15-1141

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

EURIE A. STAMPS, JR. and NORMA BUSHFAN,
Co-Administrators of the Estate of Eurie Stamps,

Plaintiffs-Appellees,

v.

PAUL DUNCAN, individually and in his official capacity as a police officer of the Framingham Police Department, and THE TOWN OF FRAMINGHAM,

Defendants-Appellants.

On Appeal from the United States District Court, District of Massachusetts

Brief of *Amici Curiae*

American Civil Liberties Union, American Civil Liberties Union of Massachusetts, Cato Institute, National Bar Association, LatinoJustice PRLDEF, and National Association for the Advancement of Colored People – New England Area Conference

Supporting Plaintiffs-Appellees and Affirmance of the Decision Below

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001

Matthew R. Segal
Adriana Lafaille
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110
617-482-3170

Benjamin Crump
NATIONAL BAR ASSOCIATION
1225 Eleventh Street NW
Washington, DC 20001

Ezekiel Edwards
CRIMINAL LAW REFORM PROJECT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Juan Cartagena
Jose Perez
LATINOJUSTICE PRLDEF
99 Hudson Street
New York, NY 10013-2815

Bradford M. Berry
Anson Asaka
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, MD 21215

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, each *amicus curiae* individually certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the safety of people seized by the police. When police officers enter a home, the Fourth Amendment protects its occupants from gunfire—whether intentional or inadvertent—by prohibiting officers from aiming firearms at them without good reason. See *Mlodzinski* v. *Lewis*, 648 F.3d 24 (1st Cir. 2011). Yet, while raiding the home of 68-year-old grandfather Eurie Stamps, an officer pointed an assault rifle at Stamps with the rifle's safety disengaged and his finger on the trigger, even though Stamps lay on the floor with his hands up. That conduct was manifestly unconstitutional. Nevertheless, the officer now claims that he *became* immune from suit when he accidentally fired the rifle and killed Stamps. That contention, if accepted by this Court, would contradict clear precedent and imperil public safety.

Officer Paul Duncan was part of a Special Weapons and Tactics (SWAT) team that raided Stamps's home to execute a search warrant. The officers believed that Stamps's stepson and two associates had been selling drugs in the home. But they also knew that Stamps lived there, that he was 68 years old, and that he was not suspected of committing

any crime or posing any threat. Add. 2; JA 496.

Shortly after midnight on January 5, 2011, police broke the home's windows and doors, deployed a disorienting "flash-bang" grenade, and entered. JA 465. Stamps got down on his stomach, as instructed, with his hands up. While other officers moved through the home, Duncan pointed his M-4 rifle at Stamps. He maintained its selector on "semi-automatic" rather than "safe." And, at some point, he placed his finger inside the trigger guard and onto the trigger. JA 121, 287-89, 508, 516; Add. 18.[1]

Defendants scarcely argue that those actions complied with the Fourth Amendment, nor can they. Compliant and nonthreatening civilians have a clearly established Fourth Amendment right against being unreasonably targeted with firearms while a search warrant is executed. When that right is violated, the offending officer is liable under 42 U.S.C. § 1983. See, *e.g.*, *Mlodzinski*, 648 F.3d at 37-39.

Defendants are therefore constrained to advance a novel theory. They contend that because of what occurred next—*because* Duncan

[1] *Amici* draw reasonable inferences in plaintiffs' favor. *Mlodzinski*, 648 F.3d at 28.

accidentally fired and killed Stamps—Duncan is relieved of § 1983 liability for any claim of unconstitutionally excessive force. In effect, defendants suggest that although an officer might be liable for unreasonably aiming a firearm at an innocent person who lives to tell the tale, an officer is *not* liable if the gun fires and the civilian dies.

The district court rejected that argument, concluding that Duncan violated clearly established law by subjecting Stamps to a level of force that endangered his life and served little if any law enforcement purpose. Add. 18. For three reasons, this Court should affirm that decision.

First, this case begins and ends with clearly established Fourth Amendment law, which would have enabled any reasonable officer to understand that Stamps had a right not to have a live firearm pointed at his head while he lay on the ground with his hands up. *Mlodzinski*, 648 F.3d at 37-39. Yet Duncan did more than that; he further endangered Stamps by putting his finger on the trigger. Those actions were unconstitutional, and Duncan is liable for their consequences.

Second, Duncan cannot avoid liability for all of his unreasonable actions simply because his *final* action—pulling the trigger—was

unintentional. Officers are not exempt from liability for the unintended consequences of unreasonable uses of force. See *Brower* v. *Cnty. of Inyo*, 489 U.S. 593, 598-99 (1989). And for good reason. Permitting officers to *acquire* immunity when their unreasonable actions yield tragedy would create perverse and absurd results.

Third, shielding officers from liability for unreasonable actions that cause accidental deaths would acutely threaten the communities that are most frequently subject to militarized police raids and other police actions. Raids like the one that resulted in Stamps's death increasingly bring military-style equipment and tactics into the homes of ordinary Americans. The risks endemic to these raids are borne especially by people of color, including Stamps himself, and it is these communities who will suffer the consequences of defendants' proposed rule.

Ultimately, defendants overlook the ordinary Fourth Amendment principles that resolve this case. Because Duncan violated clearly established law, this Court should affirm the denial of qualified immunity.

INTERESTS OF *AMICI CURIAE*

Amici are organizations devoted to the full and equal protection of the rights and liberties guaranteed by the United States Constitution. They submit this brief with the consent of all parties.[2]

The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The *ACLU of Massachusetts* is the ACLU's Massachusetts affiliate. Since 1920, these organizations have often appeared before this Court and others, both as direct counsel and as *amici curiae*.

The *Cato Institute* was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center

[2] *Amici*'s counsel state that no counsel for a party authored this brief in whole or in part, no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici*, their members, or their counsel made a monetary contribution for its preparation or submission. Fed. R. App. Proc. 29(c)(5).

for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. To those ends, the Cato Institute has participated as amicus curiae in numerous cases before this Court and others. Cato also defends constitutional rights through publications, lectures, conferences, public appearances, and other endeavors, as well as through its Project on Criminal Justice and the annual Cato Supreme Court Review.

The *National Bar Association* (NBA) is the nation's oldest and largest national association of predominantly African-American lawyers, judges, educators and law students. It has affiliate chapters throughout the United States, Canada, the United Kingdom, Africa and the Caribbean. It represents a professional network of lawyers, judges, legal educators and law students.[3] The NBA has advocated on issues of police conduct and formed a task force to implement an initiative to address police misconduct.

[3] This brief and the NBA's decision to submit this brief should not be interpreted as reflecting the views of any judicial member of the NBA or its Judicial Council.

LatinoJustice PRLDEF is a national nonprofit civil rights organization that has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. Since being founded in 1972, its mission has been to promote the civic participation of the greater pan-Latino community in the United States and to engage in and support law reform civil rights litigation across the country in the areas of criminal justice, education, employment, fair housing, immigrants' rights, language rights, and voting rights. During its 43-year history, LatinoJustice has litigated many cases in both state and federal courts challenging multiple forms of discrimination including discriminatory and abusive law enforcement practices.

The *New England Area Conference of the National Association for the Advancement of Colored People* (NAACP) represents and comprises local NAACP branches in Maine, Massachusetts, New Hampshire, Vermont and Rhode Island. Founded in 1909, the NAACP is the nation's oldest and largest civil rights organization. Its mission is to ensure the political, educational, social and economic equality of all persons and to eliminate race-based discrimination. One of the NAACP's goals is to end

racially motivated policing strategies. The New England Area Conference has been actively engaged in addressing police misconduct in Massachusetts and other states. The New England Area Conference is thus vitally interested in the outcome of this case, which will determine whether police officers can be held accountable for intentional, unreasonable conduct that accidentally results in the loss of life.

ARGUMENT

I. An officer who unreasonably aims a rifle at someone's head has violated clearly established Fourth Amendment law.

The district court properly resolved this case by applying two ordinary legal principles to the police actions that preceded, and indeed caused, Stamps's death. First, the Fourth Amendment prohibits officers from aiming a weapon at someone's head when there is no law enforcement justification for doing so. Second, an officer who violates this prohibition is not entitled to qualified immunity because the key case law has long been clearly established, thus giving officers "fair warning" that such force is illegal and will expose them to civil suit. *Jennings* v. *Jones*, 499 F.3d 2, 16 (1st Cir. 2007); see *Mlodzinski*, 648 F.3d at 37-39.

Those principles apply straightforwardly to this case. Duncan pointed an assault rifle at head of a 68-year-old grandfather who posed no threat; he failed to engage the rifle's safety; and he placed his finger on the trigger. That conduct, which proved fatal, violated clearly established Fourth Amendment law.

A. The Fourth Amendment prohibits police officers from unreasonably using firearms to threaten civilians.

The Fourth Amendment permits police officers to use force, but only "reasonable" force, to detain a home's occupants while executing a search warrant. *Muehler* v. *Mena*, 544 U.S. 93, 98-99 (2005). Officers may not, consistent with that command, aim weapons at just anyone. Aiming a firearm at a civilian is a use of force; it communicates a threat to kill, and it increases the probability that the civilian will in fact be killed either intentionally or by accident.

Determining whether such force is reasonable entails "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests"—including the "risk of bodily harm" to the individual—"against the importance of the governmental interests alleged to justify the intrusion." *Scott* v. *Harris*, 550 U.S. 372, 383 (2007)

(citation and internal quotation marks omitted); see *Tekle* v. *United States*, 511 F.3d 839, 845 (9th Cir. 2007) (court "must balance the force used against the need"); *Luna* v. *Mullenix*, 773 F.3d 712, 719 (5th Cir. 2014) (same), cert. petition filed Mar. 20, 2015, No. 14-1143. Reasonableness is determined in light of the circumstances confronting officers, including whether force was used against someone who posed an "immediate threat" to their safety or ability to carry out a search. See *Mlodzinski*, 648 F.3d at 34, 37-39 (quoting *Graham* v. *Connor*, 490 U.S. 386, 396 (1989)).

Under these principles, an officer can be found to have violated the Fourth Amendment if he lacks "a justification for pointing a gun at [someone's] head," yet does so anyway. *Mlodzinski*, 648 F.3d at 38. In *Mlodzinski*, following a report that a 17-year-old suspect had beaten someone with a nightstick, police obtained warrants to arrest the suspect and search his home for the nightstick. *Id.* at 29. The victim told police that the suspect was "known to carry a firearm." *Id.* Officers knew that the suspect lived with family members who were likely to be home at the time of the raid, which occurred just before 4 a.m. *Id.* Once inside, officers

immediately encountered and arrested the suspect. *Id.* But they also ordered the suspect's 15-year-old sister to the ground, handcuffed her behind her back, and pointed a gun at her head for seven to ten minutes. *Id.* at 30. The suspect's mother, who was found nearly naked in her bed, was handcuffed behind her back and detained at gunpoint for nearly half an hour. *Id.* at 31.

Neither the sister nor the mother, it appears, alleged that the officers who aimed weapons at them ever placed their fingers inside their trigger guards or that they had their weapons off safe mode. Nevertheless, this Court held that the officers' actions violated their Fourth Amendment rights. *Id.* at 37-39.

In this case, a jury could readily find that Duncan applied excessive force by subjecting Stamps to a level of force, including a "risk of bodily harm," that was not justified by a need to ensure officer safety or execute the search warrant. See *Scott*, 550 U.S. at 383. As the district court noted, "Stamps posed no actual threat." He "immediately cooperated with the police and lay down on this stomach, with his hands visible. He made no movement or sound of any kind to indicate any type of resistance, force,

or flight." Add. 10. Nor did the police have some other reason to suspect Stamps. They anticipated his presence at the scene; he was not a suspect; he had no history of violence; and the officers "had been specifically told that Stamps posed no known threat to the police." *Id.*

Yet, by standing over Stamps and "pointing a loaded gun" at him, Duncan used not just *some* force but "a high level of force." *Espinosa* v. *City & Cnty. of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010). Specifically, Duncan's actions communicated "the implicit threat that [he] use that weapon if [Stamps did] not comply with the officer's wishes." *Jacobs* v. *City of Chicago*, 215 F.3d 758, 774 & n.7 (7th Cir. 2000); see also *Holland ex rel. Overdorff* v. *Harrington*, 268 F.3d 1179, 1192 (10th Cir. 2001) ("[T]he pointing of firearms directly at persons inescapably involves the immediate threat of deadly force."); JA 508-09.

Moreover, Duncan did not merely threaten *intentional* deadly force; he took additional steps that unreasonably subjected Stamps to the risk of *accidental*, but equally deadly, force. See *Scott*, 550 U.S. at 383. First, rather than just ready the rifle while pointing it in a safe direction, Duncan pointed it directly at Stamps. JA 121, 289. Second, he did not

engage the gun's safety, but instead left the gun on semi-automatic mode. JA 121, 288-89. Third, he placed his finger inside the trigger guard and on the trigger. JA 116, 121, 287-88. These actions violated his department's protocols, Add. 3; JA 121, and the most fundamental principles of gun safety.[4] They created a danger that Stamps could be killed not just if he disobeyed orders, but also if Duncan flinched.

The district court correctly concluded that Duncan "greatly increased the danger to Stamps with relatively little (if any) law enforcement justification." Add. 18. Because Stamps posed no threat and Duncan applied potentially lethal force, a jury could readily find that Duncan used excessive force in violation of the Fourth Amendment. See *Fernandez-Salicrup* v. *Figueroa-Sancha*, 790 F.3d 312, 327 (1st Cir. 2015) (where suspect "never posed an immediate threat" to anyone, "only a minimal level of force . . . would be reasonable").

[4] See NATIONAL RIFLE ASSOCIATION, *NRA Gun Safety Rules*, available at training.nra.org/nra-gun-safety-rules.aspx ("1. ALWAYS keep the gun pointed in a safe direction. . . . 2. ALWAYS keep your finger off the trigger until ready to shoot.").

B. A reasonable officer in 2011 could not have believed that the force used against Stamps complied with the Fourth Amendment.

Qualified immunity does not protect officers who unreasonably aim firearms at people who pose no threat. Such immunity applies only when a reasonably competent officer could have thought, given the state of the law at the time, that his actions were reasonable. But *Mlodzinski* forecloses any such claim of immunity here. 648 F.3d at 37-39. The court below properly determined that Stamps's constitutional rights were clearly established, and that no reasonable officer could have thought that Duncan's conduct complied with the Fourth Amendment.

First, "the contours of the constitutional right were sufficiently clear at the time of the alleged conduct." *Sanchez* v. *Pereira-Castillo*, 590 F.3d 31, 52-53 (1st Cir. 2009). Both in this Circuit and others, it was clearly established by 2011 that people detained during a search may be subject only to force that is *reasonable* under the circumstances. *Mlodzinski*, 648 F.3d at 34, 37-39 (addressing events in 2006); see *Binay* v. *Bettendorf*, 601 F.3d 640, 652 (6th Cir. 2010) ("[T]he law is clearly established that the authority of police officers to detain the occupants of

the premises during a proper search for contraband is limited and that officers are only entitled to use reasonable force to effectuate such a detention." (citations and internal quotation marks omitted)). Thus, a reasonable officer would have known that the force used to detain a home's occupants, including any risk of injury created by that force, had to be justified by some threat to the officers or their ability to conduct the search. See *Scott*, 550 U.S. at 383; *Mlodzinski*, 648 F.3d at 34, 37-39; *Binay*, 601 F.3d at 652; *Tekle*, 511 F.3d at 845; *Luna*, 773 F.3d at 719.

Second, a reasonable officer in 2011 would have understood that the conduct here—using a firearm to place a prone, compliant, and utterly nonthreatening 68-year-old man within a hair's breadth of a fatal gunshot—violated that clearly established Fourth Amendment right. See *Sanchez*, 590 F.3d at 53. In *Mlodzinski*, the Court held that officers had fair notice in 2006, five years before Duncan aimed his weapon at Stamps, that aiming firearms at a suspect's nonthreatening relatives was objectively unreasonable. 648 F.3d at 37-39. In that case, the Court concluded that "no reasonably competent officer would have thought the totality of force used against [the suspect's 15-year-old sister] was

permissible given the facts of her situation." *Id.* at 38.

The same was true of the suspect's mother. *Id.* at 39. While the officers "did initially have to make split second decisions to assess Tina's threat level and the possible need for restraint," her allegations, if true, showed that "the gun pointed at [her] was not . . . lowered as soon as it was clearly safe to do so." *Id.* Instead, officers persisted even though she complied with all orders, and even though it "quickly became clear . . . that Tina was not the suspect, that she was not trying to resist arrest or flee, that she was not dangerous, and that she was not trying to dispose of contraband or weapons." *Id.* Those facts "undercut any claim that defendants acted reasonably." *Id.* And thus, citing decisions by several other courts of appeals, this Court held that the law was clearly established that detaining the suspect's mother "with an assault rifle at her head was objectively unreasonable." *Id.* at 39 (citing *Baird* v. *Renbarger*, 576 F.3d 340, 347 (7th Cir. 2009); *Jacobs*, 215 F.3d at 773-74; *Holland*, 268 F.3d at 1193).

These same cases—and numerous others denying qualified immunity to officers who pointed guns at people who posed no threat—

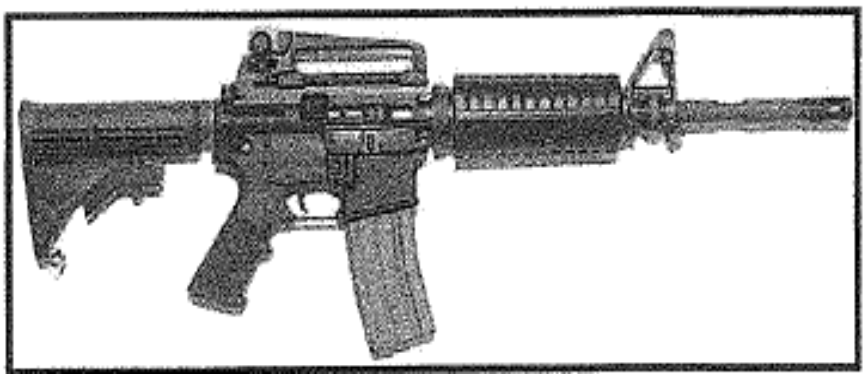
gave Duncan fair notice in 2011 that his use of force against Stamps was objectively unreasonable. See, *e.g.*, *Baird*, 576 F.3d at 345 ("[G]un pointing when an individual presents no danger is unreasonable and violates the Fourth Amendment."); *Jacobs*, 215 F.3d at 764, 774 (denying qualified immunity where officers pointed gun at head of 60-year-old man who was not a suspect and had done nothing to evade officers or interfere with their search); *Espinosa*, 598 F.3d at 537-38; *Baker* v. *Monroe Township*, 50 F.3d 1186, 1193 (3d Cir. 1995); see also *Hernandez* v. *Kunkle*, No. C12-178-RSM, 2013 WL 179546, at *4-7 (W.D. Wash. Jan. 15, 2013). As the Tenth Circuit explained in 2001:

> Where a person has submitted to the officers' show of force without resistance, and where an officer has no reasonable cause to believe that person poses a danger to the officer or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person, in contrast to simply holding the weapon in a fashion ready for immediate use.

Holland, 268 F.3d at 1193.

To be sure, the plaintiffs in some of these cases were held at gunpoint for longer periods of time. See *Mlodzinski*, 648 F.3d at 37-39; *Jacobs*, 215 F.3d at 774; *Baker*, 50 F.3d at1189. But it suffices to say that Stamps was held at gunpoint longer than could possibly have been

reasonable, because any initial need to assess Stamps's dangerousness had passed by the time Duncan reached him. See *Mlodzinski*, 648 F.3d at 39. And even if suspects might have remained at large when Duncan encountered Stamps, *cf. id.* at 38, that could not have justified aiming an assault rifle like the one pictured below (JA 113) at the head of a prone, submissive, and elderly man.



Moreover, unlike officers in the other gun-pointing cases, Duncan exposed Stamps to additional, unwarranted danger by putting his finger on the trigger of a live weapon. This conduct was manifestly unreasonable; for precisely zero law enforcement purpose, it exposed Stamps to the risk that any slight movement by Duncan would result in Stamps's death. See *Scott*, 550 U.S. at 383; *Jennings*, 499 F.3d at 17 (increasing force when suspect offers no resistance violates clearly

established law). Because Duncan's intentional use of force violated clearly established rights, he is not entitled to qualified immunity.

II. Police officers who unreasonably aim weapons at civilians do not acquire immunity if their weapons accidentally fire.

The defendants' legal theory is so remarkable that to describe it is, in effect, to rebut it. They assert that the officer should prevail here, unlike in prior cases clearly establishing a Fourth Amendment right against being unreasonably targeted with a firearm, *because in this case the gun fired*. Defendants make no serious attempt to show that they could prevail if Duncan had aimed at Stamps *without* shooting him. They do not cite a single case, for example, suggesting that a reasonable officer could have thought that Duncan's intentional conduct—pointing a weapon at Stamps with the safety off and his finger on the trigger—was constitutional. Def. Br. 24-32. Nor do they deny that those actions caused Stamps's death. After all, Stamps would have survived if Duncan had pointed the rifle in a safe direction, engaged the safety, or kept his finger off the trigger; his death therefore "resulted from the risks that made [Duncan's] conduct wrongful in the first place." See *Drumgold* v.

Callahan, 707 F.3d 28, 48 (1st Cir. 2013) (recognizing § 1983 liability for harms factually and proximately caused by defendant's misconduct).

Yet defendants argue that, when an officer aims a firearm at someone's head *and it accidentally discharges*, then the officer has not violated any Fourth Amendment right, let alone a clearly established right. Def. Br. 11, 13, 16-24, 34-44. On this view, Duncan might have incurred § 1983 liability while unreasonably threatening Stamps with a firearm, but he *became* immune when his gun fired and Stamps died.

That argument is legally unsound and downright dangerous. As a legal matter, Fourth Amendment protections against being unreasonably targeted with a rifle do not evaporate when things turn out worse than an officer intended. As a practical matter, immunizing officers whose unreasonable behavior causes deadly accidents would be absurd, and it would likely lead to more deadly accidents.

A. The Fourth Amendment contains no exception for unreasonable force that ends in an unintended gunshot.

The Fourth Amendment's well-settled protections against excessive force do not evaporate when that force yields unintended consequences.

At least since the Supreme Court's decision in *Brower*, it has been clearly established that officers are liable for unreasonably dangerous seizures that cause someone's death—in that case, a roadblock hidden behind a bend—even if officers had "earnestly hoped" that everything would turn out fine. 489 U.S. at 598-99. And at least since *Scott*, it has also been clearly established that the facts confronting an officer must justify all the force used, including any force that creates a foreseeable risk of injury or death. 550 U.S. at 383-84 (bumping a fleeing car was reasonable, despite "high likelihood of serious injury or death," where suspect posed "actual and imminent threat" to pedestrians and motorists).

This Court, too, has acknowledged that an accident cannot excuse officers from liability for the excessive force that brought about the accident. See *Landol-Rivera* v. *Cruz Cosme*, 906 F.2d 791, 796 & n.9 (1st Cir. 1990). Similarly, other federal courts have refused to grant immunity simply because a use of force may have had unintended consequences.[5]

[5] See, *e.g.*, *Powell* v. *Slemp*, 585 F. App'x 427 (9th Cir. 2014); *Watson* v. *Bryant*, 532 F. App'x 453, 458 (5th Cir. 2013); *Torres* v. *City of Madera*, 648 F.3d 1119, 1127-29 (9th Cir. 2011); *Harper* v. *Perkins*, 459 F. App'x 822, 826-27 (11th Cir. 2012); *Henry* v. *Purnell*, 652 F.3d 524, 532 (4th Cir. 2011); *Weigel* v. *Broad*, 544 F.3d 1143, 1151-54 (10th Cir. 2008); *Pleasant*

As one court explained, "[t]he word 'accident' is not a talisman for releasing an officer from liability." *Johnson* v. *City of Milwaukee*, 41 F. Supp. 2d 917, 928 (E.D. Wis. 1999). Instead, "if police conduct is unreasonable under the Fourth Amendment, the plaintiff can recover the damages caused by such conduct. It is not required that the police specifically intend to cause such damages." *Id.* at 928-29; see also *Milan* v. *Bolin*, 795 F.3d 726, 730 (7th Cir. 2015).

In the teeth of this precedent, defendants cite a handful of cases involving officers who accidentally fired weapons while trying to restrain suspects. See Def. Br. 16-24, 31-44 (citing, *e.g.*, *Dodd* v. *City of Norwich*, 827 F.2d 1 (2d Cir. 1987) (on rehearing); *Troublefield* v. *City of Harrisburg*, 789 F. Supp. 160 (M.D. Pa.), aff'd, 980 F.3d 724 (3d Cir. 1992)). These cases are distinguishable, no longer good law, and fundamentally irrelevant to this case.

The cases are distinguishable because courts in those cases found that the guns were *not* being used to seize anyone; they were accidentally fired after officers failed to reholster them while restraining suspects.

---

v. *Zamieski*, 895 F.2d 272, 275-76 (6th Cir. 1990).

See, *e.g.*, *Dodd*, 827 F.2d at 7; *Troublefield*, 789 F. Supp. at 166; *Brice* v. *City of York*, 528 F. Supp. 2d 504, 510 (M.D. Pa 2007). In *Dodd*, the officer's gun fired during a struggle that began when the suspect, who had already been apprehended, reached for the officer's gun. 827 F.2d at 7. Here, in contrast, it is beyond question that Duncan intentionally used his weapon to seize Stamps.

Moreover, to the extent that these cases assume that there can *never* be liability when an incident ends in an accidental shooting, they cannot be good law after *Brower* and *Scott*. The only court of appeals case among them, *Dodd*, was decided before *Brower*. Other cases, including *Troublefield* and *Clark* v. *Buchko*, 936 F. Supp. 212 (D.N.J. 1996), were decided before *Scott*. Indeed, as the district court recognized, *Dodd* is in the minority. Most courts have correctly analyzed accidental shootings during the course of a seizure by examining the reasonableness of the use of force that led to the discharge. Add. 13-14. See, *e.g.*, *Pleasant*, 895 F.2d at 275-76; *Watson* v. *Bryant*, 532 F. App'x 453, 458 (5th Cir. 2013); *McCoy* v. *City of Monticello*, 342 F.3d 842, 847-49 (8th Cir. 2003); see also *Brice*, 528 F. Supp. 2d at 514 (holding that, while accidental shooting did not

itself incur § 1983 liability, plaintiff could maintain excessive force claim based on volitional conduct, such as failing to reholster weapon, that could have caused the injury).[6]

Finally, defendants' cases are irrelevant here. Qualified immunity protects officers who lack "fair notice" that their conduct is unlawful. *Burke* v. *Town of Walpole*, 405 F.3d 66, 85 (1st Cir. 2005) (quoting *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004)). No matter whether courts have differed on how to analyze accidental shootings, no court has cast doubt on *whether* Duncan's conduct was reasonable. *Amici* are aware of no case, and Duncan has found none, suggesting that it was reasonable to hold a cooperative elderly man on the ground by pointing an assault rifle at his head with the safety disengaged and his finger inside the

[6] These cases concerned officers' attempts to reholster firearms while restraining suspects, which is not at issue here. See, *e.g.*, *Watson*, 532 F. App'x at 458-59 ("[T]he evidence does not show that it was objectively unreasonable for an officer to fail to reholster his weapon in the midst of handcuffing a potentially armed suspect . . . ."). In addition, two of the cases involved officers who allegedly made mistakes of *fact* in firing guns that they thought were tasers. *Henry*, 652 F.3d at 527; *Torres*, 648 F.3d at 1120. The courts concluded that, if these mistakes were unreasonable, the officers were not entitled to immunity because no reasonable officer could have thought that lethal force was lawful under the circumstances. *Henry*, 652 F.3d at 534; *Torres*, 648 F.3d at 1127-28.

trigger guard. Duncan is not, therefore, entitled to qualified immunity.

B. Defendants' proposed blanket immunity yields absurd and dangerous results.

Defendants' proposed rule—granting immunity *because* an officer accidentally fired his weapon—is dangerous and bizarre. In the defendants' view, an officer acquires § 1983 immunity when he accidentally kills someone, and *nothing* he did to cause that accident can be said to have violated clearly established Fourth Amendment rights.

The dangers of this rule are obvious. It inoculates officers if, but only if, their unreasonable actions cause injury. As applied here, the rule means that an officer who unreasonably aims a firearm at a civilian's head would incur § 1983 liability if the civilian is not shot, see *Mlodzinski*, 648 F.3d at 37-39, but not if the firearm discharges and the civilian is killed. Other possibilities abound. For example, if an officer seeks to extract a confession by dangling a suspect over the ledge of a high-rise, the officer will be liable under § 1983 if he later pulls the suspect to safety. Yet, under the defendants' rule, the officer will acquire immunity if his grip should fail and he accidentally—but due to his prior, intentional, and unreasonable conduct—drops the suspect to his death.

This Court should reject a rule that would, if anything, supply incentive for such accidents. Duncan had already violated clearly established law when he pointed a live weapon at Stamps with his finger on the trigger, and he did not become immune by shooting Stamps.

III. Immunizing officers for accidental shootings in the course of unreasonable uses of force will endanger lives.

The rule defendants propose could not be more untimely. It would grant immunity in accidental killings at a time when military equipment is increasingly trained on ordinary citizens—particularly Blacks and Hispanics—in home raids like the one that killed Stamps.

Over the last several decades, local police forces have increasingly turned to paramilitary raids to serve ordinary police functions including executing search warrants.[7] Once rare, raids like the one in this case now occur dozens of times each day in homes across the country, fueled in part by the availability of free military equipment from the federal government. Cato Report 8-11.[8]

---

[7] See Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America* 3 (CATO INSTITUTE, 2006) ("Cato Report") available at object.cato.org/sites/cato.org/files/pubs/pdf/balko_whitepaper_2006.pdf.

[8] Between 1994 and 2009, 486 fully automatic M-16 machine guns and

SWAT raids typically occur late at night. Often targeting nonviolent offenders, they begin with police crashing through doors or windows, in many cases while detonating flash-bang grenades to stun and disorient the home's occupants. Cato Report 5; see JA 465; *Milan*, 795 F.3d at 729 ("The police call them 'distraction devices,' an absurd euphemism; we [have] called them 'bombs' . . . ."). SWAT officers then move quickly to incapacitate all occupants, including children and the elderly. Cato Report 5; *Mlodzinski*, 648 F.3d at 30. The Fourth Amendment requires these officers to use only reasonable force; residents may be held at gunpoint only when the circumstances justify it. See *Mena*, 544 U.S. at 98-99. But, by bringing abundant firepower and a battlefield mindset into people's homes, these raids necessarily bring increased danger to innocent people. See Cato Report 13, 15-17.

---

564 semi-automatic M-14s, as well as other military vehicles and equipment, were distributed by the Department of Defense to Massachusetts agencies. The town of West Springfield, population 28,137, got two grenade launchers. See AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, *Our Homes Are Not Battlefields: Reversing the Militarization & Federalization of Local Police in Massachusetts* 5-6 (June 2004), available at aclum.org/app/uploads/2015/06/reports-our-homes-are-not-battlefields.pdf.

And, with regularity, accidents do happen. Each year, police conduct *hundreds* of raids on the wrong address, and thus against the wrong people. *Id.* at 4. Just last month, a SWAT team in Worcester, Massachusetts, reportedly raided a house that had long since been vacated by the suspect.[9] At the time of the raid, the house was occupied by two young children and their mother, whom the officers allegedly held naked and at gunpoint for ten minutes.[10] Worse yet, many innocent people have been killed in their own homes during SWAT raids. See, *e.g.*, Cato Report 22, 25, 63-64, 81. Alberto Sepulveda—an 11-year-old boy killed when an officer holding him at gunpoint fired his weapon—is among several who have died in shootings that officers have claimed were accidental. *Id.* at 50, 63-64, 67, 75-76. [11]

---

[9] Brad Petrishen, *Worcester man sought in controversial SWAT raid was on pretrial probation*, WORCESTER TELEGRAM & GAZETTE, Aug. 30, 2015, available at telegram.com/article/20150828/NEWS/150829190.

[10] Brad Petrishen, *SWAT team breaks into wrong Worcester house, residents say*, WORCESTER TELEGRAM & GAZETTE, Aug. 22, 2015, available at telegram.com/article/20150821/NEWS/150829750.

[11] See also AMERICAN CIVIL LIBERTIES UNION, *War Comes Home: The Excessive Militarization of American Policing* 5, 17, 21 (2014) ("War Comes Home"), available at aclu.org/sites/default/files/field_document/jus14-warcomeshome-report-web-rel1_1.pdf; Rebecca Trounson, *Deaths Raise Questions about SWAT Teams*, L.A. TIMES, Nov. 1, 2000, available

Because mistakes during SWAT raids can end so tragically, it is especially important for Courts to enforce Fourth Amendment protections against unreasonable actions that increase the likelihood of mistakes by SWAT teams. This Court has recognized that "the very purpose of § 1983 was to interpose the federal courts . . . as guardians of the people's federal rights." *Olsen* v. *Correiro*, 189 F.3d 52, 67 n.17 (1st Cir. 1999) (quoting *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972)).

Thus, as the Seventh Circuit recently explained, if the police choose to enter a home by detonating a flash-bang and terrorizing a family, and if it turns out they entered the wrong house, courts will not permit them to simply shrug their shoulders and chalk it up to an accident. See *Milan*, 795 F.3d at 730 (Posner, J.) (denying qualified immunity where mistake was due to police failure to conduct "a minimally responsible investigation").[12] The Seventh Circuit's conclusion—that an accident

---

at articles.latimes.com/2000/nov/01/news/mn-45199.

[12] Although the Worcester Police Department seems to concede that its recent wrong-address raid affected an innocent mother and her young children, its chief has suggested that the mother complained only because she succumbed to her lawyer's willingness "to distort the truth for monetary gain." CITY OF WORCESTER, *Read Police Chief Gary J. Gemme's full Response to Worcester Telegram Reporter Brad Petrishen Regarding*

cannot immunize the police for unreasonable conduct that made the accident so likely—is equally true when that accident is a shooting.

That protection is particularly important because the risks of SWAT raids are not borne by all Americans equally. Like Stamps—a 68-year-old Black man—most people subjected to SWAT raids are people of color. See, *e.g.*, War Comes Home 35-37 (71% of people affected by 800 studied SWAT deployments were Black or Latino). Across the country, such racial disparities pervade other police encounters as well, making it more likely that Blacks and Hispanics will be subjected to stops and that these stops will be more invasive. See *Floyd* v. *City of New York*, 959 F. Supp. 2d 540, 588 (S.D.N.Y. 2013) (finding, even after controlling for non-race factors, Blacks and Hispanics more likely to be stopped than whites and more likely to be subject to use of force during a stop).[13] In Boston, a

---

the SWAT Entry at 17 Hillside Avenue (Aug. 29, 2015), available at worcesterma.gov/wpd-press-releases/read-police-chief-gary-j.-gemme-s-full-response-to-worcester-telegram-reporter-brad-petrishen-regarding-the-swat-entry-at-17-hillside-avenue#idExP9R_g7cpZiLSXo3Y7k2g; see also Cato Report 38-39 (noting study of abuses by Miami SWAT team revealed police department rarely found wrongdoing, while another Florida county responded to two police shootings of unarmed men by broadening officers' ability to open fire on civilians).

[13] See, *e.g.*, Matthew B. Ross, *et al.*, *State of Connecticut Traffic Stop Data*

2015 study controlling for non-race factors concluded that Black and Hispanic neighborhoods experienced more street-level police-civilian encounters than otherwise identical white neighborhoods, and that Blacks and Hispanics were more likely than otherwise identical white people to be frisked or searched during a stop.[14]

Race can also influence the probability that the police will erroneously harm an innocent person during an encounter. Studies have extensively documented unconscious negative associations about people of color, including an association between Blacks and crime.[15] In

---

Analysis and Findings, 2013-14 (INSTITUTE FOR MUNICIPAL AND REGIONAL POLICY, 2014), available at ctrp3.org/reports (after analysis of 620,000 Connecticut traffic stops, finding Blacks and Hispanic drivers were more likely to be pulled over during daylight hours when their race and ethnicity were more visible, and, after being pulled over, were more likely to be searched than whites); Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER RACE & JUST. 183 (2002) (Blacks and Hispanics in San Diego were significantly over-represented as targets of search warrants, while searches of white suspects were more likely to actually yield drugs).

[14] Jeffrey Fagan, *et al.*, *Final Report: An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk and/or Search Reports* (2015), available at https://assets.documentcloud.org/documents/2158964/full-boston-police-analysis-on-race-and-ethnicity.pdf.

[15] See Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, in RACIAL DIVIDE:

experiments, Americans have been shown to be more likely to mistake Blacks for armed and dangerous suspects.[16] Conversely, harmless objects shown with a Black person are more likely to be confused for guns than those pictured with a white person.[17] And in studies asking participants to quickly select "shoot" or "don't shoot" depending on whether they are shown someone who is armed or unarmed, people erroneously "shoot" unarmed Blacks more often than unarmed whites.[18]

In this context, defendants' proposal to immunize officers whose unreasonable conduct causes tragic accidents is particularly troubling and dangerous for people who live in the communities where SWAT raids happen or where people of color reside. It is all the more reason this Court should resolve this case by applying settled Fourth Amendment law. Because Duncan used force that he should have known was objectively

---

RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM 41-42 (Michael J. Lynch, *et al.*, eds., 2008), available at fairimpartialpolicing.com/s/raciallybiased.pdf.

[16] See *id.* at 39, 45-46, 49.

[17] *Id.* at 44. In San Francisco, police shot and killed a young Black man, Asa Sullivan, because an officer "saw something black in [his] hand that looked like a gun." *Espinosa*, 598 F.3d at 533. It was an eyeglass case. *Id.* at 543.

[18] Fridell, *supra*, at 47-48.

unreasonable, his request for qualified immunity must be denied.

CONCLUSION

Amici respectfully request that this Court affirm the ruling below.

Respectfully submitted,

/s/ Matthew R. Segal

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
202-842-0200
ishapiro@cato.org

Matthew R. Segal
1st Cir. No. 1151872
Adriana Lafaille
1st Cir. No. 1150582
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110
617-482-3170
msegal@aclum.org

Benjamin Crump
NATIONAL BAR ASSOCIATION
1125 Eleventh Street NW
Washington, DC 20001

Ezekiel R. Edwards
CRIMINAL LAW REFORM PROJECT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Juan Cartagena
Jose Perez
LATINOJUSTICE PRLDEF
99 Hudson Street
New York, NY 10013-2815

Bradford M. Berry
Anson Asaka
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, MD 21215

September 29, 2015

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,482 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point type.

/s/ Matthew R. Segal
Matthew R. Segal

Dated: September 29, 2015

CERTIFICATE OF SERVICE

I hereby certify that this document will be filed electronically on September 29, 2015 through the ECF system, and will be sent electronically on this date to the following registered participants in this matter:

Joseph Peter Musacchio
Anthony Tarricone
Kreindler & Kreindler LLP
855 Boylston St
Boston, MA 02116

Counsel for Plaintiffs-Appellees

Thomas R. Donohue
Leonard H. Kesten
Deidre Brennan Regan
Brody Hardoon Perkins & Kesten LLP
12th Floor
699 Boylston St
12th Flr
Boston, MA 02116

Counsel for Defendants-Appellants

/s/ Matthew R. Segal
Matthew R. Segal