.justice.gov/opa/pr/justice-department-outlines-plan-enable-nationwide-collection-use-force-data.

[21] Tom McCarthy et al., *FBI to launch new system to count people killed by police officers,* THE GUARDIAN (Dec. 8, 2015), https://www.theguardian.com/us-news/2015/dec/09/fbi-launch-new-system-count-people-killed-police-officers-the-counted.

acts on the racially-charged stereotypes, thereby leading to violence. Carbado & Rock, *supra*, at 167. This striking revelation could explain why black and Hispanic individuals are 50% likelier to experience use of force during a police encounter. Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* 5 (NBER, Working Paper No. 22399, 2016). Even in circumstances when no arrest was made, black individuals are significantly more likely to experience excessive force. *Id.* at 37.

These troubling associations are further borne out by the consistent number of Justice Department administered pattern or practice federal investigations of police departments.[22] Between 1994 and 2015 the Justice Department initiated sixty-seven police department investigations, consistently finding officers having employed excessive use of force.[23] Additionally, from 2000 to 2013, nearly 325 preliminary inquiries arose. Stroud & Rojanasakul, *supra*. Of the twenty-five police departments screened out for independent monitoring and reformation, sixteen

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[22] Matt Stroud & Mira Rojanasakul, *A 'Pattern or Practice' of Violence in America*, BLOOMBERG (May 27, 2015), https://www.bloomberg.com/graphics/2015-doj-and-police-violence/.

[23] Kimbriell Kelly et al., *Forced Reforms, Mixed Results,* WASH. POST. (Nov. 13, 2015), http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/; Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees,* 51 WAKE FOREST L. REV. 793, 816 (2016).

departments contained officers who regularly utilized excessive force. Kelly et al., *supra*. For instance, the Detroit Police Department contained officers who, in a five-year period, lethally shot forty-seven individuals. *Id.* In a seventeen-month window, the New Orleans Police Department fatally shot twenty-seven people—every victim was black. *Id.* In Ferguson, Missouri, virtually ninety percent of the police department's incidents involving excessive force were waged against African Americans. DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 5 (2015).

Society at large has grown increasingly aware of civilian deaths at the hands of police officers through a steady stream of visuals. Yet, police brutality is not a new phenomenon, quite the opposite. *Id.* at 54.

The telecommunication revolution of the Internet, cable news, and social media now shine the spotlight into the unending torrent of police violence pervading minority, impoverished communities. These acts were not new, nor unprecedented in number; the acts are simply being brought to the public conscience for many for the first time. *Id.* at 53. The victims' names have become immortalized, engrained as a wretched tear on our already deeply scarred national tale.

For example, twenty years ago Philando Castile would have died in obscurity. Castile had just finished grocery shopping with his girlfriend Diamond Reynolds and her toddler in the suburbs of St. Paul when he was pulled over by police—an

exceedingly common traffic stop for Castile.[24] Before he died, he had been pulled over at least fifty-two times.[25] On this occasion, Officer Jeronimo Yanez falsely believed that Castile was the suspect in a robbery. Officer Yanez called his colleague Joseph Kauser for backup; the duo tracked down the car, approaching the vehicle from both sides.[26] Officer Yanez followed the typical law enforcement formalities, requesting Castile's license and registration.[27] Castile explained that—as a licensed carrier—he had a pistol on his person.[28] Castile then reached for his papers. Instantly, officer Yanez shouted, "Don't move!" simultaneously

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[24] *Philando Castile death: Aftermath of police shooting streamed live,* BBC (July 7, 2016), http://www.bbc.com/news/world-us-canada-36732908.

[25] Carla K. Johnson & Steve Karnowski, *Stopped 52 times by police: Was it racial profiling?,* ASSOC. PRESS (July 9, 2016), http://bigstory.ap.org/article/81351f97c0be4caea5c91b5662848129.

[26] Mark Berman, *Minnesota officer charged with manslaughter for shooting Philando Castile during incident streamed on Facebook,* WASH. POST. (Nov. 16, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/11/16/prosecutors-to-announce-update-on-investigation-into-shooting-of-philando-castile/?utm_term=.635ac215bcbf.

[27] Mitch Smith et al., *Peaceful Protests Follow Minnesota Governor's Call for Calm,* N.Y. TIMES (July 8, 2016), https://www.nytimes.com/2016/07/09/us/philando-castile-jeronimo-yanez.html.

[28] Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile is Charged with Manslaughter,* N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html.

reached for his firearm and repeatedly shot Castile. *Philando Castile death, supra*. Castile's girlfriend, a passenger in the car, pulled out her phone and, as blood spilled out of Castile's arm and sides, live-streamed to the entire world his last dying moments.[29]

In the catalogue of civilians killed by police in recent years, Castile's death may not have been as brutal as Walter Scott's being shot in the back, or as startling as Tamir Rice, a twelve-year-old boy shot seconds after police officers arrive on the scene as he played with a toy gun. What makes Castile's killing both unique and a revelation to the larger public is the awful—not to say obscene—spectacle of watching a man die live on the Internet. For an increasing number of Americans, Castile's death accomplished what countless statistics failed to do failed to do: make real the fact of police brutality.[30] What the African American community has collectively known for generations, through lived experience, can now be digitally documented for all Americans. Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOW. L. J. 5, 13 (2015).

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[29] Matt Furber & Richard Pérez-Peña, *After Philando Castile's Killing, Obama Calls Police Shootings 'an American Issue,'* N.Y. TIMES (July 7, 2016), https://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html.

[30] *See* Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks,* N.Y. TIMES (Oct. 4, 2016), https://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html.

D. Excessive levels of force against members of the community negatively impacts individuals' perception of law enforcement.

The violence police visits upon communities of color creates fear, mistrust, and resentment of police officers among the very people who have the most pressing need of law enforcement services, and upon whom police most urgently rely in order to be effective. Yet, the laisser-faire use of force doctrine does nothing to build trust or promote cooperation. Rather, the doctrine has led to a vicious cycle, in which the greater the level of police brutality the greater the level of mistrust, leading to more brutality, leading to greater mistrust ad infinitum. *See* Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v. Garner*, 7 KAN. J.L. & PUB. POL'Y 100, 112 (1998).

With approximately 18,000 police units and over 765,000 officers, the United States relies on a punitive model of justice. Barry Friedman & Maria Ponomarenko, *Democratic Policing,* 90 N.Y.U. L. REV. 1827, 1844 (2015). Yet, for all of its power, the entire punitive legal apparatus operates on a plane of trust: trust in the judiciary to interpret the laws and trust in police to enforce the laws. Absent that trust, the perceived and actual legitimacy of the system breaks down. Indeed, the very first pillar of the Obama administration's landmark White House Task Force on 21st Century Policing report called for re-building trust to spur police reform.

Officers frequently note, and courts themselves frequently cite, fear for officers' lives as justification for excessive or deadly use of force, arguing in effect that they fear and do not trust the people they serve. But what remains little discussed is that this police brutality serves to pit police against the community. More specifically, through the augmented use of excessive force encouraged by judicial patronage, police forces have, quite literally, shaken the trust out of their constituent communities. "[H]ow and what we police reinforces walls of 'us' versus 'them,' insularity, provincialism, and an 'ecology of fear.'" I. Bennett Capers, *Policing, Race, and Place,* 44 HARV. C.R.-C.L. L. REV. 43, 71 (2009).

Rather than communities in need, law enforcement increasingly view neighborhoods as war zones. *See*, *e.g.*, Carbado & Rock, *supra*, at 181. War torn imagery especially that repeated ad nauseam in the popular press and lived experience—think no further than the moniker "Chiraq" to describe Chicago—plays a powerful role in uprooting planted seeds of trust. A relationship built on trust between a tight-knit community and their local neighborhood officer, a neighbor even, is fundamentally altered when an imposing man in paramilitary regalia clutching oversized arms is on the scene. Haberman, *supra*. That man is not one of "us," he is a soldier patrolling occupied territory. The trust of innocent bystanders is not an immediate concern, if at all, when an officer looks out from his perch and sees only enemies. Meads, *supra,* at 618; Balko, *supra,* at 241. The White House Task Force on 21st Century Policing report

explicitly references this concern and encourages police to "proactively work cooperatively and collaboratively with the communities they serve, rather than acting as an occupying force in urban communities." Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform,* 12 DUKE J. CONST. L. & PUB. POL'Y 53, 90 (2016); WHITE HOUSE TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 41–42 (2015).

Even after police violence has ended, the breakdown in community and law enforcement trust prevails. *See* Jeremy R. Lacks, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force,* 64 N.Y.U. ANN. SURVEY. AM. L. 391, 395 (2008). This reality cuts both ways as police distrust their own guarded communities and rely on venomous racial stereotypes. *Id.* Consequently, the whole of the justice system is shaken as citizen assistance in reporting crime and cooperating with police officers declines. *Id.* The toll that excessive and deadly force exact thus far exceeds unconscionable loss of life.

Fear of law enforcement is prevalent amongst marginalized communities along race and class lines. This breakdown in trust is particularly pronounced in minority communities. *See e.g.*, Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777, 777–78

(1998). Police, elected officials, and the general public are simply afraid of black men in general, poisoning an otherwise hospitable climate for warmer relations. *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (forthcoming 2017). Or that poor and minority communities bear the brunt of police attention, from a national police force that is disproportionately white. *See*, *e.g.*, Friedman & Maria Ponomarenko, *supra*, at 1864; Capers, *supra*, at 56.

When a black man is more likely to be cast as a violent criminal in the minds of law enforcement, the "less space that person has to assert rights, and the more work he has to do to signal compliance." Carbado & Rock, *supra*, at 180. Consequently, the officer is incentivized to pursue excessive force while the black man is triggered to activate an internal feedback loop of social marginalization and distrust of law enforcement. *Id.* Until the ills of permissive acceptance of the widespread use of excessive force are uprooted no resolution to this brutish nightmare is in sight.

III. Vindicating society's interests in limiting the use of excessive force requires approaching the Fourth Amendment analysis from the standpoint of a reasonable community member.

In theory, this Court has long articulated that whether force is excessive should be determined by an objective reasonableness standard in light of all the facts and circumstances. *See, e.g.*, *Brosseau*, 543 U.S. at 198. In practice,

however, when an officer injures or kills a civilian the victim's point of view is rarely a part of the circumstances informing reasonableness analysis. Rather, when a civilian is harmed or killed, the question of whether an officer acted reasonably is more often than not limited to understanding what the officer saw, heard, thought, felt or imagined at the moment he or she applied a chokehold, fired a tear canister, or discharged a weapon. Case after case, courts consider the factual circumstances which precipitated the use of deadly force—almost exclusively through a framing of the officer—against a static conception of societal interests. *Garner*, 471 U.S. at 8. This failure to give serious consideration to individuals' legitimate expectations to be free from state-sponsored violence undermines the balance of "competing interests" this Court recognized as "the key principle of the Fourth Amendment." *Id*. at 8.

Faced with new evidence on the use of excessive force by law enforcement, the Court should reaffirm that the excessive force inquiry is fact-bound and includes relevant events that may precede the precise moment force is used. Recognizing that a retrospective judgment on an officer's intent and motivations is not relevant to the objective reasonableness of a decision to use force should not negate other factors in the inquiry such as how, when, and where the seizure occurred or the danger to the public at large. *See, e.g.*, *Pauly*, 137 S. Ct. 552 (noting that an alternate ground for finding that an officer unreasonably shot a suspect might include whether the later-arriving officer knew that the first officers on the scene failed to

announce themselves as police); *Sheehan*, 135 S. Ct. at 1775–76 (considering the call for emergency assistance, knowledge of the patient's threat to kill three people, and the patient's possession of a weapon in judging the reasonableness of the officer's actions); *Plumhoff*, 134 S. Ct. at 2021–22 (considering the speed at which the suspect was driving, the presence of other civilians, the five hour length of the high speed car chase, and the suspect's persistence on fleeing in judging the reasonableness of an officer's decision to shoot into the suspect's vehicle).

Furthermore, reasonableness of an officer's conduct should comport with evolving societal interests such as limiting police violence against citizens. If we accept a dual-sided examination of the totality of the circumstances inquiry, which considers society's legitimate expectations on the propriety of the use of force, then we reconcile the government's interest in effective law enforcement with society's desire to be free from police intrusion. This shift in how to evaluate the reasonableness of an officer's use of force would require courts to imagine incidents from the perspective of reasonable civilians in addition to reasonable officers. *Commonwealth v. Warren* provides an instructive model of how a civilian's perspective may coalesce with existing Fourth Amendment standards and elucidate incidents where officers unreasonably exceeded the scope of their authority. 58 N.E.3d 333, 342 (Mass. 2016). In *Warren*, a unanimous Massachusetts Supreme Court determined that little weight should be given to flight in assessing whether officers had the

requisite reasonable suspicion to apprehend a defendant who ran away rather than confront the officers.[31] The court noted that a defendant "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity." 58 N.E.3d at 342.

With respect to the excessive force doctrine, courts should similarly assess how a reasonable civilian might respond in an incident with police officers, especially in communities where officers are associated with danger rather than security. The Ninth Circuit's decision provides an opportunity to imagine a police encounter through the eyes of a civilian in a place where Fourth Amendment protections are thought to be the strongest. *See Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"); *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) ("The prohibition [of firearms] extends, moreover, to the home, where the need for defense of self, family, and property is most acute."); Br. in Opp'n. at 18. In this scenario law enforcement's presence was unexpected, unannounced, and unwarranted. In Mendez's home, there was no threat to the public as there

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[31] *Id.*; Ariane de Vogue, *Massachusetts Court: Black Man Fleeing Police Does Not Signify Guilt*, CNN (Sept. 22, 2016, 9:07 PM), http://www.cnn.com/2016/09/22/politics/massachusetts-court-ruling-fleeing-police/.

might have been in *Mullenix*, *Scott*, or *Plumhoff*. However, the officer's forced entrance into the home of an unsuspecting civilian in the middle of the night places the officer in the role of a common trespasser, from which an individual is entitled to protection. *Cf. Heller*, 554 U.S. at 628. In that context, we must then ask whether it is reasonable for an *intruder* to use force against a victim of trespass.

Moreover, a sizeable portion of this Court's jurisprudence on the extent to which officers can lawfully use deadly force has developed in the context of exigent circumstances. *See, e.g.*, *Sheehan*, 135 S. Ct. at 1775 (holding that officers used reasonable force when responding to a mentally ill patient who advanced upon officers with a knife because the officers were entitled to protect themselves); *Mullenix*, 136 S. Ct. at 312 (holding that an officer who fired six shots into a speeding vehicle, which resulted in the death of a driver fleeing arrest, was entitled to qualified immunity because there was no clearly established law on whether such force was unreasonable). Under such dangerous and escalating circumstances, officers may be required to make "split-second decisions" in pursuing suspects. The practical, if not legal, effect of the Court's desire to give officers "breathing room" has resulted in justifying the use of force even in instances where officers contribute to the exigency.[32] However, encounters with officers are

[32] *See Sheehan*, 135 S. Ct. at 1774 (stating that the qualified immunity analysis is meant to give officers "breathing room" to make reasonable but mistaken judgments); Kara Dansky,

as tense, as uncertain, and as rapidly evolving for civilians yet civilians are not afforded the same breathing room for mistakes like misplacing their car keys or driving with a cracked windshield.[33] The very presence of officers is often considered a threat to civilians. *Supra*, Part II.D.2. Although much of Fourth Amendment law is often developed in the context of unsympathetic felons, the breadth of the excessive force doctrine fails to account for such rudimentary encounters between law enforcement and the communities they serve.

Subsequently narrowing when and how officer's use deadly force may be circumscribed along time and spatial limits. Society might accept the times where officers rush into public quarters with guns ablaze in active pursuit of a dangerous criminal and still oppose officers barging into the home of sleeping civilians without a warrant or warning hours after they have lost sight of the suspect. Alternatively, society might condone an

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How Many People Must Be Maimed or Killed Before We End the Militarization of Our Police Forces?, ACLU (Oct. 7, 2014, 5:00 PM), https://www.aclu.org/blog/speakeasy/how-many-people-must-be-maimed-or-killed-we-end-militarization-our-police-forces (describing a grand jury's decision not to indict officers in a warrantless drug raid who severely injured a nineteen-month-old child by throwing a flashbang grenade into the wrong house).

[33] *See Colorado Springs Police Drew Weapons, Used Excessive Force Against African American Man Who Misplaced His Car Keys*, ACLU (July 14, 2005), https://www.aclu.org/news/colorado-springs-police-drew-weapons-used-excessive-force-against-african-american-man-who.

elevated use of force against suspects fleeing in a high speed chase, yet simultaneously condemn the same use of force against an unarmed suspect running with their back turned to the officer, in which there is less of a danger to public and officer safety. In the first instance, conflict with law enforcement is readily foreseeable. Civilians can therefore rationalize law enforcement's interest in public safety and a corresponding use of force in the face of the imminent threat. In either case, the reasonableness of an officer's conduct would be measured against society's expectations on how far officers may intrude upon their person or home.

The present state of police and community relationships necessitates the aforementioned review of society's Fourth Amendment interests, specifically society's interest in limiting the use of state police power against its citizens. The lack of clear standards on when and how officers are allowed to use deadly force practically places individual officers in the role of "judge, jury, and executioner." Gross, *supra*, at 158. We allow officers to make reasonable mistakes in judgment with potentially deadly consequences for citizens. *See Sheehan*, 135 S. Ct. at 1777 (stating that a Fourth Amendment violation cannot be based on bad tactics that could have been avoided). Such largely deferential inquiries into the reasonableness of an officer's use of force do not adequately account for the nature and quality of intrusion on the individual's Fourth Amendment interest in life. *See supra*, Part I. Where officers are permitted to make human error but civilians may not survive a traffic stop, the latter is stripped of their humanity. *See*

Gross, *supra*, at 180 (arguing that "[u]sing deadly force against someone who *might* have a weapon is only reasonable if we value the safety of the officer more than that of the suspect"). In considering whether to foreclose the opportunities for plaintiffs to bring distinct claims for damages incurred as a result of a Fourth Amendment violation, as opposed to damages stemming from excessive force claims, we need to decide whether the "breathing room" officers need to perform their duties is more important than an individual's right to be secure in property and life. Particularly, where police encounters are more likely to result in the death of a civilian rather than a responding officer "we need to decide if the life of a police officer is more valuable" than that of any other citizen. *See* Gross, *supra*, at 180.

CONCLUSION

The question of whether the police wield violence disproportionately against poor people and people of color is now part of the national conversation. What we have respectfully attempted to point out in this brief is that the fact of police brutality against black and brown people is not new; the only thing new is that it is now transmitted on the Internet for all the world to see. What we have, equally respectfully, also tried to point out in this brief is that the frequency and seeming impunity with which police wield violence cannot be separated from this Court's Fourth Amendment doctrine, according to which the reasonableness of excessive force is analyzed purely from the point of view of the officer, and the

qualified immunity defense excuses all manner of excessive force because supposedly every police interaction is a unique, in-the-moment event that has never been litigated or resolved. If "[t]he truth is the police reflect America, in all of its will and fear,"[34] so too police brutality and violence reflect this Court's jurisprudence, in all of its laissez-faire deference to police officers.

For the foregoing reasons, the Court should affirm the Ninth Circuit's decision.

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February 23, 2017

[34] TA-NEHISI COATES, BETWEEN THE WORLD AND ME 24 (2015).