No. 18-1906

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KATHY LIVINGSTON, as Administratrix of
The Estate of John David Livingston, II, *et al.*,

Plaintiffs – Appellees,

v.

NICHOLAS KEHAGIAS,
both individually and in his official capacity as law enforcement officer with the Harnett County Sheriff's Department, *et al.*,

Defendants – Appellants.

On appeal from the United States District Court for the Eastern District of North Carolina
(Terrence W. Boyle, Chief District Judge)

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE CENTER AND NORTH CAROLINA ADVOCATES FOR JUSTICE IN SUPPORT OF PLAINTIFFS–APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

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I certify that on 5/16/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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The Public Justice Center and the North Carolina Advocates for Justice respectfully submit this brief as *Amici curiae*. This brief will aid in informing the Court of the current larger context for the doctrine of qualified immunity in excessive force cases and how expanding that doctrine may harm particular communities.[1]

IDENTITY AND INTERESTS OF AMICI CURIAE

The **Public Justice Center** (PJC) is a non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of the under-represented. Established in 1985, the PJC uses impact litigation, public education, and legislative advocacy to accomplish law reform for its clients and has established an Appellate Advocacy Project to expand and improve the representation of indigent and disadvantaged persons and civil rights issues before the Maryland state and federal appellate courts. It has also created a Race Equity Project to focus its legal advocacy on the continuing disparities caused by our nation's long history of institutional and structural racism. The PJC is committed to supporting the rights of victims of police violence. *See Overbey v. Mayor & City Council of Balt.*, No. 17-244 (4th Cir. 2019); *Sizer v. State*, 456 Md. 350 (2017); *Jacome de Espina v. Jackson*, 442 Md. 311 (2015). The PJC has an

[1] No person or party other than *Amici* contributed money for or participated in the preparation or submission of this brief. All parties have consented to *Amici* filing this brief.

interest in this case because of its commitment to ensuring that victims of police violence can effectively seek remedy in the courts for their injuries.

The **North Carolina Advocates for Justice** (NCAJ) is a volunteer professional organization of 2,500 North Carolina lawyers devoted to advocating and protecting the rights of the accused in criminal cases and the injured in civil litigation, and ensuring the integrity of the judicial system. Members of NCAJ regularly represent individuals injured by the unconstitutional conduct of law enforcement officers, and regularly seek to hold individual officers accountable for violations of the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case comes to the Court with a disturbing record developed by Plaintiffs-Appellees below. Defendant-Appellant Nicholas Kehagias came to John Livingston's home without a warrant to enter, and so, Mr. Livingston told Mr. Kehagias to leave. Mr. Kehagias refused. Instead, he forced open the front door, entered the home anyway, and forcefully tried to arrest Mr. Livingston. Even though Mr. Livingston was face-down on the floor, unarmed, and not actively resisting arrest, Mr. Kehagias—mounted on top of him—tased him repeatedly, pepper-sprayed him repeatedly, and struck him in the head and upper body

repeatedly. The incident culminated in Mr. Kehagias taking out his gun, firing it, and killing Mr. Livingston.[2]

Despite those facts, Defendants and their *Amici*, the Southern States and North Carolina Police Benevolent Associations (PBA), insist that qualified immunity shields Mr. Kehagias and the other officers involved in the incident from any liability. To support their argument, PBA contends that escalating violence against the police supports qualified immunity for the officers involved in killing Mr. Livingston. In contrast to that dire picture, all available data suggests that violence against the police is decreasing, and militarization of the police—and the increase in civilian killings that it causes—provides courts a sound reason to limit application of qualified immunity.

What is more, permitting Defendants to enjoy qualified immunity on these facts would convert the doctrine from a robust shield that should be reserved only for officers acting reasonably—to impenetrable body armor that even the most unreasonable officer accused of excessive force can wear. Expanding qualified immunity in this way would "gut[ ] the deterrent effect of the Fourth Amendment,"

[2] Defendants' *Amici*, the Southern States and North Carolina Police Benevolent Associations (PBA), fail to mention in their brief that five other plaintiffs allege that Defendants inflicted an appalling level of excessive force against them in separate incidents, and engaged in a pattern and practice of excessive force. Here, we say those victims' names: Christine Bloom, Michael Cardwell, Tyrone Bethune, Ryan Holloway, and Wesley Wright.

sending "an alarming signal to law enforcement officers and the public. It tells officers that they could shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). Instead, the Constitution demands that victims of excessive force be able to seek a remedy when the alleged conduct is as outrageous as what Plaintiffs demonstrated below.

In addition, this Court should exercise its discretion under *Pearson v. Callahan* and address the constitutionality of Defendants' conduct, and encourage the lower courts to do so in future cases in which police officers assert qualified immunity, thereby more swiftly establishing the limits of constitutional conduct.

Finally, permitting officers who commit unconstitutional conduct to escape liability will continue to disproportionately endanger low-income communities, communities of color, and people with mental illness. For them, police violence is an issue, quite literally, of life and death. Accordingly, any decision by this Court expanding qualified immunity will inevitably hurt these communities the most. Given the adequate protection officers already enjoy under the current qualified immunity doctrine, the Court should resist calls by Defendants and their *Amici* to expand qualified immunity even further.

ARGUMENT

I. VIOLENCE AGAINST POLICE OFFICERS IS NOT INCREASING.

A. Violence Against Police Officers Is Actually Decreasing.

To support its argument that police officers are facing an increased "need" for qualified immunity, the PBA asserts that violence against police officers has "exploded in recent years," reaching a "war-like status." Brief S. States & N.C. Police Benevolent Ass'n as *Amici Curiae* at 23, Doc. 44 [PBA Brief]. This is false. Data from multiple law enforcement organizations demonstrate that violence against police officers, by any measure, is not increasing. In fact, it is decreasing.

According to the Officer Down Memorial Page, which tracks deaths of officers in real-time, there have been forty-three officer deaths in 2019 as of the date of the filing of this brief. *Fatality Statistics, Year 2019*, Officer Down Mem'l Page (last visited May 16, 2019), https://www.odmp.org/search/year/2019. This is a 33% decrease from this point last year. *Id.* Of those forty-three deaths, nineteen officer deaths were from gunfire, a 30% decrease from last year. *Id.* The Officer Down Memorial Page's numbers are consistent with the most recent data from the Federal Bureau of Investigation (FBI). According to the FBI Criminal Justice Information Services Division's most recent Line of Duty Death Report, in 2017 there were forty-two officer deaths from gunfire. Fed. Bureau of Investigation,

Officers Feloniously Killed 4 (2018), https://ucr.fbi.gov/leoka/2017/topic-pages/felonious_topic_page_2017.pdf.

The recent decreases in officer deaths are merely the latest manifestation of a several decades-long trend. According to a recent study using data from the Officer Down Memorial Page, from 1975 to 2016, there has been a 75% drop in officer deaths. Michael D. White, et al., *Assessing Dangerousness in Policing*, 18 Criminology & Pub. Pol'y 11, 23 (2019), https://onlinelibrary.wiley.com/doi/epdf/10.1111/1745-9133.12408. According to the principal researcher, though police officers continue to face danger, "policing is much safer now than it has been in any time in the last 150 years." Casey Kuhn & Steve Goldstein, *ASU Study: Number of Police Line-of-Duty Deaths Plummet in Last 50 Years*, KJZZ (May 1, 2019), https://kjzz.org/content/912871/asu-study-number-police-line-duty-deaths-plummet-last-50-years. Indeed, scholars have pointed out that 2015 was the safest year for police in American history. Bill Chappell, *Number of Police Officers Killed by Gunfire Fell 14 Percent in 2015, Study Says*, NPR (Dec. 29, 2015), 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.

The decrease in violence against officers is not limited to officer deaths. Assaults against officers are also significantly down. In 1988, there were 15.9 assaults for every 100 officers. U.S. Comm'n on Civil Rights, *Police Use of*

Force: An Examination of Modern Policing Practices 39 (2018) [hereinafter USCCR Report] (citing Christopher Ingraham, *Police Are Safer under Obama than They Have Been in Decades*, Wash. Post (July 9, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/09/police-are-safer-under-obama-than-they-have-been-in-decades/?noredirect=on&utm_term=.335c9bdba41a), https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf. In 2000, that figure dropped to 12.7 assaults, and in the most recent data collected by the FBI, in 2014, it dropped to its lowest of 9.0 per every 100 officers. *Id.* Thus, while being a police officer will always be inherently dangerous, no matter the data source or unit of measurement—whether measured by deaths or assaults—the present-day is the safest time in decades to be a police officer.

B. Increased Militarization of the Police, Rather than Violence Against the Police, Has Created the "War-Like" Conditions That the PBA Asserts.

Not only is violence against officers at its lowest level in decades, but the true source of the "war-like" conditions the PBA identified is the increased use of military-grade weapons, tools, and training by police departments to confront and overwhelm any danger they may face. Ensuring that victims of police violence can effectively seek a remedy in court and hold unreasonable officers accountable is critically important when the violence unreasonable officers can inflict is greater than ever.

Law enforcement has "undergone a dramatic evolution, from community peacekeepers to municipal armies, from guardians to warriors." John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 Tex. J. C.L. & C.R. 155, 162 (2016). The evolution began in 1981, when Congress enacted the Military Cooperation with Law Enforcement Act. This act allowed law enforcement at all levels to access military-style 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.").

Later, the Department of Defense's so-called 1033 Program, which was enacted in 1989 and made permanent in 1996, authorized the military to transfer weaponry and combat-style training to law-enforcement agencies. Am. Civil Liberties Union, *War Comes Home: The Excessive Militarization of American Policing* (2014), https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rel1.pdf; Alexander, *supra*, at 77. The weapons local police departments received came from the battlefield itself. They included sniper rifles, military-style rifles, submachine guns, helicopters, and mine-resistant armored vehicles. ACLU, *supra*, at 27. Under the 1033 Program, the Department of

Defense transferred more than $4.3 billion in military-grade tools and supplied them to law enforcement agencies free of charge. *Id.* at 26.

Similarly, special weapons and tactics (SWAT) teams are being used now more than ever. Initially, law enforcement agencies deployed SWAT teams for only the most dangerous offenses, such as holding hostages or urban trench warfare. Clyde Haberman, *The Rise of the SWAT Team in American Policing*, N.Y. Times (Sept. 7, 2014), https://www.nytimes.com/2014/09/08/us/the-rise-of-the-swat-team-in-american-policing.html. Today, however, police departments routinely deploy SWAT teams for drug raids. *Id.* As of 2014, police executed more than eighty thousand SWAT raids annually, a drastic increase from the three thousand per year in the early eighties. 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.

Militarization has not only changed the weapons and training available to officers, it has militarized the mindset with which officers approach policing. Military weapons and training encourage officers to "adopt a 'warrior' mentality and think of the people they are supposed to serve as enemies." *Id.* at 3. Officers are trained to adopt the "win-at-all-costs mentality of a soldier." Radley Balko, CATO Inst., *Overkill: The Rise of Police Paramilitary Raids in America* 17 (2006),

https://object.cato.org/sites/cato.org/files/pubs/pdf/ balko_whitepaper_2006.pdf. They learn to treat every person they meet as an "armed threat" and "every situation as a deadly force encounter in the making." *See* Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 Harv. L. Rev. F. 225, 228 (2015). The PBA's brief itself reveals this warrior mentality. It describes violence against officers as "war-like," "the policeman's world" as "spawned of degradation, corruption, and insecurity," and the community they are supposed to serve as "Hell." PBA Brief at 22 (alterations omitted) (quoting William A. Westley, *Violence and the Police* (1970)).

Increased militarization of the police has dire consequences for the communities they patrol. As Abraham Maslow famously observed, "it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." Abraham Maslow, *The Psychology of Science: A Reconnaissance* 15 (1966). And officers, armed with weapons designed for war and a warrior mindset, have increasingly killed the citizens they are supposed to serve.

According to one study, the 1033 Program made participating police departments more likely to engage in deadly violence. Casey Delehanty, et al., *Militarization and Police Violence: The Case of the 1033 Program*, Res. & Pol., June 2017, at 2, https://journals.sagepub.com/doi/pdf/10.1177/20531680

17712885. 1033 Program participants were associated with "an increase in the number of observed police killings in a given year as well as the change in the number of police killings from year to year," even when "controlling for a battery of possible confounding variables including county wealth, racial makeup, civilian drug use, and violent crime." *Id.* That increase in killings was approximately 129%. *Id.* at 3. The study attributed the increased killings to the military-style weapons leading "to a culture of militarization over four dimensions: material; cultural; organizational; and operational." *Id.* at 2. Put differently, "running military operations with military tools and military mindsets organized militarily will rely more on the tenets of militarization," which—unsurprisingly—increased use of violence on average. *Id.*

In short, with militarized weapons, training, and mindsets, and the resulting increase in killings, victims of police violence need an effective remedy in court now more than ever against officers who misuse those resources.

II. NOTHING ELSE SUPPORTS AN EXPANSION OF QUALIFIED IMMUNITY IN EXCESSIVE FORCE CASES.

Current qualified immunity doctrine provides adequate protection to police officers.

A. Qualified Immunity Analysis Already Requires Courts to View the Use of Force Exclusively from the Perspective of the Officer.

Under current qualified immunity doctrine, courts review the alleged excessive force only from the officer's perception of danger. *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."). As the Supreme Court held in *Graham*, some deference is owed to officers because they need to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" about the needed level of force during a violent confrontation. *Id.* at 397. What is more, unlike in some other circuits,[3] in the Fourth Circuit, "the reasonableness of the officer's actions in creating the dangerous situation is not

[3] There is currently a split among the Courts of Appeals regarding whether, under *Graham*, courts may also consider officer conduct prior to the use of force in evaluating Fourth Amendment claims. *Compare Elliot*, 99 F.3d at 644, *with, e.g.*, *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005) ("[P]olice officers' actions for [excessive force cases] need not be examined solely at the 'moment of the shooting.' [Citation omitted.] This rule is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances.'"); *accord Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1189 (10th Cir. 2001); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999). Other Courts of Appeals, though not expressly rejecting the time-limited approach under *Graham* that this Court has adopted, have nonetheless considered the conduct of officers leading up to the use of force. *See, e.g.*, *Williams v. Ind. State Police Dept.*, 797 F.3d 468, 483 (7th Cir. 2015), *cert. denied sub nom. Blanchard v. Brown*, 136 S.Ct. 1712 (2016).

relevant to the Fourth Amendment analysis . . . ." *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005).[4]

Current qualified immunity doctrine accords officers so much deference that they may still enjoy immunity even when they admittedly made a mistake, as long as that mistake is reasonable from the officer's perspective. *Saucier v. Katz*, 533 U.S. 194, 195 (2001), *partially overruled on other grounds*, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Accordingly, courts afford officers "breathing room" that protects all officers except those who are "plainly incompetent or those who knowingly violate the law." *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). The PBA acknowledged this deference in their *Amici* brief. *See* PBA Brief at 16, 20.

[4] A recent decision by the Supreme Court carved out an explicit exception to this Court's interpretation of *Graham*, if not calling this Court's interpretation into serious question entirely. In *County of Los Angeles v. Mendez*, a unanimous Court remanded the plaintiffs' excessive force claim to the Ninth Circuit to decide whether "proximate cause" allows them to recover damages for their injuries based on the defendant officers' earlier Fourth Amendment violation of "fail[ing] to secure a warrant at the outset." 137 S. Ct. 1539, 1549 (2017). Accordingly, at minimum, under *Mendez* this Court must consider conduct prior to the use of force if an earlier Constitutional violation proximately caused injuries to plaintiffs bringing an excessive force claim. Indeed, *Mendez* strongly suggests that this Court should reconsider its interpretation of *Graham* to include officer conduct prior to the use of force when considering the totality of circumstances.

B. The "Clearly Established Law" Standard Has Led to Courts Avoiding Setting Boundaries for What Constitutes Excessive Force.

Qualified immunity analysis requires courts to ask (1) "whether a constitutional violation occurred," and (2) "'whether the right violated was clearly established' at the time of the official's conduct." *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017) (citation omitted). In *Pearson*, the Supreme Court held that courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. at 236.

Since *Pearson*, however, the Supreme Court and lower courts—including this Court—have often exercised their discretion to "skip" to the second prong and hold that no clearly established law prohibited the alleged excessive force, leaving unanswered whether the force the officer exercised violated the Constitution to begin with. *See, e.g.*, *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *Sheehan*, 135 S. Ct. at 1775; *Brown v. Elliott*, 876 F.3d 637, 645 (4th Cir. 2017); *see also* 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 from 2001 to 2016, the Supreme 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).

As a result, officers enjoy qualified immunity, even if the underlying conduct constituted excessive force. Even worse, because the court did not address whether the underlying conduct violated the Constitution, if similar conduct is litigated in the future, the officers in that later case will enjoy qualified immunity too—because the conduct's unconstitutionality was never clearly established in an earlier case. If this pattern continues, officers will continue to enjoy immunity for violations of Fourth Amendment rights, even clear violations, without courts ever setting the boundaries for constitutional exercises of force. As Judge Willett of the United States Court of Appeals for the Fifth Circuit explained:

> [M]any courts grant immunity without first determining whether the challenged behavior violates the Constitution. They avoid scrutinizing the alleged offense by skipping to the simpler second prong: no factually analogous precedent. Forgoing a knotty constitutional inquiry makes for easier sledding. But the inexorable result is "constitutional stagnation"—fewer courts establishing law at all, much less clearly doing so. . . . Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose.

Zadeh v. Robinson, 902 F.3d 483, 498–99 (5th Cir. 2018) (Willett, J. concurring) (footnotes omitted); *see also* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 12 (2015) ("Because a great deal of constitutional litigation occurs in cases subject to qualified immunity, many rights

potentially might never be clearly established should a court 'skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.'" (quoting *Saucier*, 533 U.S. at 201)).

Thus, not only does the qualified immunity doctrine currently provide plenty of protection to officers, it is failing in its purpose of providing adequate guidance on the boundaries of reasonable force to police officers throughout the country. *Amici* urge this Court to exercise its discretion under *Pearson* to address how the egregious conduct that Plaintiffs established below violated the Constitution and to encourage trial courts to address the constitutionality of alleged excessive force. This way, the Court can establish clear limits on what level of force is proper under the Fourth Amendment. *See* Nielson & Walker, *supra*, at 13 (observing that courts "could describe the constitutional question anyway—thereby setting markers down for future litigants . . . [and because] it is necessary to decide the constitutional question so that doctrine remains fresh as technology and circumstances evolve"). There is no justification for allowing the doctrine to continue to expand passively through mere "constitutional stagnation." *See Zadeh*, 902 F.3d at 498 (Willett, J. concurring) (quoting Nielson & Walker, *supra*, at 12).

III. LOW-INCOME COMMUNITIES, COMMUNITIES OF COLOR, AND PEOPLE WITH MENTAL ILLNESS WILL BE DISPROPORTIONATELY AFFECTED BY ANY DECISION THAT MAKES USE OF FORCE MORE PERMISSIBLE.

When police use force in the United States, they do not use it against Americans equally. On the contrary—as the group of plaintiffs in this very case helps demonstrate—officers disproportionately use force in low-income communities and against communities of color and people with mental illness.

A. Police Violence and Use of Force Disproportionately Impact Poor People.

Fatal police shootings "tend to take place in neighborhoods that are more socioeconomically disenfranchised and have a higher percentage of Black residents than the U.S. as a whole." USCCR Report at 25 (citing Ben Casselman, *Where Police Have Killed Americans in 2015*, FiveThirtyEight (June 23, 2015), https://fivethirtyeight.com/features/where-police-have-killed-americans-in-2015).[5]

For example, in 2015 about 30% of fatal police shootings in the first-half of 2015 "occurred in census tracts that are in the bottom 20% nationally in terms of household income." *Id.* (citing Casselman, *supra*). According to one study using a nationally representative sample of U.S. residents, Black males with an income

[5] Because federally-collected data on police shootings is limited, "several newspapers, non-profit organizations, and universities have helped provide an understanding of the nature of police-involved killings across the country." *Id.* at 18.

under $50,000 experienced police use of force during a street stop more frequently than all other Black residents. Robert O. Motley, Jr. & Sean Joe, *Police Use of Force by Ethnicity, Sex, and Socioeconomic Class*, 9 J. Soc'y Soc. Work & Res., 1, 53–56 (Spring 2018), https://doi.org/10.1086/696355 (finding that 22% of Black males with incomes less than $20,000 were exposed to police pushing or grabbing during a stop and 27% of those making $20,000–$49,000 were exposed to handcuffing during a stop, the highest frequency of each category). Meanwhile, white residents with an income under $50,000 also experienced police use of force during a street stop more frequently than white residents with an income over $50,000. *Id.* (finding that 13% of white females with incomes less than $20,000 were exposed to police handcuffing during a stop and 6% of white males with incomes less than $20,000 and 4% of them with incomes of $20,000–$49,000 were exposed to pushing and grabbing, the highest frequency of each category).

B. People of Color Are Impacted to an Even Greater Degree.

The disparities that exist in how police use force in this country are even more extreme in terms of race. The data on income above, which was disaggregated also by race, shows a stark difference between Black and white people. In 2017, relative to the overall U.S. population, Black civilians whom police killed were "more likely to be unarmed and less likely to be threatening someone compared to Latinx and white people." USCCR Report at 24 (citing

Mapping Police Violence, *2017 Police Violence Report* (last visited Nov. 3, 2018), https://policeviolencereport.org). In fact, on average across counties in the U.S., an individual is *as* likely to be Black, unarmed, and shot as being white, *armed*, and shot. *Id.* at 24 (citing Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011–2014*, PLOS ONE, Nov. 5, 2015). In other words, an unarmed Black man is more than seven times as likely as an unarmed white man to be fatally shot by a police officer. Sandya Somashekhar, et al., *Black and Unarmed*, Wash. Post (Aug. 8, 2015), http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed.

One way of quantifying the disparity is that, even though most fatal police shootings were of white people, the rate of those shootings was 2.9 per million people, compared to 3.23 per million for Latinx people, 6.66 per million for Black people, and 10.13 per million for Native American people. *Id.* at 23 (citing *The Counted*, Guardian (last visited Oct. 26, 2018), https://www.theguardian.com/us-news/series/counted-us-policekillings).

Further, the disparity extends to non-fatal interactions between police and people of color. One study found that police disparately use force when interacting with Black residents even when comparing only whites and Blacks involved in violent arrests. Phillip A. Goff et al., Ctr. For Policing Equity, *The Science of*

Justice: Race, Arrests, and Police Use of Force 4 (2016), http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf. Similarly, Black and Latinx individuals are 50% likelier to experience use of force during any given police encounter. Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, J. Pol. Econ., forthcoming issue, at 5, https://www.journals.uchicago.edu/doi/pdfplus/10.1086/701423. Even when police do not make an arrest, Black individuals are significantly more likely to experience excessive force. *Id.* at 37.

What explains the disparity? The answer is, in part, implicit bias. As this Court recently recognized, "many studies have shown that most people harbor implicit biases and even well-intentioned people unknowingly act on racist attitudes." *Woods v. City of Greensboro*, 855 F.3d 639, 641 (4th Cir. 2017). Implicit bias is formed by cultural stereotypes influencing the unconscious mental processes of perception, impression, and judgment, producing behavior that is at odds with a person's stated principles. *See generally* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945 (2006) (surveying implicit bias research). According to a "substantial and actively accumulating body of research evidence," bias is pervasive and associated with discrimination against African-Americans. *Id.* at 966. As one example, "the vast majority of Americans of all races implicitly associate Black Americans with

adjectives such as 'dangerous,' 'aggressive,' 'violent,' and 'criminal.'" The Sentencing Project, *Report of the Sentencing Project to the U.N. Human Rights Cmte. Regarding Racial Disparities in the Criminal Justice System* 4 (Aug. 2013), https://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf.

Implicit bias is most pernicious when humans are called to make "split-second judgments," such as the decision to exercise force, which is also the only moment this Court analyzes when it is assessing the reasonableness of an officer's conduct for excessive force claims. *E.g.*, *Elliot v. Leavitt*, 99 F.3d 640, 644 (4th Cir. 1996); *see United States v. Mateo-Medina*, 845 F.3d 546, 553 (3d Cir. 2017) (discussing operation of implicit bias "in situations that require rapid decision-making"). Implicit bias, therefore, has a direct bearing on the very moment an officer is deciding whether and how much force to exercise. Unfortunately, it pulls officers to exercise force against African-Americans more often and to a greater degree. For one thing, in simulated shooting experiments, officers showed "robust racial bias" when deciding whether to "shoot (or not shoot) Black and white targets." Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. Personality & Soc. Psychol. 1006, 1006 (2007). For another, when "a target was unarmed, participants mistakenly shot him more often when he was African-American than when he was white." Joshua

Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. Personality & Soc. Psychol. 1314, 1325 (2002). Overall, then, research has shown that implicit bias helps account for "evidence of a significant bias in the killing of unarmed black Americans relative to unarmed white Americans" by police officers. *See* Ross, *supra*.

Even when law enforcement agencies employ policies that appear to be race-neutral, "such as 'hot spot' policing and certain risk assessment instruments," the policies nonetheless "have targeted low-income people of color for heightened surveillance and punishment." USCCR Report at 30 (quoting Nazgol Ghandnoosh & Christopher Lewis, Sentencing Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* 4 (2014), https://www.sentencingproject.org/wpcontent/uploads/2015/11/Race-and-Punishment.pdf); *see also U.S.: Drug Arrests Skewed by Race*, Human Rts. Watch (March 2, 2009 12:01 PM), https://www.hrw.org/news/2009/03/02/us-drug-arrests-skewed-race (reporting that reports of crime are disproportionately made in communities of color).

C. People with Mental Illness Are More Vulnerable to Any Decision That Makes Use of Force More Permissible.

Individuals with mental illness are particularly vulnerable to experiencing excessive force from police. The stigma associated with mental illness affects how accurately police officers assess the dangerousness of a person who has a mental

illness, even when that person is not dangerous. The general public strongly associates people with mental illness with violence or danger. Jo C. Phelan & Bruce G. Link, *Fear of People with Mental Illness*, 45 J. Health & Soc. Behav. 68, 76 (Mar. 2004); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445–46 (1985) (recognizing that "the mentally ill" experience "prejudice from at least part of the public at large"). Police officers are no different: "calls involving persons with mental illnesses may be more likely to result in injuries to officers or the person with mental illness." Amy C. Watson, et al., *Understanding How Police Officers Think About Mental/Emotional Disturbance Calls*, 37 Int'l J. L. Psychiatry 351 (2014) (citing J. Ruiz, *An Interactive Analysis between Uniformed Law Enforcement Officers and the Mentally Ill*, 12 Am. J. of Police 149 (1993)).

The stigma surrounding mental illness, then, creates a host of effects that put them at greater risk of experiencing excessive force from officers—even when they do not pose a danger to police. Officers, already expecting danger from a person with mental illness because of the associated stigma, "approach in a manner that contributes to the escalation of violence in the encounter and the need to respond with physical force." Watson, *supra*, at 351. (citing Ruiz, *supra*). For example, officers may be more likely to "view common objects, such as a chair, as a potential weapon," when those objects are near a person with mental illness. *Id.*

Overall, therefore, police officers disproportionately kill or otherwise exercise excessive force against people with mental illness. In 2015, individuals with mental illness "account[ed] for a quarter of the 462 people shot to death by police in the first six months of 2015," well above their overall portion of the population. Wesley Lowery et al., *Distraught People, Deadly Results*, Wash. Post (June 30, 2015), http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results. For instance, a recent Department of Justice investigation into the Baltimore Police Department concluded that officers "routinely" used "unreasonable force" against people with mental illness. U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Balt. City Police Dep't* 80 (Aug. 10, 2016), https://www.justice.gov/opa/file/883366/download. Unreasonable force was routine even when the person with mental illness has "not committed any crimes and when the officers know or should know that the individual has a mental health disability." *Id.* Unfortunately, Baltimore is not an outlier. Surveys of fatal police shootings in New York City in 1999 and Seattle from 1980 to 2000 each concluded that about one-third of those killed had mental illness. *See* James J. Frye, *Policing the Emotionally Disturbed*, 28 J. Am. Acad. Psychiatry 345 (2000); Robert L. Jamieson, Jr. & Kimberly A.C. Wilson, *Mental Illness Frequently Deepens Tragedy of Police Shootings*, Seattle Post-Intelligencer (May 25, 2000).

Because low-income communities, communities of color, and those with mental illness are disproportionately the victims of fatal police shootings and other forms of police violence, any decision by this Court that has the effect of expanding qualified immunity will inevitably hurt these communities the most. In light of the adequate protection officers already enjoy from the current qualified immunity doctrine, the Court should resist calls by Defendants and their *Amici* to further expand qualified immunity.

CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that this Court address whether the alleged conduct of Defendants is constitutional, encourage lower courts to do the same when deciding whether qualified immunity applies in excessive force cases, and affirm the denial of summary judgment on the challenged claims.

Respectfully submitted,

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Dated: May 16, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,504 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point type.

Dated: May 16, 2019

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CERTIFICATE OF SERVICE

I certify that on May 16, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/Ejaz H. Baluch, Jr.
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