

# 22-1756

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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CERISIER V. CITY OF NEW YORK

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF NEW YORK IN CASE NO. 19-CV-3850  
(Hon. Eric N. Vitaliano)

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**BRIEF OF THE GIFFORDS LAW CENTER TO  
PREVENT GUN VIOLENCE AS *AMICUS CURIAE*  
IN SUPPORT OF APPELLANT AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amicus curiae* certifies that it has no parent corporation. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

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## **JURISDICTIONAL STATEMENT**

The District Court granted Defendants’ Summary Judgment Motion, Plaintiff James Cerisier timely petitioned this Court for permission to appeal and this Court granted that petition. This Court has jurisdiction under 28 U.S.C. § 1291.

## **INTERESTS OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus Curiae* Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a nonprofit policy organization committed to drafting, proposing, implementing, supporting and defending laws and measures that save lives by reducing gun violence. Founded in 1993 following a mass shooting at a law firm, the organization was renamed Giffords Law Center in 2017 when it joined with the gun-safety organization founded by former Arizona Congresswoman Gabrielle Giffords. Today, Giffords Law Center provides free legal advice to legislators, lawyers, law enforcement officials, advocates and citizens who strive to eliminate gun violence from their communities. Moreover, the Center has served as an *amicus* in numerous cases involving gun violence and public safety.

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<sup>1</sup> No party or party’s counsel authored or funded any part of this *amicus curiae* brief. No person other than *amicus curiae*, its members or its counsel contributed funding for this brief. Moreover, Appellant and Respondents provided consent to the filing of this *amicus curiae* brief.



In January 2020, Giffords Law Center published a report about how trust between the community and police is important to combatting gun violence.<sup>2</sup> The report aggregated and analyzed research on police practices and found that officers' unlawful use of force corrodes community trust and confidence in law enforcement, particularly in communities of color given the brutal histories of over-policing and under-protection. The report shows that when communities experience law enforcement using excessive force—such as brandishing a gun for minor infractions—they are less likely to report shootings, cooperate with the police, and serve as witnesses. This leads to crimes going unsolved and increases community violence.

## INTRODUCTION

Giffords Law Center files this amicus brief in support of Mr. Cerisier's appeal because the District Court's decision regarding the scope of qualified immunity has profound implications that stretch well beyond the harm suffered by Mr. Cerisier when he was threatened with a loaded gun during a routine traffic stop. Giffords Law Center has spent several years researching and advocating for community trust in law enforcement to help eliminate gun violence in our towns and cities.<sup>3</sup>

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<sup>2</sup> See Giffords Law Center, IN PURSUIT OF PEACE: BUILDING POLICE-COMMUNITY TRUST TO BREAK THE CYCLE OF VIOLENCE (2020), <https://giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf>.

<sup>3</sup> See *id.*

The research is clear: localities that experience higher rates of police misconduct, and significantly higher rates of unjustified police violence toward civilians, suffer from higher rates of gun violence. As discussed below, *amicus*' research and the research of others confirm that this connection is not a pure coincidence. Increased rates of gun violence follow directly from the broken ties between law enforcement and the communities they serve.

In this case, the lower court ruled that a police officer brandishing a loaded firearm, even if done without justification, is nonetheless protected by qualified immunity because it is not sufficiently clear that such conduct violates statutory or constitutional rights. *See* SPA-5–9. The District Court impliedly found that brandishing a gun is not threatening and, ultimately, not “serious” enough to trigger a constitutional violation. This ruling is incorrect, relies upon faulty interpretations of the relevant precedent, and ignores obvious issues of fact. These points are well addressed in the Appellants’ memorandum of law, and Giffords Law Center will not duplicate that discussion. *See generally* Appellant’s Br. at 19–41, ECF No. 30.

Rather, this *amicus* brief focuses on how Officer Shah’s violent misconduct harms the community, an issue that has understandably not been the focus of the parties’ briefs. Every instance of violent police misconduct, such as in this case, erodes the relationship of trust between citizens of New York City and the law enforcement officers tasked with protecting them. Each day this relationship is

damaged is a day when we lose ground in all our efforts to diminish gun violence in our city.

This brief proceeds in three sections. Section A focuses on the doctrine of qualified immunity and how it balances the need to protect the public from police misconduct and the need for police to perform their law enforcement function. This balancing test acknowledges the importance of mitigating harms to the public interest that result from officer misconduct. More specifically, we highlight the importance that courts have placed on the deterrent effect of permitting claims like Mr. Cerisier's to proceed, which protects the broader community by decreasing the likelihood of future misconduct and, if successful, compensates victims for constitutional violations. Section B explains why brandishing a gun during a routine traffic stop without any threat or misconduct from Mr. Cerisier was excessive force that any reasonable officer should have recognized as a constitutional violation. The suggestion that brandishing a firearm, without more, is not "serious" enough to trigger constitutional scrutiny is belied by research establishing the significant negative impact that similar behavior has had on communities. Finally, Section C reviews the literature demonstrating the causal link between police misconduct and harms to communities, such as traumatic responses to violence which elevate mental health-related distress at the population level, and how strained community-police relations limit access to appropriate and necessary law enforcement services such as

protection from violent crime and timely intervention during emergencies and disasters. This section explains that courts must consider not just individual harm but community harm when evaluating whether qualified immunity should be applied to shield police officers from the consequences of their misconduct.

### **FACTUAL BACKGROUND**

It was a regular Monday morning, on January 28, 2019, when Mr. Cerisier left 45 minutes earlier than usual to avoid traffic as he drove from Flatbush, Brooklyn, to Chelsea, Manhattan for a biannual Department of Education (“DOE”) citywide training. SPA-1; Cerisier Dep. Tr. 24:4–25, No. 19-cv-3850, ECF No. 31-1. Mr. Cerisier often traveled on the Brooklyn-Queens Expressway (“BQE”) because in his capacity as an attendance teacher, he made home visits to check on students who had a concerning number of absences. *Id.* at 58:24–25, 59:1–3. The DOE did not issue cars for attendance teachers, so Mr. Cerisier drove his 2019 Mercedes GLE 450, with his City plaque visible on his dashboard. *Id.* at 29:7–14, 58:19–59:19.

Mr. Cerisier was enjoying his “easygoing” drive to work while listening to the morning news, when he decided to change his route and take the Brooklyn Bridge instead of the Battery Tunnel. SPA-1; Cerisier Dep. Tr. 24:9–14, 26:4–25, 29:19–25. He put on his turn signal, and waited for the driver to his right to allow him to merge. *Id.* at 48:3–12, 56:1–4. Without realizing it, like countless other drivers on the BQE, Mr. Cerisier crossed the solid double line separating the entrance to the

Brooklyn Bridge from the entrance to the Battery Tunnel—the “often-violated median separating traffic.” SPA-2, SPA-5–6; Cerisier Dep. Tr. at 27:14–20, 37:21–24.

Officer Shah—an experienced Highway Patrol Officer—was performing his morning routine that required him to step out into traffic on foot to wave cars over for traffic violations. Shah Dep. Tr. 10:22–25, 16:3–22, 18:16–23, No. 19-cv-3850, ECF No. 31-2. Having patrolled that location hundreds of times, Officer Shah knew that drivers frequently violated the double line. *Id.* at 28:9–17. On January 28, 2019, he pulled over a dozen people in just the first hour of his work day—without once brandishing his gun. *See id.* at 14:17–25, 15:1, 19:7–11. The first time he pulled his firearm that morning was when he saw Mr. Cerisier, a Black man, in his Mercedes GLE 450. Cerisier Dep. Tr. 9:12–14, 29:9, 69:3–5. Officer Shah could not articulate anything about Mr. Cerisier’s appearance or conduct that differentiated him from the countless traffic stops where Officer Shah did not draw his firearm. *Id.* at 11:16–25, 12:2–11. Instead, he stated without any foundation that Mr. Cerisier could have been “committing a crime, murder, or anything like that” or could have had a “suspended license” or was the type of person who attempts to “run over cops, you know.” *Id.* at 11:6–13. While pointing his gun at Mr. Cerisier, Officer Shah became increasingly erratic and aggressive, yelling at Mr. Cerisier to “move it.” Cerisier Dep. Tr. 75:15–24. The surrounding traffic on the BQE ground to a halt, as

other drivers honked their horns and watched Officer Shah point his firearm at Mr. Cerisier. *See id.* at 49:1–5; *see also id.* at 50:11–20 (stating that Officer Shah took “five to 10 seconds” from “when he first directed [Mr. Cerisier] to pull over to when he pulled out his service weapon”).

After Mr. Cerisier pulled his car to the median, Officer Shah approached the car. By the time he reached the vehicle, his firearm was holstered. *Id.* at 57:17–25. Mr. Cerisier asked Officer Shah “why did he pull out his gun.” *Id.* at 60:3. Officer Shah responded “you see what you see on TV.” *Id.* at 60:6–8, 60:25–61:17. He did not indicate that Mr. Cerisier’s driving created any safety concerns. *Id.* After reaching the vehicle, Officer Shah noticed the City plaque on Mr. Cerisier’s car and asked Mr. Cerisier about his work for the City. *Id.* at 58:19–21. Officer Shah did not issue a ticket or warning, nor even look at Mr. Cerisier’s driver’s license. *Id.* at 61:10–11. Officer Shah later testified that he did not do so due to his “own personal practice” of not issuing tickets to City employees or lawyers. Shah Dep. Tr. 39:14–17. Moreover, Officer Shah did not record pointing his firearm at Mr. Cerisier in his memo book despite the New York Police Department’s (“NYPD”) Patrol Guide requiring him to do so.<sup>4</sup> *Id.* at 27:8–18.

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<sup>4</sup> *See also* Corey Kilgannon, *Why the N.Y.P.D. Dropped One of Its Oldest Crime-Fighting Tools*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/nyregion/nypd-memo-book.html> (explaining that “[f]or more than a century, the New York City Police Department has required its officers to keep a detailed, handwritten memo book while on patrol”).

Throughout the ordeal, Mr. Cerisier remained calm and followed Officer Shah's instructions. Cerisier Dep. Tr. at 49:6–12. He was being “safe” and “careful” and put up his hands to show Officer Shah he was unarmed and had no intent to harm anyone or drive away. *Id.* at 54:4–12, 56:3–4. But ultimately, as Mr. Cerisier testified, he “would have preferred that [Officer Shah] gave [him] a ticket” rather than “point[ing] the gun.” *Id.* at 99:19–24.

The encounter with Officer Shah “forever changed [Mr. Cerisier's] life.” *Id.* at 104:17–18 (cleaned up). Upon arrival to work, Mr. Cerisier informed his colleagues of the incident, and they advised him to take the day off because he was visibly “shaken.” Am. Compl. ¶ 35, No. 19-cv-3850, ECF No. 11. Mr. Cerisier didn't take any days off because it is not his custom to miss work, but his performance suffered. Cerisier Tr. at 92:3–8. Fearing for his life, Mr. Cerisier wanted nothing more than to go to work safely and be there for his 10-year-old son. *See id.* at 51:6–7. The trauma he experienced affected him immediately as his life partner had to console him due to nightmares. *See id.* at 51:7–8. He sees a psychiatrist for the incident because Mr. Cerisier is not comfortable discussing the trauma he experienced. *Id.* at 100:11–12; 105:16–25.

Mr. Cerisier is not the only one who witnessed Officer Shah brandishing his firearm that Monday morning on the BQE. *Id.* at 49:1–5; *see also id.* at 42:17–22. The highway was busy with rush hour commuters and many of those drivers watched

as Officer Shah pointed his gun at Mr. Cerisier. *Id.* at 49:1–5, 75:14. In addition, Mr. Cerisier’s colleagues were all impacted by the incident when he retold the details at the work conference the same morning, as were his family members and friends who learned more later. *See id.* at 22:22–25, 105:22–25, 106:1–12. All of these individuals and groups were negatively affected by this use of excessive force in connection with a routine traffic stop, an example in microcosm of the loss of trust and confidence that communities experience when individuals are subjected to police misconduct.

## ARGUMENT

### A. The Qualified Immunity Doctrine Incorporates into Its Balancing Test the Harm Caused to the Public Interest by Police Misconduct

The qualified immunity doctrine requires courts to balance “the need to hold public officials accountable when they exercise power irresponsibly” with “the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In balancing these two sets of competing values, courts assess whether an individual may seek accountability for the harm caused by a public official’s unreasonable exercise of authority, or whether the court should shield the public official from suit because the harm was a byproduct of a reasonable discretionary decision that was an exercise of authority necessary to deter unlawful conduct. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807, 819 (1982); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017)



(discussing the two sets of competing values weighed in the qualified immunity analysis); *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (same); *Fabrikant v. French*, 691 F.3d 193, 212 (2d Cir. 2012) (recognizing the need to balance the competing values underlying qualified immunity). In short, the objective qualified immunity analysis recognizes the need to “cause an official to hesitate where the ‘official could be expected to know that certain conduct would violate statutory or constitutional rights.’” Brian Morganelli, *Reform of Qualified Immunity for Police Officers: A Pathway to Legislative Reform*, 1 INST. FOR AM. POLICE REFORM 7 (2021) (quoting *Harlow*, 457 U.S. at 819)).<sup>5</sup>

The key inquiry is the reasonableness of the police officer’s conduct given the facts and circumstances, including how the particular harm compares to the particular use of force. *See Graham v. Connor*, 490 U.S. 386, 395–97 (1989). When considering reasonableness, courts must take the public interest—which includes the harm caused by the police officer’s conduct—into consideration or they risk leaving many individuals whose constitutional rights are violated with no redress and transforming qualified immunity into an “absolute shield” for officers. *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at \*11 (E.D.N.Y. June 26, 2018);

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<sup>5</sup> In the same vein, the qualified immunity doctrine recognizes that “‘where an official’s duty *legitimately* required action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences’” subject to the official making “a defense in extraordinary circumstances.” *Id.*

*Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *see also McKinney v. Middletown*, 49 F.4th 730, 757–58 (2d Cir. 2022) (Calabresi, J., dissenting). Put another way, courts that neglect public interests may sanction “unqualified impunity,” allow officials to “duck consequences for bad behavior,” render “unjust” decisions and deny relief to citizens, like Mr. Cerisier, with meritorious constitutional claims. *See Davis*, 468 U.S. at 195; *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019).

In the excessive force context, qualified immunity cannot extend where (1) a plaintiff alleges that the police officer’s patently unreasonable conduct violated his constitutional right, and (2) that right is “clearly established” such that “every reasonable official would [have understood] that what he is doing” violates it. *See Graham*, 490 U.S. at 395–97; *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (cleaned up) (alteration in original). When analyzing the facts and circumstances to determine whether a police officer’s show of authority rises to excessive force, courts consider: “[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396 (explaining that this objective standard is based on the “perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”).

When these factors are analyzed in the context of this matter, they all weigh against the application of the qualified immunity bar. Starting with the first factor, the severity of the crime was low. Mr. Cerisier committed an “exceedingly low” level traffic violation by “driving across the solid double lines” demarcating “the often-violated median separating traffic bound for the Brooklyn Battery Tunnel from traffic bound for the Brooklyn Bridge.” SPA-1, SPA-5. Second, Mr. Cerisier posed no articulable safety threat as he complied—as soon as reasonably practical, given the number of cars on the BQE during rush hour—with Officer Shah’s instructions by driving in Officer Shah’s “direction before coming to a stop on the median, as he was ordered.” SPA-6; Cerisier Dep. Tr. at 75:15–25. Third, there is no evidence that Mr. Cerisier resisted arrest, and little risk that he would flee. He was stuck in rush hour traffic on the BQE. *Id.* at 46:9–10, 47:1–48:12 (explaining that he was “driving as safely as possible” to avoid a collision). Traffic conditions were sufficiently constrained that Officer Shah deemed it safe enough to walk in the active traffic lanes for more than an hour before he pulled over Mr. Cerisier. Shah Dep. Tr. 81:14–23. Indeed, Mr. Cerisier could not have fled Officer Shah’s traffic stop because the rush hour traffic was moving at 25 miles per hour, and there were cars surrounding Mr. Cerisier. *See* Shah Dep. Tr. 163:18-19.

The NYPD Patrol Guide and related training similarly supports the notion that the decision to brandish a loaded firearm on a public highway during rush hour was

unreasonable and violated Mr. Cerisier’s constitutional rights. *See Graham*, 490 U.S. at 396 (explaining that uses of force must be judged from the standpoint of a “reasonable officer on the scene,” subject to conduct rules like the Patrol Guide); *Drummond v. Anaheim*, 343 F.3d 1052, 1059–62 (9th Cir. 2003) (“Although such training materials are not dispositive, we may certainly consider a police department’s own guidelines when evaluating whether a particular use of force is constitutionally unreasonable”); *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) (“Although these ‘police department guidelines do not create a constitutional right,’ they are relevant to the analysis of constitutionally excessive force”) (citation omitted). The NYPD Patrol Guide has a zero-tolerance policy for excessive force and instructs police officers to (1) only draw a firearm if there is an articulable belief that there is a potential for serious physical injury, (2) use de-escalation techniques to obtain voluntary compliance and (3) apply the *Graham* factors in discretionary choices to use a firearm. *See* NYPD Patrol Guide 221-01 at 1, 3 (June 1, 2016), [https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations\\_pdf/pg221-01-force-guidelines.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-01-force-guidelines.pdf). For all the reasons outlined above, Officer Shah’s conduct was not only unconstitutional, but also violated his own department’s guidelines which require holding Officer Shah accountable.

When taken together, the *Graham* factors (seriousness of the suspect’s violation, risk to the Officer or public, and danger of flight or resisting arrest)

indicate that Officer Shah used excessive force. In addition, the severity of Officer Shah's conduct, the clear guidance in the Patrol Guide and the obvious harm to the individual and the public interest put the Officer Shah on notice that there was a constitutional violation. Thus, the qualified immunity doctrine should not apply. In fact, the consequences of affirming the District Court's grant of qualified immunity are so grave that by doing so, the Second Circuit risks "sanctioning a 'shoot first, think later' approach to policing [that renders] the protections of the Fourth Amendment hollow." *Thompson*, 2018 WL 3128975, at \*6–7 (quoting *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (per curiam) (Sotomayor, J., dissenting)) (cleaned up).<sup>6</sup> Moreover, the failure to hold Officer Shah accountable for his patently unreasonable conduct harms the community by sending the message that police officers can violate constitutional rights with impunity despite exercising unbridled discretion

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<sup>6</sup> The facts in this case are reminiscent of those in *Mullenix* where Justice Sotomayor dissented from the Court's grant of qualified immunity and found no government interest in shooting at the automobile instead of letting it drive over spikes. *Id.* at 20–26 (noting that Mullenix fired "six rounds in the dark at a car traveling 85 [mph]" acting without training, against his superior officer's orders, and disproportionately given the circumstances). Officer Shah similarly acted contrary to the NYPD's training, against the NYPD's procedures, and disproportionately used a lethal threat against a cooperative driver during a routine traffic stop. At the very least, Officer Shah's prior experience should have informed him that his conduct was unreasonable. *See, e.g.*, Shah Dep. Tr. 18:3–21:23; *see also Mullenix*, 577 U.S. at 22–23 (explaining that a reasonable officer could not have thought the gun use was appropriate based on the circumstances and their prior training).

when brandishing their firearms against cooperative civilians. *See Thompson*, 2018 WL 3128975, at \*11.

**B. Officer Shah’s Brandishing of a Loaded Firearm Is Excessive Force that Violated Mr. Cerisier’s Constitutional Rights and Harmed the Public Interest**

The District Court found that Officer Shah is entitled to qualified immunity because he did not make verbal threats while aiming his gun at Mr. Cerisier on the BQE. *See SPA-8* (finding it was not clearly established that Mr. Cerisier had a constitutional right against Officer Shah brandishing his gun since there was “*no allegation of verbal threats*”) (emphasis added). Essentially, the District Court found that brandishing a loaded firearm—that could have easily been fired inadvertently because his NYPD-issued firearm did not include a safety—at an unarmed civilian without more is not serious enough to put the officer on notice of a constitutional violation. *See Shah Dep. Tr.* 200:7–23. In reaching this conclusion, the District Court largely relied upon *Gerard v. New York*, a non-precedential summary order.<sup>7</sup> *See* 843 F. App’x 380, 381 (2d Cir. 2021). The District Court’s conclusion of law is incorrect and unsupported by the law of this Circuit as discussed in appellant’s brief. *See Appellant’s Br.* at 42–46, ECF No. 30.

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<sup>7</sup> Because *Gerard* is a summary order that lacks precedential effect, the Second Circuit is under no obligation to follow it. 2d Cir. R. 32.1.1(a); *Jackler v. Byrne*, 658 F.3d 225, 244 (2d Cir. 2011).

Nor is the District Court’s conclusion consistent with precedent outside the Second Circuit where courts have found on many occasions that brandishing a firearm is a threat enough to trigger a constitutional violation and overcome the qualified immunity bar. For example, the Sixth Circuit ruled that aiming a firearm “at an unarmed suspect who poses no danger” amounts to an excessive force violation. *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010); *see also Vanderhoef v. Dixon*, 938 F.3d 271, 281 (6th Cir. 2019) (holding a police officer could not rely on qualified immunity when he held at gunpoint a car driver and passengers who obeyed his orders and did not resist while exiting the vehicle). Likewise, the Ninth Circuit found that “pointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force.” *See generally Espinosa v. San Francisco*, 598 F.3d 528, 537 (9th Cir 2010). The Seventh Circuit and Tenth Circuit have issued decisions that are in accord. *See, e.g., Jacobs v. Chicago*, 215 F.3d 758, 773–74 (7th Cir. 2000) (holding qualified immunity did not protect an officer who, without warning, pointed a gun at a man who was sitting alone inside his apartment and “did nothing more threatening than provide the officer with his identification and ask the officer for permission to sit down”); *Maresca v. Bernalillo Cty.*, 804 F.3d 1301, 1316 (10th Cir. 2015) (same when officers pointed guns “directly” at a family driving back from a hiking trip notwithstanding their “full compliance” with officers’ orders).

Moreover, the harm to the public interest caused by an unreasonable brandishing of a firearm is well established in our legal system. For example, brandishing a fake firearm is grounds for a court to aggravate a criminal charge simply because of the psychological effect of the perceived gun threat. *People v. Smith*, 75 N.E.3d 84, 100–02, 96 n.1 (N.Y. 2017) (explaining that the court’s rationale for enhancing the criminal charge for brandishing a fake firearm reflected the victim’s heightened fear due to the “perceived threat of additional violence to the victims of the robbery”).

Here, brandishing a gun escalated an ordinary, routine traffic stop to a traumatic, life-changing incident.<sup>8</sup> Officer Shah’s conduct was an entirely unreasonable response to the minimal risk—if any—caused by Mr. Cerisier’s traffic infraction. *See Stamps v. Town of Framingham*, 813 F.3d 27, 42 (1st Cir. 2016) (“[P]ointing a firearm at a person in a manner that creates risk of harm incommensurate with any police necessity can amount to a Fourth Amendment violation.”). Officer Shah’s decision to draw his firearm was “incommensurate with any police necessity” and a violation of Mr. Cerisier’s constitutional rights.<sup>9</sup>

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<sup>8</sup> Amanda Geller, et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUBLIC HEALTH 2321, 2321–27 (2014) (finding “troubling” associations between police contact and PTSD symptoms in men who endure the most invasive police encounters).

<sup>9</sup> The U.S. Department of Justice’s National Institute of Justice recognized the “long tradition of theory and research suggest[ing] that the recent homicide rise may be attributable to compromised police legitimacy.” Richard Rosenfeld, et al.,



**C. Police Misconduct, Including the Unreasonable Brandishing of Firearms, Causes Severe and Substantial Harm to the Public Interest by Diminishing Community Trust in Law Enforcement and Increasing Gun Violence**

The qualified immunity doctrine seeks to strike a balance between two evils. *See Harlow*, 457 U.S. at 813; *Callahan*, 555 U.S. at 231. One evil is the imposition of civil liability on potentially innocent police officers, which imposes costs on “society as a whole,” including “expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.” *Id.* at 814; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (balancing competing values of victim compensation and undue inhibition of police officers discharging their duties). The public interest in holding an officer accountable who unreasonably points his gun at an unarmed civilian, during a routine traffic stop, in the middle of a congested highway, clearly outweighs the risk of any “undue inhibition” by police officers.

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NATIONAL INSTITUTE OF JUSTICE, ASSESSING AND RESPONDING TO THE RECENT HOMICIDE RISE IN THE UNITED STATES 17 (Nov. 2017), <https://www.ncjrs.gov/pdffiles1/nij/251067.pdf>. Some have posited that the rise in homicides is instead attributable to a “Ferguson Effect” that blames Black Lives Matter advocates for forcing police to cede authority to protesters. But the National Institute of Justice concluded in 2017 that evidence for the Ferguson Effect was “ambiguous . . . at best.” *Id.* at 16. A 2018 Congressional Research Service report also found “little evidence of a link between de-policing and increases in violent crime.” Nathan James, *Recent Violent Crime Trends in the United States*, CONG. RES. SERV. 17 (June 20, 2018), <https://fas.org/sgp/crs/misc/R45236.pdf>.

The other evil is the social cost of failing to hold police officers accountable “[i]n situations of abuse of office,” when “an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.” *Harlow*, 457 U.S. at 814. As discussed below, data shows that failing to hold officers accountable in these abusive situations not only harms individual victims but also entire communities as police officers’ unbridled use of excessive force perpetuates the corrosive cycle of over-policing, negative police encounters, community distrust and increased gun violence. This Court must accept all its obligations under the doctrine of qualified immunity and implement its balancing approach to consider the pervasive community costs and protect the public. *See generally Callahan*, 555 U.S. at 231.

### **1. Officer Shah’s Conduct Caused Community Harm**

Not only does police use of excessive force, such as Officer Shah’s brandishing of his gun, cause significant emotional and psychological harm to the individual, *see supra* section B,<sup>10</sup> but the downstream community consequences of this type of excessive force are also numerous and well documented.<sup>11</sup> The

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<sup>10</sup> *See also* Denise Herd, *Cycles of Threat: Graham v. Connor, Police Violence, and African American Health Inequities*, 100 BOSTON U. L. REV. 1047 (2020), <https://www.bu.edu/bulawreview/files/2020/05/09-HERD.pdf> (explaining that police use of excessive force leads to increased physical injuries, lower resistance to diseases and increased levels of chronic stress and psychological harm, and exploring how these outcomes result in reduced opportunities for education and employment and increased incidents of crime).

<sup>11</sup> *See generally* Giffords Law Center, *supra* note 2.

insurmountable data analyzing excessive force and police distrust shows that Officer Shah eroded many citizens' trust in law enforcement when he pointed his gun at Mr. Cerisier on the BQE. Mr. Cerisier's family, friends and colleagues learned about the traumatic event and witnessed how deeply it affected Mr. Cerisier's mental health. Moreover, the incident occurred during rush hour on a Monday morning, so the multitude of drivers and passengers on the crowded BQE witnessed Officer Shah's unreasonable conduct and were surely affected by it. The community's awareness of Officer Shah's unreasonable conduct results in increased distrust for police due to the perception that police officers may become "erratic" and threaten lives during routine interactions with the community.<sup>12</sup>

## **2. Police Use of Excessive Force Generates Community Distrust and Compromises Public Safety**

Police use of excessive force undermines community safety by generating and reinforcing a public distrust in law enforcement.<sup>13</sup> Studies show that in order to

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<sup>12</sup> See *infra* notes 12–35; Matthew Desmond, et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 870 (2016) (“[I]n predominantly black neighborhoods, publicized cases of police violence can have a *community-wide impact* on crime reporting that transcends individual encounters.”) (emphasis in original).

<sup>13</sup> See Giffords Law Center, *supra* note 2; see also *Podlach v. Vill. of Southampton*, No. 14-CV-6954, 2017 WL 4350433, at \*4 (E.D.N.Y. May 11, 2017), *report and recommendation adopted*, No. 14-CV-6954, 2017 WL 4350434 (E.D.N.Y. June 6, 2017), *aff'd*, 767 F. App'x 200 (2d Cir. 2019) (“[A] police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian's face may not cause *physical* injury, but he has certainly laid the building blocks for a section 1983 claim against him.”).

successfully protect the public, police officers “must have active public cooperation, not simply political support and approval.”<sup>14</sup> Community members who perceive police officers as engaging in *unreasonable* conduct—such as unreasonably pointing a loaded gun at a driver for violating a minor traffic law—are less likely to view police as legitimate.<sup>15</sup> This is exacerbated when police officers are perceived as acting with impunity and are not held accountable for excessive force, further reinforcing community members’ mistrust of police officers.<sup>16</sup>

For example, distrust in law enforcement, triggered by community awareness of police brutality and excessive force, dramatically decreases witness engagement and crime reporting rates.<sup>17</sup> This ultimately leads to lower rates of solved homicides

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<sup>14</sup> Tom Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. LAW 266, 267 (2008) (finding that community members who view police as legitimate are more likely to cooperate with police officers and comply with the law).

<sup>15</sup> Tom R. Tyler & Cheryl J. Wakslak, PROFILING AND POLICE LEGITIMACY: PROCEDURAL JUSTICE, ATTRIBUTIONS OF MOTIVE, AND ACCEPTANCE OF POLICE AUTHORITY (2006), <https://onlinelibrary.wiley.com/doi/10.1111/j.1745-9125.2004.tb00520.x>.

<sup>16</sup> See Rebeccah L. Sokol, et al., *The association between perceived community violence, police bias, race, and firearm carriage among urban adolescents and young adults*, PREVENTATIVE MED. 154 (Jan. 2022), <https://pubmed.ncbi.nlm.nih.gov/34863814/> (finding that individuals with higher levels of police distrust were more likely to acquire a firearm for protection).

<sup>17</sup> Matthew Desmond, et al., *supra* note 12, at 870–73 (reporting an estimated net loss of 22,000 emergency 911 calls in the year following the beating of Frank Jude).

and other violent crimes.<sup>18</sup> Lower rates of crime reporting have been proven to persist even in the rare instances when an officer is ultimately held accountable for their actions.<sup>19</sup> This demonstrates the enduring impact of excessive force on community safety. Community distrust in police also contributes to increases in firearm carriage, which directly leads to more gun-related deaths, out of a growing belief that police cannot or will not provide effective assistance.<sup>20</sup> The result of this dangerous cycle is not simply distrust, but even more death and violence.

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<sup>18</sup> POLICE EXEC. RESEARCH FORUM, REVIEW OF THE CHICAGO POLICE DEP'T'S HOMICIDE INVESTIGATION PROCESS 99 (2019), [http://www.iapa-il.org/news/Chicago-Homicide-Investigations-Assessment-Report\\_FINAL\\_to-CPD.pdf](http://www.iapa-il.org/news/Chicago-Homicide-Investigations-Assessment-Report_FINAL_to-CPD.pdf) (“Lack of witness cooperation,” including because of police distrust, is “one of the primary reasons for uncleared homicides”); *see generally* Wesley Lowery, et al., *Murder with Impunity: An Unequal Justice*, WASH. POST (July 25, 2018), [https://www.washingtonpost.com/graphics/2018/investigations/black-homicides-arrests/?utm\\_term=.1a29ae9b4d30](https://www.washingtonpost.com/graphics/2018/investigations/black-homicides-arrests/?utm_term=.1a29ae9b4d30) (discussing the “vicious cycle” where law enforcement continually fails to solve homicides involving Black Americans, distrust of law enforcement deepens, fewer arrests occur, and investigation cooperation declines).

<sup>19</sup> Desmond Ang, et al., *Police violence reduces civilian cooperation and engagement with law enforcement*, HKS FAC. RESEARCH WORKING PAPER SERIES RWP21-022 (Sept. 2021), <https://www.hks.harvard.edu/publications/police-violence-reduces-civilian-cooperation-and-engagement-law-enforcement> (“We find that George Floyd’s murder by Minneapolis police spurred a roughly 50% drop in 911 calls per gunshot, an effect that is mirrored across multiple cities and racial groups and that persisted over time[,]” with “little evidence that the decision [to convict the officer who shot Floyd] increased civilian crime reporting.”).

<sup>20</sup> David S. Kirk & Andrew Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. OF SOC. 1190, 1198, 1216–21 (2011), <https://www.scholars.northwestern.edu/en/publications/cultural-mechanisms-and-the-persistence-of-neighborhood-violence>; *see also* Desmond, et al., *supra* note 12, at 870–73.

Even when the outcome of excessive force is not immediately fatal, studies show that the wellbeing of civilians and their communities are profoundly impacted.<sup>21</sup> “Reoccurring” and “persistent” excessively violent police misconduct not only “promotes wear and tear, including diabetes, stroke, ulcers, cognitive impairment, autoimmune illnesses, accelerated aging, and death,” but also might cause “emotions [that] might be damaging to individual mental health and might elevate distress at the population level.”<sup>22</sup>

This phenomenon of community distrust of police compromising public safety has been referred to as the “Jude Effect,”<sup>23</sup> which was coined based on the dramatic decline of 911 calls after a highly publicized incident in which off-duty police brutally beat a man named Frank Jude. The Jude Effect has been recently observed in Chicago after the police killing of 17-year-old Laquan McDonald and in Baltimore after Freddie Gray’s death in police custody. As explained in a federal investigative report on the Chicago Police Department, Laquan McDonald’s

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<sup>21</sup> Sirry Alang, et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, 107 AM. J. PUB. HEALTH 662, 662–65 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5388955/>.

<sup>22</sup> *Id.* at 663.

<sup>23</sup> See Desmond, et al., *supra* note 12; John Diedrich & Ashley Luthern, *911 calls fell in black Milwaukee neighborhoods after Jude beating, study finds*, MILWAUKEE J. SENTINEL (Sept. 2016), <https://www.jsonline.com/story/news/investigations/2016/09/29/911-calls-fell-black-milwaukee-neighborhoods-after-jude-beating-study-finds/90907882/> (discussing how prosecutors created the term “the Jude effect” to describe the distrust they were witnessing among Black jurors during jury selection).

shooting represented “a tipping point—igniting longstanding concerns about officers’ use of force, and the City’s systems for detecting and correcting the unlawful use of force.”<sup>24</sup> The report concluded that “trust has been broken” between police and the community and that this “breach in trust has in turn eroded [the] ability to effectively prevent crime.”<sup>25</sup> From 2015 to 2016, homicides in Chicago increased by 85% while murders solved by police fell by nearly 50% (from 50% to 29%).<sup>26</sup> Police who unreasonably brandish firearms during routine traffic stops contribute to the Jude Effect by breaking trust between police and communities, deterring cooperation with police and, thereby, compromising public safety in New York City.

Further, trends in the concentration of violent crime illustrate the importance of community trust and participation in ensuring public safety. Many cities experience the same striking pattern of violence whereby law enforcement resorts to over-policing in order to address crimes carried out by a minuscule fraction of the community,<sup>27</sup> but these over-policing efforts prove ineffective in stopping cycles of

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<sup>24</sup> U.S. Dep’t of Justice & U.S. Attorney’s Office for the N.D. Of Ill., INVESTIGATION OF THE CHICAGO POLICE DEP’T 1 (Jan. 13, 2017), <https://www.justice.gov/opa/file/925846/download>.

<sup>25</sup> *Id.* at 1-2.

<sup>26</sup> POLICE EXEC. RESEARCH FORUM, *supra* note 16, at 2–3.

<sup>27</sup> Typically, crimes are carried out by an insular group of people who are often involved in cycles of retaliatory violence but comprise less than 1% of a city’s population. See Stephen Lurie, et al., *Presentation: The Less Than 1%: Groups and*



violence because the community loses trust in the police as a result of their increased practice of both over-policing and under-protecting.<sup>28</sup> Declines in public trust in law enforcement result in systemic issues, including higher crime and more frequent “self-policing” since fewer crimes are reported. Research funded by the National Institute of Justice confirmed this effect in Chicago at a time when high murder rates persisted in certain neighborhoods while rates of violence were falling in most other areas of the city.<sup>29</sup> Recognizing that mistrust of law enforcement is a powerful contributor to violence, researchers found strong evidence that “neighborhoods where the law and the police are seen as illegitimate and unresponsive have significantly higher homicide rates,” even after accounting for differences in race, age, poverty and other structural factors.<sup>30</sup>

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*the Extreme Concentration of Urban Violence*, NATIONAL NETWORK FOR SAFE COMMUNITIES 13–17, 23 (Nov. 2018), [https://cdn.theatlantic.com/assets/media/files/npsc\\_gmi\\_concentration\\_asc\\_v1.91.pdf](https://cdn.theatlantic.com/assets/media/files/npsc_gmi_concentration_asc_v1.91.pdf) (summarizing data collected from nearly two dozen U.S. cities that revealed that around 50% of the cities’ homicides and nonfatal shootings involved about 0.6% of the population, and law enforcement knew those victims and perpetrators had affiliations with groups involved in violence).

<sup>28</sup> See Giffords Law Center, *supra* note 2 (explaining that “many communities struggling with long-simmering crises of confidence in law enforcement witnessed spikes in violence after high-profile police misconduct further weakened community trust,” and explaining that these communities “have long felt brutally over-policed and under-protected,” making them “particularly susceptible to this trend.”).

<sup>29</sup> Kirk & Papachristos, *supra* note 20, at 1190.

<sup>30</sup> Kirk & Papachristos, *supra* note 20, at 1216–21.



### 3. Racial Profiling Degrades Community Trust and Safety

Officer Shah pointed his gun at Mr. Cerisier because of his “unfounded and racially motivated belief that Mr. Cerisier was a robber or a murderer.” Pl. Mot. At 11, Case No. 19-cv-03850, ECF No. 34-14; *see also* Shah Dep. Tr. 13:4–7, 17: 11–21. Racial profiling can cause severe emotional, psychological and other health consequences that not only harm individuals but also communities.<sup>31</sup> This is compounded by the overwhelming evidence that police are more likely to use physical force in America’s most structurally disadvantaged neighborhoods<sup>32</sup> and they are especially likely to use force, including deadly force, against Black Americans.<sup>33</sup>

These troubling disparities in policing, in part, explain why Black Americans and individuals living in economically disadvantaged communities report higher

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<sup>31</sup> Kimberly Barsamian Kahn, et al., *How Suspect Race Affects Police Use of Force in an Interaction Over Time*, 41 L. & HUMAN BEHAVIOR 117, 122 (2017) (describing the negative psychological effects that Black Americans experience as a result of the propensity for police officers to have more interactions with people of color and to act on negative racialized stereotypes in such interactions).

<sup>32</sup> *See* Phillip Attiba Goff, et al., CENTER FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE 4 (2016), <https://policingequity.org/careers/the-science-of-justice-race-arrests-and-police-use-of-force>.

<sup>33</sup> *See* Giffords Law Center, *supra* note 2; *see also* Rob Arthur, *New Data Shows Police Use More Force Against Black Citizens Even Though Whites Resist More*, SLATE (May 30, 2019), <https://slate.com/news-and-politics/2019/05/chicago-police-department-consent-decree-black-lives-matter-resistance.html>.

levels of police distrust.<sup>34</sup> Several recent Department of Justice investigations confirm this hypothesis, uncovering pervasive patterns of unconstitutional policing practices, including excessive use of force, and showing that these practices were disproportionately applied to Black individuals, leading to higher levels of police distrust among Black communities.<sup>35</sup> This distrust resulted in less community engagement with police, and ultimately undermined police officers' ability to effectively solve and prevent violent crime.

In short, immunizing police officers who engage in unreasonable conduct like Officer Shah's fuels the public perception of law enforcement as illegitimate. This perception undermines trust in police, diminishes crime reporting, and leads to self-help measures and gun-related deaths. Granting qualified immunity here would feed into the cycle of over-policing, negative police encounters and community distrust, which exacerbates violence and harm in our communities. The consequences of this vicious cycle cannot be overstated.<sup>36</sup> These community harms must be accounted

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<sup>34</sup> See Desmond, et al., *supra* note 12.

<sup>35</sup> For descriptions of the investigations, see Giffords Law Center, *supra* note 2, at 55–57.

<sup>36</sup> See generally Giffords Law Center, *supra* note 2 (finding that Black Americans make up nearly 50% of all homicide deaths in America, and that homicides are among the leading cause of death for Black teenage boys but, nonetheless, police in urban areas significantly over-police non-violent crimes and “spend just 4% of their time responding to serious violent crimes and less than 1% of their time handling homicides and shootings”). The research makes plain that “[t]his over-enforcement and under-protection are two sides of the same coin. Both devalue the lives and

for when weighing the public interests in the qualified immunity balancing test. When done so here, it is clear that Officer Shah is not entitled to qualified immunity for his unreasonable act of brandishing a firearm against Mr. Cerisier on a crowded BQE for a minor traffic violation.

### **CONCLUSION**

For the foregoing reasons, this Court should reverse the District Court's decision.

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priorities of communities of color, and both reinforce a destabilizing lack of trust that undermines public safety.” *Id.*

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New York, New York

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Counsel certifies that this *amicus curiae* brief in support of Plaintiff-Appellant contains 6,897, according to the word count tool of the Microsoft Word word-processing program, in compliance with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(g)(1) and Second Circuit Local Rule 29.1(c).

Counsel additionally certifies that this *amicus curiae* brief uses a proportionally spaced typeface using Microsoft Word with 14-point Times New Roman font, in compliance with the typeface requirements of Federal Rule of Appellate Procedure 29(a)(4), 32(a)(5) and 32(a)(6).

Dated: November 23, 2022

Respectfully submitted,

/s/ Amelia T. R. Starr

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