NO. 15-118

IN THE

Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR FORMER POLICE CHIEFS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PETER KARANJIA
Counsel of Record
JASON HARROW
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, DC 20006
(202) 973-4200
peterkaranjia@dwt.com

Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted by the following:

- Thomas C. Frazier – Executive Director, Major Cities Police Chiefs Association (2001–2009); Director, U.S. Department of Justice Office of Community Oriented Policing (1999–2001); Police Commissioner, Baltimore, Maryland (1994–1999).

- Stanley Knee – Chief of Police, Garden Grove, California (2006–2012, 1992–1997); Chief of Police, Austin, Texas (1997–2006); Chief of Police, National City, California (1988–1992).

- David Mitchell – Secretary, Delaware Department of Safety & Homeland Security (2004–2009); Superintendent, Maryland State Police (1995–2003); Chief of Police, Prince George's County, Maryland (1990–1995).

- Roberto Villasenor – Chief of Police, Tucson, Arizona (1980–2014).

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[1] All parties to this litigation have consented to this *amici curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

We are former chiefs of police, from various jurisdictions across the country. Collectively, we have overseen the training of tens of thousands of police officers, and have first-hand knowledge of how officers actually make (and are trained to make) decisions in the field, often in dangerous and fast-moving situations. We therefore have a strong interest in ensuring that police officers and other law enforcement officials are protected by qualified immunity when they act reasonably—based on the information available to them at the time—and in accordance with clearly established law. We also have a strong interest in helping ensure that this Court's qualified immunity decisions are consistent with the use of best practices in officer training and conduct.

In light of our professional experience and expertise, this brief focuses on the qualified immunity issues presented by this case. In particular, we are troubled by the approach to those issues adopted by the court below—which looked at qualified immunity through the lens of hindsight, rather than standing in the shoes of a reasonable officer at the time of the incident. As we explain, the qualified immunity analysis should accord with the real-world decisionmaking process of law enforcement and create the right incentives for law enforcement officials to follow their training.

SUMMARY OF ARGUMENT

Qualified immunity strikes a balance between protecting law enforcement officers from personal liability for their objectively reasonable mistakes,

while providing the officers a sufficient incentive to follow their training and clearly established law. But this balance works effectively only if the qualified immunity analysis turns on the situation the officer reasonably perceived at the time. Maintaining that contemporaneous focus—rather than focusing on the situation as it appears with the benefit of hindsight—reflects the real-world decisionmaking process of law enforcement, comports with widely accepted standards of officer training, and encourages officers to use force only when doing so is reasonable and necessary.

In particular, this contemporaneous inquiry is sensitive to the challenges officers face in fast-moving and potentially dangerous situations, where they must make on-the-spot judgments about whether the use of force (including deadly force) is appropriate. By contrast, under the approach embraced by the court below, the qualified immunity analysis hinges on after-the-fact assessments such as the suspect's citizenship and the degree of his ties to the United States. That approach, however, is unmoored from the practical realities of law enforcement decisionmaking and creates precisely the wrong incentives.

First, the Fifth Circuit's hindsight-driven analysis severs the traditional link between qualified immunity and the officer's exercise of judgment in fast-moving situations. Instead, it permits courts to examine factors that no reasonable officer would ever consider when deciding whether to use deadly force. Indeed, under widely accepted standards of officer training—both in the United States and

abroad—officers should not consider such factors when deciding whether to use deadly force. A rule of law that invites consideration of these factors will only create perverse incentives, encouraging officers to engage in the perilous exercise of speculating about a subject's citizenship and connections to the United States—perhaps hoping that, if their speculation about those legal questions turns out to be correct, the officer will be insulated from liability for violations of the law.

Second, hinging the qualified immunity analysis on after-the-fact discoveries could end up unfairly subjecting law enforcement officials to personal liability when they acted entirely reasonably based on the information available to them at the time. Law enforcement officials are often forced to act based on incomplete or inaccurate information. The Fifth Circuit's contrary rule—which invites consideration of facts that the officer may not have known at the time, or reasonably may have misapprehended—will do nothing to improve good officer behavior. This Court should reverse that holding, and adhere to the traditional rule that focuses on the officer's on-the-spot decisionmaking based on the circumstances the officer reasonably perceived at the time.

ARGUMENT

CONSISTENT WITH WIDELY ACCEPTED STANDARDS OF OFFICER TRAINING, THE QUALIFIED IMMUNITY ANALYSIS SHOULD TURN ON THE CIRCUMSTANCES REASONABLY PERCEIVED BY THE OFFICER AT THE TIME OF THE INCIDENT.

A. Qualified Immunity Plays An Important Role In Fast-Moving Situations Calling For On-The-Spot Assessments By Law Enforcement.

Qualified immunity protects government officials from being held liable for their objectively reasonable mistakes—a protection that is particularly important in the fast-moving situations that law enforcement officers face every day. As this Court has recognized, these officials "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office," and it would be unfair to penalize them for their reasonable (albeit mistaken) judgments under these challenging circumstances. *Scheuer v. Rhodes*, 416 U.S. 232, 246–48 (1974).

Because qualified immunity protects officials' well-founded and good-faith judgments, the inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established *at the time it was taken*." *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (emphasis added). As Justice Holmes explained, in "cases where the expert on the spot may be called upon to

justify his conduct later in court, . . . great weight is given to his determination, and the matter is to be judged on the facts *as they appeared then, and not merely in the light of the event*." *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (emphasis added and citations omitted); *see also Scheuer*, 416 U.S. at 247–48 (focusing on "all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based") (quoting *Moyer*, 212 U.S. at 85).

In short, qualified immunity is a flexible doctrine that shields officers from liability for reasonable error, while allowing them to be held accountable for clearly unlawful decisions they make based on the information available to them at the time. It does not require omniscience or encourage after-the-fact nuanced analyses of considerations that could not reasonably be known and evaluated in the critical moment when the officers must act. The proper perspective is that of the officer in the field—not that of the armchair lawyer or historian.

B. Law Enforcement Officers Are Trained To Focus On The Observed Situation, Not The Jurisdiction Of The Incident Or A Subject's Status.

1. Whether deadly force is appropriate turns on the officer's contemporaneous and reasonable perception of imminent peril.

The need for a qualified immunity doctrine that protects reasonable judgment calls by law enforcement is particularly acute where officers

confront rapidly evolving and potentially dangerous situations—some of which occur at the U.S. borders and call for on-the-spot decisions about whether to use force, including deadly force. Both within the United States and throughout the world, there is a striking degree of consensus regarding the appropriate standards for the use of force. And, particularly significant here, these standards typically do *not* invite the officer to engage in such nuanced and legalistic assessments as trying to determine the citizenship status of a subject or the degree of the subject's ties to a particular country or his precise location relative to a border.

For instance, the Customs and Border Protection's *Use of Force Policy, Guidelines, and Procedures Handbook* explains that determination of whether use of force is "objectively reasonable" requires primary consideration of officer safety, the severity of the crime, whether the subject is actively resisting arrest or capture, and whether there is a foreseeable risk of injury. U.S. Customs and Border Protection Office of Training and Development, *Use of Force Policy, Guidelines, and Procedures Handbook* 2 (May 2014).[2] Additional factors include readily observable facts: the apparent age, size, and strength of the officer and the subject; whether weapons are involved; how many people are around; and the environmental conditions. Deadly force is permitted only when, considering all the circumstances, an officer has a reasonable belief that

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[2] *Available at* https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf.

the "subject of such force poses an imminent danger of serious physical injury or death to the officer/agent or to another person." *Id.* at 3.

Similarly, a recent review of Customs and Border Protection policies confirms that agents "should be prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them." The Police Executive Research Forum, *U.S. Customs and Border Protection Use of Force Review: Cases and Policies* 2 (Feb. 2013).[3] The report emphasizes that training should focus on "specific situations and scenarios," including such situation-specific tactics as "the use of cover and concealment" and "maintaining safe distances." *Id.* It does *not* ask that agents determine whether a subject is a U.S. citizen, has connections to the United States, or is on one or the other side of the international border.

Nor does it make sense to train law enforcement to take these factors into account, as these officials are required to follow constitutional standards laid out by this Court and statutory standards across the country. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court invalidated a state statute that authorized law enforcement to use deadly force whenever a felony suspect might escape. The Court held that deadly force is constitutionally reasonable only "[w]here the officer has probable cause to believe that the suspect poses a threat of serious

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[3] *Available at* https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf.

physical harm, either to the officer or to others." *Id.* at 11. The Court rejected the idea that a suspect's mere status—there, a person committing a felony—could justify qualified immunity where it otherwise would be unwarranted. Instead, the constitutional standard requires law enforcement officials to assess conditions on the ground and use force only when justified in the moment. *Id.*; *see also Scott v. Harris*, 550 U.S. 372, 383 (2007) (in determining whether an officer's use of deadly force was justified, a court "must consider the risk of bodily harm that [the officer's] actions posed to [the suspect] in light of the threat to the public that [the officer] was trying to eliminate"). The policies in states and localities are often framed similarly.[4] They do not mention citizenship status or the jurisdiction of the incident.

This constitutional standard is echoed throughout the world. *E.g.*, Commonwealth

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[4] *E.g.*, Model Penal Code § 3.07(2)(b)(iv) (Am. Law Inst. 1962) (use of deadly force not justified, unless the officer attempts an arrest for a crime involving the "use or threatened use of deadly force" or "there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed"); *Price v. Sery*, 513 F.3d 962, 964–65 (9th Cir. 2008) (upholding the constitutionality of municipal policy providing that "[m]embers may use deadly force to protect themselves or others from what they reasonably believe to be an immediate threat of death or serious physical injury.") (quoting Portland Police Bureau General Order § 1010.10); New York Police Dep't Patrol Guide § 221-01 (detailing new "Force Guidelines" that include eleven factors to consider, none of which includes subject's citizenship status or jurisdiction of encounter) (eff. June 1, 2016); Los Angeles Police Dep't Policy Manual § 556.10 (similar).

Secretariat, *Commonwealth Manual on Human Rights Training for Police* 65 (2006) ("Unnecessary and unlawful use of deadly force by a police officer would therefore constitute a violation of the right to life"); Organization for Security and Cooperation in Europe, *Guidebook on Democratic Policing* 23 (2d ed. 2008) ("[I]ntentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."); International Committee for the Red Cross, *Human Rights and Humanitarian Law in Professional Policing Concepts* 22–25 (2002) (stating that "[t]he intentional lethal use of firearms is allowed only when strictly unavoidable to protect life," and noting that non-citizens, among others, are entitled to protection under the law). Thus, no officer would consider either the jurisdiction of incident or the citizenship status of a subject in a totality-of-the-circumstances assessment of whether deadly force is justified.

2. Because jurisdiction and nationality are not relevant to the reasonableness of deadly force, including them in a retrospective qualified immunity analysis would create perverse incentives.

As described above, whether or not a law enforcement official is entitled to qualified immunity depends on the objective facts about the incident that the official confronts *at the time*—not on the happenstance of hindsight. *See supra*, § A. Incorporating these nuanced legal questions into the qualified immunity analysis does nothing to enhance the functioning of a well-trained police force, because those questions do not help an officer determine—

under the widely accepted standards discussed above—whether use of deadly force is appropriate.

As the law stands today, no reasonable police chief would train, or to our knowledge ever has trained, a police officer to use a lesser standard for deploying lethal force based on the legal jurisdiction in which the suspect is located. Nor would any reasonable police chief train, or to our knowledge ever has trained, a police officer to use a lesser standard for deploying lethal force based on the suspect's citizenship or nationality. Indeed, the facts of this case perfectly illustrate that point: In our experience as former chiefs of large and diverse police forces, it would be wholly unrealistic to expect an officer in a rapidly moving and potentially dangerous situation to try to determine the citizenship of the suspect—much less determine, as here, whether the suspect had a "significant voluntary connection" to the United States. *Hernandez v. United States*, 785 F.3d 117, 120 (5th Cir. 2015) (*en banc*).

Far from furthering broadly accepted standards of law enforcement training, the qualified immunity analysis embraced by the court below creates perverse incentives. It encourages officers to engage in the perilous exercise of guessing the citizenship and ties of the subject confronted—based on the premise that the officer need not worry about being exposed to liability if the subject turns out to be a non-citizen or on one side of a border. This is a concern everywhere, but it is of particular concern in cases such as this. As the Customs and Border Patrol has recognized, "some cases suggest that

frustration is a factor motivating agents to shoot at rock throwers." *Use of Force Review, supra*, at 9.

In these situations, where the officer's speculation turns out to be right, qualified immunity would only serve as a shield to insulate an officer who did not follow proper training or the law. That approach runs counter to both the overarching goals of qualified immunity—to protect reasonable, good-faith judgments by law enforcement, while also incentivizing adherence to clearly established constitutional rules—and widely accepted standards of officer training. This Court should reject it.

C. Permitting Retrospective Qualified Immunity Will Jeopardize Officers Who Act Reasonably.

The Fifth Circuit's qualified immunity holding is flawed not only because it rewards lucky bets about factors officers should not be trying to determine in fast-moving situations, but also because it may expose officers to liability in many situations where doing so would be unfair and would have no salutary effect on officer conduct in the future. Plaintiffs in Section 1983 cases have often attempted to use facts discovered *after* the incident at issue to impose liability on the officers who made good-faith judgments based on the facts known to them *at the time*. So far, this Court has shut the door to claims based on reasonable mistake, but a ruling here could open the door.

In *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012), for instance, the Court held that officers' execution of a search pursuant to the warrant of a

"neutral magistrate" is "the clearest indication that the officers acted in an objectively reasonable manner" and were entitled to qualified immunity—even where the plaintiff argued that the search was unconstitutional because it later transpired that the warrant was not supported by probable cause. *Id.* at 1245. As the Court pointed out, a long line of cases holds that the good-faith exception to the exclusionary rule "'defines the qualified immunity accorded an officer' who obtained or relied on an allegedly invalid warrant." *Id.* at 1245 n.1 (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)); *see also Malley*, 475 U.S. at 345 (in cases alleging that officers requested an invalid warrant, the relevant question for qualified immunity purposes is "whether a reasonably well-trained officer *in petitioner's position* would have known that his affidavit failed to establish probable cause" and that "he should not have applied for the warrant") (emphasis added).

Thus, this Court's prior encounters with attempts to hold officers liable based on after-the-fact reassessments have reaffirmed that the qualified immunity inquiry focuses on "the facts as they appeared then, and not merely in the light of the event." *Moyer*, 212 U.S. at 85. That is, plaintiffs may not use retrospective re-assessments of warrants to impose liability on police officers who, under the circumstances as they appeared at the time, acted in a way that they reasonably believed to be legally permissible. *See Butz v. Economou*, 438 U.S. 478, 507 (1978) (qualified immunity protects government officials from liability for "mere

mistakes of judgment, whether the mistake is one of fact or one of law").

Adopting the Fifth Circuit's rule would be in considerable tension with that framework and would likely only serve as a potential pitfall for law enforcement. To take one example, officers frequently conduct permissible warrantless searches of what they believe are premises of absconded parolees. *Moore v. Vega*, 371 F.3d 110, 116 (2d Cir. 2004). But sometimes officers are mistaken about the identity of the occupants in the house they are searching. In *Moore*, the officers who conducted the search were "provided with incorrect information" and ended up searching the home of someone who was not on parole (as it turned out, the plaintiff's brother had the same name as the parolee the officers were looking for). *Id.* at 113–16. Nonetheless, the officers were granted qualified immunity from a claim alleging a violation of the Fourth Amendment, because "a mistake while engaging in the performance of an official duty . . . does not deprive a governmental officer of immunity." *Id.* at 117.

The Fifth Circuit's rule here, which permits courts to consider facts about a suspect's status that can be known only after-the-fact, would erode the foundations of that common-sense conclusion. If it were adopted, officers would no longer be able to assert qualified immunity based on the facts as they appeared at the time of their action, because the inquiry would permit the court to consider all the facts that theoretically *could have* been known—

even if no reasonable officer would have actually known the facts at the time.

Granting officers qualified immunity based on facts that they could not perceive at the time or were mistaken about is an integral part of the qualified immunity analysis. *See Hill v. California*, 401 U.S. 797, 802 (1971) ("[W]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.") (internal quotation marks omitted). The Court should not erode that important foundation here.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fifth Circuit.

Respectfully submitted.

PETER KARANJIA
Counsel of Record
JASON HARROW
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, DC 20006
(202) 973-4200
peterkaranjia@dwt.com

Counsel for Amici Curiae

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