No. 14-1143

In The Supreme Court of the United States

CHADRIN LEE MULLENIX,
in His Individual Capacity,

Petitioner,

v.

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION AND TEXAS ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI CURIAE[1]

The Texas Municipal League ("TML") is a non-profit association of over 1,000 Texas municipalities. Over 13,000 mayors, council members, city managers, city attorneys, police chiefs, and other department heads are member officials of the League by virtue of their cities' participation. The TML legal defense program was established to monitor major litigation which affects municipalities and to file briefs on behalf of cities in cases of special significance to municipalities.

The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of attorneys who represent Texas cities and city officials in the performance of their duties.

The Texas Association of Counties is a non-profit corporation created pursuant to Section 89.002 of the Texas Local Government Code. Each of the 254 Texas counties is a member of the Association. The Association's Board of Directors includes representatives

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The entity funding preparation of this brief is the Texas Municipal League Intergovernmental Risk Pool. Amici understand that Petitioner and Respondents have both consented to the filing of amicus briefs in this appeal and received notice, at least ten days prior to the due date of this brief, of amici's intention to file.

from the County Judges and Commissioners Association of Texas, the North and East Texas Judges and Commissioners Association, the South Texas Judges and Commissioners Association, the West Texas Judges and Commissioners Association, the Texas District and County Attorneys Association, the Sheriff's Association of Texas, the County and District Clerks Association of Texas, the Texas Association of Tax Assessors-Collectors, the County Treasurers Association, the Justice of the Peace and Constables Association of Texas, and the County Auditors Association of Texas.

INTRODUCTION

Amici strongly urge the Court to grant Mullenix's petition. The court of appeals' decision represents a significant departure from the way this Court has articulated and applied qualified immunity principles. The opinion goes so far as to effectively adopt an exhaustion of "alternative" or "non-lethal" methods requirement before an officer may resort to deadly force. Pet. App. 16a, 21a. No court has embraced such a rule and this Court has expressly or implicitly eschewed it.

As this Court has often explained, courts must view the immediacy and severity of the risk posed by a fleeing felon or other dangerous individual from the perspective of, and with great deference to, those charged with protecting against the risks created by

those individuals. A suspect's overt threats to shoot and kill officers during a high-speed pursuit represent one of the most grave risks law enforcement officials can face. The present outcome does not hold true to precedent and profoundly impacts thousands who, like the Petitioner, put their lives on the line daily.

Amici are a part of the law enforcement community to whom this Court and the Courts of Appeals speak when promulgating "clearly established" law for qualified immunity purposes. Amici share that community's concern that the challenged decision breaks from traditional immunity moorings when deciding whether the law has reached a point of being enunciated clearly enough that an officer would have known his or her conduct violated clearly established law. This Court's precedent, as the Fifth Circuit's, did not provide the requisite clear notice to Mullenix that his conduct would have been, as the court of appeals held, objectively unreasonable. Pet. App. 12a, 24a. These and other holdings by the court necessitate review to ensure qualified immunity remains the meaningful doctrine it is intended to be and to ensure the protections law enforcement officers are dedicated to provide.

ARGUMENT

I. The court of appeals' reasonableness analysis conflicts with this Court's precedent.

The court of appeals held that Mullenix's conduct was objectively unreasonable and therefore violated Leija's Fourth Amendment rights because, it said, Leija did not pose a substantial and immediate risk to officers or others at the second Mullenix fired his weapon. Of the stated reasons driving its conclusion, two stand out. First, because traffic was "light" in the court's view, the risk Leija posed to others was minimal and materially different from the risks in *Scott v. Harris*, 127 S.Ct. 1769 (2007); *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014); and *Thompson v. Mercer*, 762 F.3d 433 (5th Cir. 2014). Second, Mullenix did not allow for what the court called "alternative" or "non-lethal" methods, *i.e.*, road spikes, to potentially stop Leija's speeding car before firing at his engine.

In light of the facts construed in Respondents' favor, the relevant legal question leads to one inescapable conclusion: Mullenix's actions were objectively reasonable. The court of appeals' justifications for concluding otherwise offend long-engrained qualified immunity principles and exemplify precisely the type of "20/20 hindsight" determination qualified immunity law proscribes. *Plumhoff*, 134 S.Ct. at 2020; *Graham v. Connor*, 490 U.S. 386, 396 (1989). The required analytical framework is built on the "perspective of a reasonable officer on the scene" and the facts known to (or reasonably believed by) that officer.

Plumhoff, 134 S.Ct. at 2020. *See Ryburn v. Huff*, 132 S.Ct. 987, 991 (2012).

Accordingly, the most critical, and *undisputed*, facts informing the present analysis are Leija's repeated threats that he had a gun and ***he would shoot any officer*** he saw. As with a bomb threat, officers have a right – indeed an obligation – to believe, and therefore assume, Leija had a gun and that he intended to use it, going so far beyond rational bounds as to be willing to shoot *any* police officer. Also, the dispatcher informed the responding officers that Leija was potentially intoxicated and unstable. Given those circumstances, which were communicated to Mullenix, "[t]he Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm." *Elliott v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1996). Thus, police officers do not have "to wait until a suspect shoots to confirm that a serious threat of harm exists." *Id*. at 643. This strong presumption renders immaterial whether Leija in fact had a gun or whether officers could see it, facts the court of appeals emphasized but which could not have been known to any officer until Leija was no longer a threat. Pet. App. 3a, 19a. Therefore, the court's citation to this fact, established only after Mullenix was required to decide what to do to protect himself and others, is unrelated to the issue of whether Mullenix's actions violated the Fourth Amendment.

To be sure, "*Scott* did not declare open season on suspects fleeing in motor vehicles." *Thompson*, 762

F.3d at 438. But the court must recognize that a known promise to kill police officers – itself a felony, which Leija committed twice while eluding pursuit – is among the most grave threats law enforcement officers can face. The greater the threat, the greater the justification for deadly force to neutralize that threat. The court of appeals affords far too little weight to the clear gravity of Leija's explicitly and repeatedly stated intent to inflict deadly harm on the peace officers he was both evading and approaching. Given those threats, together with Leija's conduct throughout the chase, it is objectively reasonable for an officer to believe that Leija was an ongoing and continuous threat to the lives and safety of others.

The Sixth Circuit has emphasized analogous threats to law enforcement officers in establishing the objective reasonableness of deadly force. *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (use of deadly force not unreasonable when suspect "posed a major threat" to officers manning roadblock by driving directly into them on a residential dead-end street and "had proven he would do almost anything to avoid capture").[2] The present outcome cannot be squared with *Smith*.

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[2] Additionally, in *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992), the court found that exigent circumstances existed as a matter of law when police received a call concerning a suicidal and possibly homicidal gunman, and at least one radio communication indicated the gunman had threatened to kill any police officers who arrived. *Id*. at 1375 (context of warrantless searches

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Further, the court of appeals' reference to so-called "light traffic" does not support its holding. When an evading felon has threatened the lives of officers, or even in a more general sense, the absence of heavy traffic on the interstate does not affect, let alone minimize, the severity or immediacy of the risk Leija posed. High-speed pursuits are inherently dangerous. *County of Sacramento v. Lewis*, 118 S.Ct. 1708 (1998) (high-speed automobile chase is a rapidly evolving, fluid, and dangerous predicament). For so many good reasons, this Court and other courts have rejected the "lonely" roads argument as dissipating the ongoing and serious threat posed by felons evading lawful pursuit at high speeds. *Scott*, 127 S.Ct. at 1775; *Thompson*, 762 F.3d at 439 (acknowledging the immediacy of the danger to vehicles up road if suspect had been allowed to continue driving spree). This Court has not suggested the level of traffic bears at all on an officer's assessment of the risk associated with a fleeing felon who has repeatedly threatened to kill police officers if stopped.

In fact, the light traffic could be much more easily seen as a justification for Mullenix to act as *and when* he did, to minimize the exposure to innocents if he was successful in disabling Leija's vehicle, as he attempted. Instances of lighter traffic present *less* risk of an officer injuring innocent bystanders or

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under exigent circumstances). The court thus found a suspect's threat to shoot officers to be of sufficient immediacy and urgency to establish exigent circumstances as a matter of law.

others, making the choice to use deadly force in ending the threat at that moment *more* reasonable, not less. Counterintuitively, and perhaps inadvertently, the court of appeals' reliance on this issue could be read to suggest it may be preferable that officers shoot into a crowd. While this analysis seems to be the very "sanctity of the judge's chambers"[3] review this Court has shunned, its result, and certainly the precedent it has the potential to establish, is not and cannot be the law.

Mullenix knew Leija was minutes from reaching the overpass where Ducheneaux was deploying spike strips. Regardless of whether Mullenix could see Ducheneaux's precise location, he knew Ducheneaux was there and any officer in Mullenix's position would reasonably believe Ducheneaux would be a target for Leija to make good on his several threats to cause death or serious bodily injury to "*any* police officer." This rational concern is heightened when a speeding suspect slows down as he approaches the officers threatened, which would only facilitate Leija's ability to effectively fire on the officers or use his vehicle itself as a weapon. Thus, Leija's slowing his car as he approached does not support the court's conclusion.

The video of the present high-speed chase reveals a scenario just as, if not more, dangerous than the risks presented in *Plumhoff*, a recent case in which

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[3] *Graham*, 490 U.S. at 396.

this Court found the use of deadly force objectively reasonable. The pursuit of Leija was longer in duration and distance than the approximately five minute chase in *Plumhoff*. Leija recklessly weaved and swerved around other vehicles at night on a dark highway for over 18 miles, reaching speeds of up to 110 miles per hour, giving no indication that he intended to give up. During the chase, he twice called the dispatcher to say he had a gun and would shoot any officers he saw, thus expressing an unmistakable intention to cause immediate serious injury or death to police officers. Fast approaching several officers, including those deploying road spikes, Leija was in a position to make good on his threats. Mullenix also had reason to believe Leija might be intoxicated.

Equally if not more troubling is the court of appeals' heavy emphasis on Mullenix's decision to fire at Leija's engine before he actually drove over the road spikes. Contrary to Supreme Court precedent, the Fifth Circuit is now creating a rule that "alternative" methods[4] must be exhausted before resorting to deadly force when the fleeing suspect has already

[4] The court of appeals' substitute opinion, issued December 19, 2014, modified its prior opinion by inserting the phrase "alternative methods" in place of "non-lethal methods," which the court used in its original opinion. *Compare* Pet. App. 16a, 21a *with* 765 F.3d at 540, 542.

threatened to shoot any officers he sees.[5] This Court has never articulated such a principle. Moreover, in reaching its conclusion, the Fifth Circuit even disregarded its own binding precedent. *Ramirez v. Knoulton*, 542 F.3d 124, 129-130 (5th Cir. 2008) (rejecting officer's failure to consider non-lethal methods as a compelling basis to deny immunity in deadly force case). The instant result was no accident; it represents a complete distortion of Fourth Amendment law, a point not lost on Judge Jolly and the other Judges who dissented from en banc rehearing. Pet. App. 40a-41a.[6]

More so, if the case at bar were offered for the proposition the court of appeals clearly implies, it conflicts with existing authority in other circuits. "There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used." *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994). On the contrary, "where deadly force is otherwise justified

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[5] Leija was "fleeing" only those officers behind him. He was rapidly approaching officers he twice threatened to shoot, including Mullenix and Ducheneaux.

[6] As Judge Jolly stated: "[m]y impression is that the panel majority either does not understand the concept of qualified immunity or, in defiance thereof, impulsively determines the 'right outcome' and constructs an opinion to support its subjective judgments, which necessarily must ignore the concept and precedents of qualified immunity." *Id*.

under the Constitution, there is no constitutional duty to use non-deadly alternatives first." *Id*.

A prophylactic standard requiring exhaustion of "non-lethal" or "alternative" methods before resorting to deadly force in Fourth Amendment cases is flatly unworkable. This is particularly so when fleeing suspects overtly threaten officers' lives and certain forms of non-lethal mechanisms, such as spike strips, would provide those felons precisely the opportunity to carry out their threats. As Judge King noted, as precedent demonstrates, and as the record proves, road spikes are inherently dangerous to the officers who deploy them and they often fail. *Luna v. Mullenix*, 765 F.3d 531, 548-49 (5th Cir. 2014) (withdrawn on rehearing) (King, J., dissenting); *Thompson*, 762 F.3d at 440; ROA.636-ROA.637 [describing frequent ineffectiveness of spikes and dangers to officers attempting to deploy them]. Of course, in the instant case, the risk of the use of spikes is only in addition to the risk of Leija's clear threats.

Amici curiae believe the reasonableness of Mullenix's actions is as objectively clear as the officers' actions in *Scott*, *Brosseau*,[7] *Plumhoff*, and *Thompson*. Because the Fifth Circuit's opinion in the present case holds otherwise, the Court should grant review and reverse it.

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[7] *Brosseau v. Haugen*, 125 S.Ct. 596, 599 (2004).

II. The decision irreconcilably conflicts with controlling precedent as to the "clearly established law" element and substantially erodes qualified immunity as a viable defense.

Given the explicit disagreement among the panel judges as to whether Mullenix's actions violated the Fourth Amendment, informed readers would recognize this case to at least fall within the "hazy border between excessive and acceptable force" deserving of qualified immunity protection. *Saucier v. Katz*, 121 S.Ct. 2151, 2158 (2001). Yet the court of appeals did not so hold and refused Mullenix the benefit of reasonably mistaken beliefs.

Without question, denying qualified immunity requires the court to identify a "particular right" so clearly established that the official had fair notice of that right and its concomitant legal obligations. *Camreta v. Greene*, 131 S.Ct. 2020, 2031 (2011). The interests immunity preserves are so great that this Court insists the right, and its particular contours, be articulated "in light of the specific context of the case." *Saucier*, 121 S.Ct. at 2156. Only when "controlling authority" or a "robust consensus of persuasive authority" leaves no doubt that the officer's conduct violated the Constitution may a court refuse immunity. *Plumhoff*, 134 S.Ct. at 2023. Existing precedent must place the constitutional question "beyond debate." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011). When the lawfulness of an officer's conduct is "arguable" under existing law, immunity applies. *Reichle v. Howards*, 132 S.Ct. 2088, 2096 (2012).

"This inquiry focuses not on the general standard – when may an officer use deadly force against a suspect? – but on the *specific circumstances of the incident* – could an officer have reasonably interpreted the law to conclude that the perceived threat posed by the suspect was sufficient to justify deadly force?" *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 383, n.1 (5th Cir. 2009) (emphasis added) (citing *Brosseau*, 125 S.Ct. at 599). As this Court observed, "[t]his is the nature of a test which must accommodate limitless factual circumstances." *Saucier*, 121 S.Ct. at 2158.

Whether a reasonable officer would have known that his or her use of deadly force violated a particularized constitutional right depends on how the court defines the right. Here, the problem begins with the court of appeals' characterization of the right at issue in such general terms that one questions qualified immunity's continued vitality. Faced with the present *undisputed* facts, the court of appeals defined the "clearly established" right as prohibiting "deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." Pet. App. 22a. An unsurprising proposition, but certainly one failing to appreciate the "specific circumstances of the incident." *Ontiveros*, 564 F.3d at 383, n.1. Future courts and litigants could now cite the Fifth Circuit's opinion to deny qualified immunity in practically any instance when fleeing suspects overtly threaten officers' lives. It is undisputed Leija repeatedly threatened that he had a gun and would fire upon any officers he saw. An express and deliberate threat to kill peace

officers is simply too alarming and important a factual circumstance to justify ignoring it in articulating the specific context of the right at issue. The majority's characterization of the right "avoids the crucial question whether the official acted reasonably in the particular circumstances" faced. *Plumhoff*, 134 S.Ct. at 2023.

Most important to the court's qualified immunity analysis is the indisputable fact that there is no Supreme Court (or Fifth Circuit) case that, as of March 2010, fairly and "beyond debate" notified Mullenix that his decision to fire upon Leija's vehicle in these circumstances was objectively unreasonable under the Fourth Amendment. Saying blandly that the Constitution prohibits deadly force against a fleeing felon absent "sufficient threat of harm to the officer or others" hardly accounts for the multitude of circumstances from which an officer could reasonably believe a sufficient risk exists and certainly does not perform the particularized evaluation mandated by well-established Supreme Court and circuit precedent. In 2010, reasonable officers certainly could have read *Scott* and *Brosseau* as endorsing, not condemning, a decision to fire at Leija's speeding car as it quickly approached an officer exposed to the roadway as he was deploying spike strips and presented further danger to other officers just north of Mullenix's position. The broad, general approach applied in the case at bar simply cannot be squared with existing precedent emphasizing the "highly fact-specific" nature of excessive force cases and expressing the

desirability, if not the necessity, of "cases squarely on point" before refusing officers their presumptive qualified immunity. *Cf. Ontiveros*, 564 F.3d at 383, n.1 (citing *Brosseau*, 125 S.Ct. 596; *Anderson v. Creighton*, 107 S.Ct. 3034, 3038-39 (1987)).

Lacking controlling precedent governing these particular circumstances, the Fifth Circuit turned to the Sixth and Eleventh Circuits to support its broadly generalized description of the constitutional right at issue. Pet. App. 22a-23a (citing *Kirby v. Duva*, 530 F.3d 475, 484 (6th Cir. 2008), and *Vaughn v. Cox*, 343 F.3d 1323, 1330 (11th Cir. 2003)). Some Circuits, including notably the Fifth Circuit, do not permit reference to other circuits in determining whether the contours of particular constitutional rights are "clearly established." *Brady v. Fort Bend Cty*., 58 F.3d 173, 175 (5th Cir. 1995); *Boddie v. City of Columbus, Miss*., 989 F.2d 745, 748 (5th Cir. 1993). The Seventh Circuit, on the other hand, disagrees with the Fifth Circuit on the relevance of inter-circuit law in establishing a right as "clearly established." *Burgess v. Lowery*, 201 F.3d 942, 944 (7th Cir. 2000). Thus, the propriety of expanding the analysis to decisions beyond those of the Supreme Court and forum circuits is a question that in itself warrants review.

The court of appeals also cited unpublished Fifth Circuit cases as providing the requisite notice to law enforcement officers. Pet. App. 22a-23a (citing *Sanchez v. Fraley*, 376 Fed. App'x 449, at *4, n.1 (5th Cir. 2010); *Reyes v. Bridgewater*, 362 Fed. App'x 403, 404-05 (5th Cir. 2010)). However, such decisions are

entitled to little if any weight insofar as educating the law enforcement community is concerned because unpublished decisions, though permissible to cite, are not precedent. FED. R. APP. P. 32.1; 5th Cir. Loc. R. 47.5.4. Accordingly, they cannot be used to inform police officers on the clearly established law that governs their conduct. In any event, *Sanchez* and *Reyes* do not provide relevant guidance here because, in both cases, the court found "fair warning" of clearly established law based on the "general test," irrespective of a developed body of case law putting the matter beyond debate. *Sanchez*, 376 Fed. App'x at *4, n.1 (finding "'fair warning' . . . 'in the general tests' of excessive force and deadly force, and the law was clearly established irrespective of the existence of 'a body of relevant case law.'").

It is truly difficult to comprehend how the court of appeals can say that, as of 2010, the law was of such clarity as to justify forcing Mullenix to trial. The court of appeals panel did not even agree that his conduct was objectively unreasonable. Coupled with this Court's 2004 and 2007 decisions in *Brosseau* and *Scott*, how could a reasonable officer be expected to know in 2010 that it was unconstitutional to use deadly force to stop a fleeing felon from following through on his repeated threats to kill police under these undisputed facts? Even interpreting the court of appeals' holding in this case as birthing such a rule, it certainly was not "clearly established" law in 2010. Hence, it cannot be said that Mullenix "reasonably

misapprehend[ed] the law governing the circumstances [he] confronted." *Brosseau*, 125 S.Ct. at 599.

Further, this Court has never said that officers must exhaust all "non-lethal" means before using deadly force to stop a speeding felon who has repeatedly threatened to kill any officers he encounters during his flight. If the Court is to adopt an exhaustion of "non-lethal" or "alternative" methods requirement, it must say so in terms concrete enough to place officers on clear notice.

A core goal of the qualified immunity doctrine is to ensure law enforcement officials have clear notice that specifically described conduct is constitutionally infirm "beyond debate," or at least in the presence of a persuasive "robust consensus." Not only does Supreme Court law fail to unequivocally proscribe Mullenix's actions, the court of appeals' decision, in view of the other Circuit decisions discussed in the Petition, confound matters. The law presumptively allows for mistaken, but reasonable, beliefs as to the relevant contours of the constitutional right in question. Qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Anderson*, 107 S.Ct. at 3038. And its protection "applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009).

Because there exists no precedent, in this Court or elsewhere, "clearly establishing" a felon's right to be free from deadly force used in an attempt to stop his flight – under the material and uncontroverted facts Mullenix faced – qualified immunity protects Mullenix from trial. The court of appeals' decision does not follow, but undermines, qualified immunity principles. Review is needed to maintain consistency and preserve the doctrine's continued vitality.

PRAYER

Therefore, the amici curiae respectfully urge the Court to grant the Petition for Writ of Certiorari and reverse the court of appeals' judgment.

Respectfully submitted,

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