No. 18-695

IN THE

Supreme Court of the United States

CHRISTOPHER CHUNG; SAMANTHA CRITCHLOW; STEPHEN KARDASH,

Petitioners,

v.

GULSTAN E. SILVA, JR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHELDON PAUL HALECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INC. AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

WILLIAM J. JOHNSON
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS
317 South Patrick Street
Alexandria, VA 22314
(703) 549-0775

MARY ELISABETH NAUMANN
Counsel of Record
CHACEY R. MALHOUITRE
KEVIN M. MCGUIRE
JACKSON KELLY PLLC
175 East Main Street
Lexington, KY 40507
(859) 255-9500
mnaumann@jacksonkelly.com

Counsel for Amici Curiae

(For Continuation of Appearances See Inside Cover)

December 27, 2018

285488

Amanda Kellar
International Municipal
Lawyers Association, Inc.
51 Monroe Street, Suite 404
Rockville, MD 20850
(202) 466-5424

Gregory C. Champagne
St. Charles Parish
Sheriff's Office
260 Judge Edward Dufresne
Parkway
Luling, LA 70070
(985) 783-2883

Carrie Hill
National Sheriffs' Association
1450 Duke Street
Alexandria, VA 22314
(612) 306-4831

Counsel for Amici Curiae

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The National Association of Police Organizations ("NAPO") is a coalition of police unions and associations from across the United States. NAPO advances the interests of America's law enforcement officers. Founded in 1978, it is the strongest unified voice supporting law enforcement in the country. It represents over 1,000 police units and associations, over 241,000 sworn law enforcement officers, and more than 100,000 citizens who share a common dedication to fair and effective law enforcement. NAPO often appears as *amicus curiae* in cases of special importance on behalf of law enforcement officers to protect officers' legal and constitutional rights.

The National Sheriffs' Association (the "NSA") is a non-profit association formed under 26 U.S.C. § 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,080 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected.

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1. Pursuant to this Court's Rule 37.6, counsel for the *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than the *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and received appropriate notice.

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 2,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before federal and state courts.

The *amici curiae* have a strong interest in this case because they represent the thousands of law enforcement officers across the country who, like Officers Chung, Critchlow, and Kardash ("Officers"), spend most of their time not investigating crimes, but addressing situations that arise every day when people in the community need help or assistance. Without guidance as to how this part of their job interrelates with qualified immunity and their potential liability for their actions, those officers will be disincentivized from acting in their community caretaking role.

INTRODUCTION

This case presents a novel question of law on which all law enforcement officers need this Court's guidance. To protect their communities, officers make difficult decisions every day in response to unforeseen and often dangerous circumstances. This Court has provided an extensive body of law governing how those decisions can be made during the investigation of crimes. However, despite popular

perception, 70–80% of officers' time is spent performing activities "divorced" from criminal investigations—what this Court has called "community caretaking" functions. While the moniker "community caretaker" sounds benign, this role is not without risk. Officers have been killed by traffic when handling non-criminal situations, and 9,397 officers were assaulted in non-criminal incidents in 2017.

When officers act as "community caretakers," their duties and liabilities are unclear. The lower courts have recognized this lack of clarity when analyzing the application of qualified immunity in excessive force cases. Certain courts found that using the Court's *Graham*[2] factors to evaluate excessive force in the community caretaker context is inappropriate because the factors presume the existence of a crime and unfairly weigh the analysis against officers. While those courts use a different analysis, other courts continue to apply *Graham*. This divergence has caused inconsistency and uncertainty in the law. The uncertainty and risk of liability or unwarranted suit could lead to officers choosing not to act in situations without an active crime.

The Officers in this case acted in their role as community caretakers. Because almost all existing law on qualified immunity is tailored to situations involving crime fighting, not caretaking, the *amici curiae* respectfully request that the Court take this case and clarify the law as follows: (i) the community caretaking doctrine applies to excessive force cases and provides an overarching context for analyzing qualified immunity; (ii) the three factors used to evaluate the constitutionality of the use

2. *Graham v. Connor*, 490 U.S. 386 (1989).

of force in *Graham* are inappropriate to review excessive force cases where community caretaking is involved; and (iii) there is no clearly established law governing the particular conduct in this case.

FACTUAL BACKGROUND

Qualified immunity depends on the particular facts and circumstances of each case. The *amici curiae* accept the agreed facts set out in the Petition, but the record and other publicly available sources whose accuracy cannot reasonably be questioned[3] provide additional facts that shed light on the questions presented in the Petition.

Honolulu is the biggest city in the state of Hawaii, with an urban population of 350,395 on an island with almost a million residents.[4] The street where the incident took place is in downtown Honolulu, the 300 block of South King Street, where an average of 24,543 vehicles pass daily.[5] It

3. Federal Rule of Evidence 201 allows the Court to judicially notice these facts.

4. Hawaii Demographics, https://www.hawaii-demographics.com/cities_by_population (last visited Dec. 15, 2018) (compiling 2010 census data). As of the 2010 census, the population of the County of Honolulu was 953,207. United States Census Bureau, Quick Facts, Honolulu County, Hawaii, https://www.census.gov/quickfacts/fact/dashboard/honolulucountyhawaii/PST045217 (last visited Dec. 15, 2018).

5. U.S. Dep't of Transport., Fed. Highway Admin., Policy & Gov'tal Affairs, Office of Highway Policy Info., *Highway Performance Monitoring System*. The data for roadways in Honolulu, Hawaii, is searchable at the following link: https://www.arcgis.com/home/webmap/viewer.html?useExisting=1&layers=c2d5d

was dark; the sun had set two hours earlier at 6:40 p.m.[6] ER 0132 ¶ 2. "[N]o officers [were] directing traffic at the time," ER 0132 ¶ 5, ER 0139 ¶ 14, instead cars were stopped at the intersection "waiting for [Officers] to clear the road," ER 0126 ¶ 2.

The Officers faced a situation where a "man dressed in dark clothing" was in the "middle" of a six-laned roadway, ER 0132 ¶ 1, and had to make a decision on how to respond in order to protect Haleck, other motorists, as well as themselves, ER 0149 ¶ 39. Because it was dark with minimal lighting and cars were only beginning to stop, Critchlow's "immediate thought was just to get [Haleck] off the roadway so he doesn't get hit by a car." ER 0213 41:6–12. Haleck was approximately six feet tall and weighed two hundred pounds—much larger than either Chung or Critchlow. ER 0132 ¶¶ 6–7. By the time Chung tased Haleck the second time at 8:26 p.m., SER042 ¶ 22, the Officers had been attempting to get him out of the street for 11 minutes. He was neither sprayed nor tased after he fell to the ground, SER042 ¶¶ 22–24, even though he was flailing, squirming, and kicking such that it took six officers to place him in handcuffs, ER 0134 ¶¶ 34–35, ER 0220.

9c7faf84262a87f545ffe65487a&layerId=0 (last visited Dec. 19, 2018). At that link, the undersigned searched the address "300 S King Street Honolulu," which is approximately the intersection of South King Street and Richards Street where the incident took place. Clicking on the roadway segment of South King Street reveals the embedded data for that segment, including "AADT" (annual average daily traffic).

6. timeanddate.com, Honolulu, Hawaii, USA — Sunrise, Sunset, and Daylength, March 2015, https://www.timeanddate.com/sun/usa/honolulu?month=3&year=2015 (last visited Dec. 15, 2018).

ARGUMENT

I. MOST POLICE ACTIVITIES INVOLVE THE NON-INVESTIGATORY FUNCTION OF COMMUNITY CARETAKING.

In 1973, this Court recognized local law enforcement officers' "community caretaking functions," activities "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). In fact, it is an "enduring myth" that "the police are primarily crime fighters." Samuel Walker & Charles M. Katz, *The Police in America: An Introduction* 17 (9th ed. 2017) (citations omitted). But "reality" is "very different." *Id.* Studies show crime-related calls represent only 19% of all 911 calls to law enforcement. *Id.* at 18–20, Ex. 1–1; *id.* at 228–29, Ex. 7-7 ("The most important finding is that only 20–30 percent of all calls for service involve criminal law enforcement.").

Thus, the clear majority, from 70–80%, of officers' activities are related to non-crime incidents. "The police are not primarily crime fighters but are peacekeepers and problem solvers." *Id.* at 228; *see id.* at 150–81 (chapter examining officers' non-crime related role, "Peacekeeping and Order Maintenance"); *see also* Howard Abadinsky, *Discretionary Justice* 15–16 (1984) (listing four primary police goals, only one of which is "control of crime," and listing ten objectives of police, only two of which involve crime); Peter K. Manning, *Police Work: The Social Organization of Policing* 108–09, 126 n.10 (1977) (citing study of West Coast police department where "Crime-related functions" comprised only 27% of police time);

Samuel Walker, *Taming The System: The Control of Discretion in Criminal Justice 1950–1990* 46 (1993) (in discussing limitations on police discretion imposed by the Fourth Amendment, observing "criminal law enforcement represents only a part of police work—between 20 and 30 percent of a patrol officer's activities" (citation omitted)).

In 2015, reports of a "non-crime emergency" were the third most common reason for contacts between the public and the police. U.S. Dep't of Justice, Bureau of Justice Statistics, E. Davis, A. Whyde, & L. Langton, *Contacts Between Police and the Public, 2015*, p. 8 (Oct. 11, 2018), NCJ 251145, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=6406 (finding most common reasons for police contact are: (i) reporting a possible crime (23.1 million contacts); (ii) being pulled over in a traffic stop (22.7 million contacts); and (iii) "reporting a non-crime emergency" (12 million contacts)). When officers initiated contacts with the public in 2015, after excluding traffic stops (which account for 85% of contacts), 6.3% of officer-initiated contacts were for reasons "other" than street stops (6.7%) and arrests (1.9%). *Id*. at 10. When the public initiated contacts with officers, almost a third, 26.9%, were for non-crime emergencies. *Id*. at 18.

Even though such interactions may not involve a crime, they are not without risk to law enforcement officers' safety. The Federal Bureau of Investigation compiles statistics showing that these encounters endanger the lives of officers. This case, for example, involves officers on foot, outside of the patrol vehicle, in a busy street. Since 2013, 40 officers have been fatally struck by other vehicles. U.S. Dep't of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted, 2017*

Table 65 (Spring 2018), retrieved Dec. 11, 2018, from https://ucr.fbi.gov/leoka/2017/topic-pages/tables/table-65.xls. Officers' assistance in non-criminal situations can easily lead to an officer assault or injury. For example, 9,397 officers were assaulted in non-criminal incidents in 2017. *Id.*, Table 84, retrieved Dec. 11, 2018, from https://ucr.fbi.gov/leoka/2017/topic-pages/tables/table-84.xls. In 68.4% of those incidents, the only "weapons" involved were "personal weapons"—hands, fists, or feet. *Id.*, Table 88, retrieved Dec. 11, 2018, from https://ucr.fbi.gov/leoka/2017/topic-pages/tables/table-88.xls; *see id.*, Overview, retrieved Dec. 11, 2018, from https://ucr.fbi.gov/leoka/2017/topic-pages/assaults_topic_page_-2017 (defining "personal weapons").

The Ninth Circuit properly found that the encounter Chung, Critchlow, and Kardash had with Haleck was within this non-criminal ambit—their community caretaker functions. But the Ninth Circuit ignored the objective facts of the circumstances the Officers faced as they tried to corral Haleck, in the dark, from the middle of the six-lane street in downtown Honolulu and failed to address the interaction between the community caretaker and qualified immunity doctrines.

II. THE COURT SHOULD CLARIFY HOW TO ANALYZE QUALIFIED IMMUNITY IN THE COMMUNITY CARETAKING CONTEXT.

Qualified immunity is immunity from suit, not merely a defense at trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It acts as a gatekeeper, protecting all law enforcement officers from suit except for "the plainly incompetent or [those] who knowingly violate the law."

White v. Pauly, 137 S. Ct. 548, 551 (2017) (internal quotation and citation omitted). It is therefore incumbent on lower courts to apply the correct qualified immunity analysis because the very purpose of qualified immunity "'is effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 551–52 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

To determine whether qualified immunity applies, courts analyze whether (1) officers infringed upon a constitutional right and (2) the law was so clearly established at the time that the officers would have known the actions they took were unconstitutional. The Ninth Circuit did not consider the community caretaker doctrine in its analysis, instead relegating the doctrine to a brief aside at the end of the opinion where it noted that the Officers were acting in their community caretaker capacity. This cannot be the proper analysis.

The community caretaker doctrine is an exception to the Fourth Amendment's warrant requirement. Just like every other warrant exception (plain view and exigent circumstances, for example), it provides officers with the basis to conduct searches and seizures. These exceptions typically involve the question of whether evidence discovered without a warrant is admissible to prove a criminal charge. *See, e.g., Cady*, 413 U.S. at 437–39 (admission of evidence of murder found in automobile inventory search); *South Dakota v. Opperman*, 428 U.S. 364, 366–67 (1976) (admission of evidence of "marihuana" possession found in inventory search); *United States v. Garner*, 416 F.3d 1208, 1211–14 (10th Cir. 2005) (admission of firearm discovered when checking on man slumped or laying down in a field); *United States v. Rideau*, 969

F.2d 1572, 1574–75 (5th Cir. 1992) (admission of firearm discovered when removing drunk man from road).

This case does not involve an evidentiary issue. It involves the use of force. When courts evaluate uses of force, they must examine the reasonableness of the officer's conduct in the context in which the encounter occurred, which is usually a crime in progress, an arrest, or other investigatory matter—the context in which *Graham* and its factors arose. In the present case, however, the Officers were acting in their community caretaker role, and this Court has not provided guidance for analyzing qualified immunity in that context.

In this vacuum, the circuit courts have taken varied, inconsistent approaches in the few cases where they have recognized the community caretaker doctrine as part of the qualified immunity analysis. *See Estate of Hill v. Miracle*, 853 F.3d 306, 314–16 (6th Cir. 2017) (applying a different modified version of the *Graham* factors in community caretaking case); *Kent v. Oakland Cty.*, 810 F.3d 384, 396 (6th Cir. 2016) (acknowledging community caretaker role when officer tased unarmed man in his home when the man attempted to prevent EMTs from resuscitating his deceased father, but applying *Graham* factors and looking beyond community caretaker cases in defining clearly established law); *MacDonald v. Town of Eastham*, 745 F.3d 8, 13–15 (1st Cir. 2014) (noting "disarray" in law on community caretaker doctrine but that case law addressing the exception does not provide "the sort of red flag that would have semaphored to reasonable police officers that their entry into the plaintiff's home was illegal"); *Martin v. City of Oceanside*, 360 F.3d 1078, 1082–83 (9th Cir. 2004) (finding that officers

were justified in entering home as community caretakers under "emergency aid" exception to warrant requirement); *Winters v. Adams*, 254 F.3d 758, 766 (8th Cir. 2001) (finding that officers could not have violated clearly established law when "the availability of the community caretaking function as an alternative to reasonable suspicion under *Terry v. Ohio* [was] still a subject of debate in the courts"); *see also Ames v. King Cty.*, 846 F.3d 340, 345–50 (9th Cir. 2017) (applying modified version of *Graham* factors and finding officer's violent, physical removal of woman from vehicle did not violate Fourth Amendment when officer was acting in community caretaker role to aid woman's son who needed immediate medical attention).

By improperly divorcing this Court's law on Fourth Amendment exceptions from this Court's law on qualified immunity, the Ninth Circuit created confusion for officers and disincentivized them from assisting citizens in precarious situations because the officers do not know the limits of what conduct is constitutional.

III. THE *GRAHAM* FACTORS DO NOT PROVIDE AN ADEQUATE ANALYSIS IN THE COMMUNITY CARETAKING CONTEXT AS TO WHETHER A USE OF FORCE IS CONSTITUTIONAL.

The Ninth Circuit stated that it evaluated whether Chung, Critchlow, and Kardash violated Haleck's Fourth Amendment rights by using intermediate force under the three-prong test outlined by this Court in *Graham v. Connor*, which evaluates: (1) "the severity of the crime at issue," (2) "whether the suspect pose[d] an immediate threat to the safety of the officers or others," and (3) "whether [the suspect] [was] actively resisting arrest

or attempting to evade arrest by flight." 490 U.S. 386, 396 (1989). However, rote application of the *Graham* factors is not an appropriate measure of constitutionality when officers act in their role as community caretakers.

Community caretaking involves officer actions apart from investigating crime. Yet, two of the *Graham* factors presume the existence of a crime—the first looks at the "severity of the crime" and the third requires an arrest. Because *Graham* involved an "investigatory stop," the test made sense in that context. 490 U.S. at 389. But *Graham* also provides that courts should look to "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id*. at 397 (citation omitted). Thus, reasonableness is the benchmark for excessive force cases. The question this case poses is how the analysis changes when officers are acting as community caretakers.

Some courts recognize that blind application of the *Graham* factors is inappropriate in the non-investigatory context. For example, in *Estate of Hill v. Miracle*, the Sixth Circuit addressed the use of a taser[7] on a man suffering from a hypoglycemic episode, in bed in his home, surrounded by paramedics. 853 F.3d at 310–11. Hill resisted treatment by the paramedics, and Officer

7. "TASER" is a registered trademark for a device that uses electric current to apply force to a person (conducted electrical weapons). *See* Solutions for Law Enforcement, In the Field, AXON, https://www.axon.com/solutions/law-enforcement/in-the-field (last visited Dec. 24. 2018). Courts also refer to these types of devices as stun guns or electroshock weapons. In this brief, the word "Taser" is capitalized or not capitalized based on whether the underlying court capitalized the word.

Miracle used his taser to subdue Hill long enough for the paramedics to administer the required treatment. *Id.*

The Sixth Circuit refused to merely apply the three *Graham* factors, observing that applying *Graham* to non-criminal situations disfavors reasonableness from the start, unfairly weighing against the officer. *Id.* at 313. Noting that "no appellate court has previously provided any guidance on how to assess objective reasonableness in the present *atypical* situation," the court created an alternative three-part test. *Id.* (emphasis in original). The test did not require evaluation of the "severity" of a potentially nonexistent crime. *Id.* at 314. Instead, it evaluated reasonableness of the force used in the context of the caretaking situation. *Id.*

Similarly, in *Ames v. King County*, the Ninth Circuit reviewed an officer's use of force in removing a driver, Ames, from her truck cab by pulling her hair, taking her down to a prone position on the ground, and slamming her head into the ground three times. 846 F.3d at 344–45. Ames was neither suspected of a crime nor under arrest. *Id.* at 348–49. The officer was attempting to prevent her from driving away with her son, who needed immediate medical attention for a drug overdose. *Id.* at 344–45.

Citing *Cady*, the court found the district court erred when it failed to modify the *Graham* factors to consider that the officer "was acting in her community caretaking capacity." *Id.* at 348. Instead, the court found that the first *Graham* factor should consider the gravity of the serious and life-threatening situation presented to the officers. *Id.* at 349.

In the Officers' case, the Ninth Circuit's failure to consider the community caretaking context in which the situation with Haleck arose strayed from the overarching test of reasonableness required by the Fourth Amendment and *Graham*. This Court should provide guidance on how the constitutionality of law enforcement officers' decisions will be reviewed as they safeguard the public welfare in their community caretaker roles.

IV. THERE WAS, AND IS, NO CLEARLY ESTABLISHED LAW GIVING HALECK THE RIGHT NOT TO BE SUBJECTED TO INTERMEDIATE FORCE WHILE BLOCKING TRAFFIC IN A BUSY ROADWAY, AT NIGHT, AND REFUSING COMMANDS TO GET OUT OF THE STREET.

When determining whether a right is clearly established, this Court requires an examination of "whether the violative nature of the *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (emphasis in original) (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The Ninth Circuit failed to identify the particular conduct at issue in the present case. The proper inquiry would have asked whether Haleck had a right not to be subjected to intermediate force while moving around in a busy roadway, at night, and refusing to get out of the street. There was, and is, no clearly established law giving Haleck such a right.

As noted in the Petition, there was no binding precedent in the Ninth Circuit to guide the Officers. In the absence of such precedent, the Ninth Circuit looks to

precedents in other circuits. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1094 (9th Cir. 2013). Moreover, this Court agrees that in the clearly established law inquiry, a "robust consensus" of "persuasive" authority can create a federal right. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 (2015) (internal quotation marks omitted) (quoting *al-Kidd*, 563 U.S. at 741–42). In representing officers' interests from all over the country, the *amici curiae* monitor and review all levels of decisional authority to provide guidance to their constituencies. A review of that "persuasive" authority supports the conclusion that the Officers did not violate Haleck's constitutional rights.

A. In Cases Decided before March 16, 2015, Involving Tasers in Non-Criminal Situations, Courts Have Found No Clearly Established Law Prohibiting the Use of Intermediate Force in Similar Contexts.

Tasers are an appropriate measure to be used to subdue a person, such as Haleck, for his own protection in a non-criminal encounter. *See Caie v. West Bloomfield Twp.*, 485 F. App'x 92, 94–96 (6th Cir. June 18, 2012) (officers' use of taser to subdue suicidal man isolated on the shore of a lake did not violate his constitutional rights);[8] *Oliver v. Fiorino*, 586 F.3d 898, 906–07 (11th Cir. 2009) (initial use of Taser shock on agitated man who had signaled police and was leaving median of intersection likely constitutional). Haleck's circumstances were as

8. While the decision in *Caie* is unpublished, the Sixth Circuit relied on it in *Estate of Hill*, 853 F.3d at 313–14, and under *Gravelet-Blondin* and *Sheehan*, it is part of the decisional authority that can create a clearly established right.

dire, if not more so, than those in *Caie*. Haleck was not on an isolated lakeshore—he was walking in the middle of a six-lane road that carries an average of 24,543 vehicles per day in downtown Honolulu, in the dark, with cars present, for at least 11 minutes. While the Ninth Circuit noted traffic was stopped, the longer Haleck remained in the roadway, the longer he exposed himself, the Officers, and the public to the risk of oncoming traffic.

The Officers' conduct was also unlike the unconstitutional conduct in *Oliver*. Oliver was tased eight times in a "safe area" of the street; "none of [the] incident took place in the middle of the intersection." *Oliver*, 586 F.3d at 906–07. In Haleck's case, there was no cordoned off "safe area." Although Haleck was moving away from the Officers, he was not moving toward the sidewalk like Oliver. *Id.* Finally, unlike in *Oliver*, the Officers warned Haleck before force was used and did not use pepper spray or a Taser after Haleck was subdued. *Oliver* supports the Officers' actions.

In addition, clearly established law does not prohibit using a Taser to protect the public by removing a resisting, uncooperative person from a roadway who "could potentially be dangerous to any others who may have been in the area at the time." *Steen v. City of Pensacola*, 809 F. Supp. 2d 1342, 1351–52 (N.D. Fla. 2011) (cyclist was not accused of a crime but was not obeying an officer's directions to stop and was "riding in the middle of the road, and crossing over all four lanes of the street"). The *Steen* court recognized this danger to the public even though, unlike with Haleck, it was early in the morning and the "roads were mostly empty during the chase." *Id.* Thus, *Steen* provided the Officers with further guidance

that a "robust consensus" of law allowed them to tase Haleck to protect him, themselves, and the public.

B. Decisions Rendered after Haleck's Encounter Confirm the Absence of Any Clearly Established Law Prohibiting the Officers' Actions.

In cases decided after March 16, 2015 involving Tasers in non-criminal situations, courts have found no clearly established law prohibiting the use of intermediate force in similar contexts. *See Estate of Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 896–97, 899–909 (4th Cir. 2016), *cert. denied sub nom. Vill. of Pinehurst, N.C. v. Estate of Armstrong*, 137 S. Ct. 61 (2016) (finding no clearly established law prohibited taser use on a mentally ill man "offering stationary and non-violent resistance to a lawful seizure," having wrapped himself around a stop sign post and not obeying instructions to leave the post); *Estate of Hill*, 853 F.3d at 310–16 (finding that it was constitutional to tase a man suffering from a hypoglycemic episode, in his own bed, in his own home, surrounded by paramedics).

In reaching their decisions, both courts noted the inconsistency in the law regarding the use of Tasers. *See Estate of Armstrong*, 810 F.3d at 909 (recognizing that even as of 2016, law on taser use was "an evolving field of law," such that it was difficult to ever determine whether there was clearly established law); *Estate of Hill*, 853 F.3d at 316 (noting that in cases involving tasers "'the result depends very much on the facts of each case,'" and no case law squarely governed those facts (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004))).

Even as of October 2017, it was constitutional to tase an unarmed man fleeing in the roadway from a traffic stop. *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1127, 1130 (9th Cir. 2017). The court drew the line for reasonableness at *additional* tasing after the man was prone and surrounded by other officers. *Id.* at 1130–31. Chung, Critchlow, and Kardash acted consistently even without this case as guidance; no officers used any intermediate force after Haleck fell to the ground.

These cases underscore the Ninth Circuit's error in this case because there was no clearly established law. When community caretaking is considered, there is even more reason that its opinion should be reversed.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari or, alternatively, summarily reverse the Ninth Circuit's decision.

Respectfully submitted,

William J. Johnson
National Association of Police Organizations
317 South Patrick Street
Alexandria, VA 22314
(703) 549-0775

Amanda Kellar
International Municipal Lawyers Association, Inc.
51 Monroe Street, Suite 404
Rockville, MD 20850
(202) 466-5424

Mary Elisabeth Naumann
Counsel of Record
Chacey R. Malhouitre
Kevin M. McGuire
Jackson Kelly PLLC
175 East Main Street
Lexington, KY 40507
(859) 255-9500
mnaumann@jacksonkelly.com

Gregory C. Champagne
St. Charles Parish Sheriff's Office
260 Judge Edward Dufresne Parkway
Luling, LA 70070
(985) 783-2883

Carrie Hill
National Sheriffs' Association
1450 Duke Street
Alexandria, VA 22314
(612) 306-4831

Counsel for Amici Curiae