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New Jersey

November 30, 2020

VIA ELECTRONIC FILING

Superior Court of New Jersey
Appellate Division
25 Market Street
P.O. Box 006
Trenton, New Jersey 08625

Re: Corey Bland and Virginia Bland v. Thomas Del Mauro, David Martinez, Ruben Torres, New Jersey Division of State Police, State of New Jersey, James Thompson, Brian Murphy, Thomas Espinoza, William Legg, Miguel Holguin, Anthony Sardanopoli, John Oliveira, and Stephen Riefler

Appellate Division Docket No. A-1800-19T3

Honorable Judges of the Appellate Division:

Pursuant to R. 2:6-2(b), please accept this letter brief in lieu of a more formal submission on behalf of *amicus curiae* the American Civil Liberties Union of New Jersey ("ACLU-NJ") in the above-captioned matter.

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PRELIMINARY STATEMENT

The duty is articulated in the name: a law enforcement officer's cardinal charge is to enforce the law. While the use of deadly force must sometimes be a part of that duty, uses of force should be subordinated to constitutional protections and civil liberties. Indeed, it is the Constitution that fashions the bounds of policing, and it is the individual's constitutional rights that policing is, ostensibly, duty bound to protect.

The legal doctrine of qualified immunity, crafted by the United States Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967), allows police officers to make "reasonable" mistakes (of law, fact, and otherwise) in "good faith" while in the line of duty without fear of a lawsuit so as to ensure that suitable actors are not dissuaded from public service. Over the span of five decades, however, the doctrine has become a near impenetrable shield from the consequences of civil rights violations by law enforcement and other government actors. Today, a grant of qualified immunity too often sidesteps the rule of law and ignores breaches of constitutional rights in favor of legitimizing the illegitimate behaviors of state actors.

This Court should refuse to grant qualified immunity on any motion for summary judgment where an assertion of the

"reasonableness" of deadly force is disputed by the record. Where the fundamental rights and lives of New Jerseyans have been put at risk or ended, an assertion of a "reasonable" reliance on unconstitutional powers cannot become a shelter from liability. Rather, a thorough examination of the facts of the alleged violations, and thus the factual grounding for the "reasonableness" of the seizure itself, are for a jury to decide based on evidence and not the reflexive acceptance of officer assertions fueled by adrenaline, and, too often, animus.

In this matter, the trial court erred in refusing to hear Mr. Bland's Civil Rights Act violations claims by asserting he was collaterally estopped from litigating them and ignored the larger purview of New Jersey's constitutional and statutory provisions left unconsidered by the Third Circuit's Federal constitutional frame. (Point I). The trial court also erred in granting Defendants qualified immunity on their motion for summary judgment when there were material facts in dispute, especially given that those facts underscore the unreasonableness of the Defendants' use of lethal force against Mr. Bland. (Point II).

For all of these reasons, this Court should find that material facts are in dispute that should be sent to a jury to consider and the grant of qualified immunity on Defendants' summary judgment motion was erroneous and should be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus American Civil Liberties Union of New Jersey accepts and incorporates the statement of facts and procedural history contained within Plaintiffs-Appellants' briefing in support of this appeal. This brief accompanies its Motion for Leave to Participate as Amicus Curiae, pursuant to R. 1:13-9(e).

ARGUMENT

Since its judicial inception as an immunity from suit against civil rights actions under 42 U.S.C. § 1983, qualified immunity has become an instrument of unfairness that consistently leads to unjust results.¹ While qualified immunity purportedly exists to prevent the threat of legal action from inhibiting government officials in the performance of their duties (Gormley v. Wood-El, 218 N.J. 72, 113 (2014)), in practice, it has come to serve as the vehicle through which law enforcement officers, under a mere assertion of "reasonableness", can ignore the constitutional limits of their powers. This Court should reverse the trial court's qualified immunity grant under New Jersey's statutory and constitutional jurisprudence, finding material facts in dispute that unmask the unreasonableness of police use of lethal force in this instance.

¹ Although commonly referred to as a defense, qualified immunity is "an immunity from suit rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

This Court should also make clear that harms caused as a direct result of the Defendants' unreasonable, unconstitutional behavior cannot protect them from suit.

Though the Third Circuit determined that Defendants were entitled to qualified immunity on their federal constitutional claims, on remand, the state trial court was obligated to examine Mr. Bland's state constitutional claims brought pursuant to the New Jersey Civil Rights Act ("NJCRA"). In cases with state law claims, trial courts must consider a defendant's request for qualified immunity under New Jersey law and its broader statutory and constitutional protections.

POINT I

THE TRIAL COURT ABDICATED ITS JUDICIAL RESPONSIBILITIES BY DECLINING TO ADJUDICATE MR. BLAND'S STATE CIVIL RIGHTS ACT CLAIMS.

In support of its grant of qualified immunity and summary judgment to the Defendants, the trial court perfunctorily declared: "as the issue was already litigated, Defendants are entitled to the defense . . .". (Pa010)². The trial court failed, however, to provide any doctrinal support regarding its dismissal of Mr. Bland's state Civil Rights Act claims on

² "Paxxx" refers to the appendix of Plaintiff-Appellants' July 20, 2020 brief.

collateral estoppel grounds because the argument is without merit.

A. The Lower Court Was Not Collaterally Estopped From Considering the Alleged Violations of Mr. Bland's State Civil and Constitutional Rights.

The New Jersey Supreme Court has consistently interpreted the protections of Article I, Paragraph 7 of the State Constitution more expansively than the protections that have been afforded by Federal Courts under the Fourth Amendment of the United States Constitution. State v. Alston, 88 N.J. 211, 226 (1981) ("[b]ecause we find that these recent decisions of the Supreme Court provide persons with inadequate protection against unreasonable searches and seizures, we respectfully part company with the Supreme Court's view of standing and construe Article I, paragraph 7 of our State Constitution to afford greater protection."); see also State v. Hempele, 120 N.J. 182, 196 (1990) ("[b]ound to fulfill our covenant with the people of New Jersey, we must 'respectfully part company' with the Supreme Court when we find that it has provided our citizens with 'inadequate protection against unreasonable searches and seizures'"); State v. Novembrino, 105 N.J. 95, 145 (1987) ("This plain meaning includes an interpretation of the state Constitution that 'afford[s] our citizens broader protection of certain personal rights than that afforded by analogous or identical provisions of the federal

Constitution.'"). Indeed, "[a]lthough the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete." Right to Choose v. Byrne, 91 N.J. 287, 300 (1982); see also State v. Earls, 214 N.J. 564, 584 (2013) (finding privacy interest in cell phone locations); State v. McAllister, 184 N.J. 17, 19 (2005) (finding reasonable expectation of privacy in bank records); State v. Mollica, 114 N.J. 329, 344-45 (1989) (finding privacy interest in hotel-room telephone toll billing records).

Apprehension by deadly force is a seizure subject to the Fourth Amendment and Article 1, paragraph 7 of the New Jersey Constitution. Tennessee v. Garner, 471 U.S. 1, 7 (1985); N.J. Const. art. I, ¶7; Baskin v. Martinez, ___ N.J. ___, ___ (2020) (slip op. at *7). "The intrusiveness of a seizure by means of deadly force is unmatched. The subject's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." Id. at *9. A broader reading of what constitutes a violation of an individual's security against unreasonable seizures must thus "strike . . . a balance between the interests of the individual in being free of police interference and the interests of society in effective law enforcement." State v. Dilley, 49 N.J. 460, 468 (1967). Accordingly, in determining the reasonableness

of a seizure, a court must weigh the public interest served against the nature and scope of the intrusion upon the individual. State v. Davis, 104 N.J. 490, 502-03 (1986); State v. Stever, 107 N.J. 543, 557 (1987) (quoting State v. Hunt, 91 N.J. 338, 345, 450 A.2d 952 (1982)) (noting that the State Constitution's greater protection is generally "extended only when justified by 'sound policy reasons.'"). Here, an extension of the protections enshrined in Article 1, paragraph 7 of the State Constitution regarding the parameters of an unlawful seizure is soundly rooted.

It is squarely within the public's interest to prevent New Jersey law enforcement officers from using lethal force except when absolutely necessary.³ Concomitantly, it is squarely within the public's interest to ensure that where malfeasance has occurred through the use of unnecessary lethal force, a victim is readily able to seek legal redress. Qualified immunity

³ To this point, New Jersey has set clear limits, by both statute and policy, regarding the circumstances under which lethal force may be used by police. See N.J.S.A. 2C:3-7(d) (noting that the use of deadly force by law enforcement is not justifiable under various circumstances unless, inter alia, the officer reasonably believes there is an imminent threat or reasonably believes the lethal force is necessary to prevent an escape); Attorney General's Use of Force Policy, (2000), available at <https://www.nj.gov/oag/dcj/agguide/useofforce2001.pdf> (noting that deadly force can only be used when "immediately necessary to protect the officer or another person from imminent danger of death or serious bodily harm").

encourages and excuses the excesses of the former scenario and squelches any possible access to restoration in the latter.

The United States Supreme Court developed the doctrine of qualified immunity to impose liability only if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted" and proceeded to create a procedural framework for its implementation. Saucier v. Katz, 533 U.S. 194, 202 (2001). In New Jersey, a grant of qualified immunity under that framework is determined by the use of a two-prong test. "The first inquiry asks whether the facts alleged, [t]aken in the light most favorable to the party asserting the injury, show that the challenged conduct violated a statutory or constitutional right. Second, the court must determine whether the right was clearly established." Morillo v. Torres, 222 N.J. 104, 117-18 (2015) (citations omitted). Under this framework, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question of whether the right was clearly established must be considered on a more specific level."⁴ Saucier, 533 U.S. at 200.

⁴ A mere eight years after Saucier, the United States Supreme Court overruled this sequencing requirement in Pearson v. Callahan, holding that the ordering of the analysis of any qualified immunity grant was discretionary, meaning that a decision on the underlying constitutional question could be

For purposes of a qualified immunity grant, the current case law indicates that the state and federal standards of proof are the same. See Morillo, 222 N.J. at 113-15; Ramos v. Flowers, 429 N.J. Super. 13, 24 (App. Div. 2012). The rights and privileges protected by the NJCRA, however, are more expansive. While the two-prong test for qualified immunity asks the same questions on both federal and state civil rights claims, New Jersey's more expansive constitutional protections inform the definition of the constitutional violation in those prongs and thus cannot operate from the same analysis. See State v. Jones, 287 N.J. Super. 478, 496 (App. Div. 1996) (where illegal search issue raised in federal motion was denied and State moved to collaterally estop defendant from raising the same issue in state court proceeding, trial judge refused to apply collateral estoppel and conducted independent review because New Jersey Constitution provides greater protection than Federal Constitution).

In the instant case, the trial court was asked to adjudicate Mr. Bland's state law claims; specifically, the

bypassed for a determination as to whether the galvanizing action by officers was reasonable or established by the facts of another case. Pearson, 555 U.S. 222, 236 (2009). New Jersey, by contrast, continues to lead any Article I, Paragraph 7 violation analysis with an eye sharply fixed on the underlying Constitutional violations. See Baskin, ___ N.J. (slip op. at *9).

violation of his rights under the NJCRA which authorizes a private right of action in the following provision:

Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.

[N.J.S.A. 10:6-2(c) (emphasis added).]

The NJCRA creates a separate state cause of action, outside the basis of the Third Circuit's analysis of federal constitutional law. See L. 2004, c. 143; see also S. Judiciary Comm., Statement to Assemb. Bill No. 2073, at 1 (May 6, 2004) (stating that "to protect and assure against deprivation of the free exercise of civil rights which are guaranteed and secured under the New Jersey Constitution and federal Constitution, this bill provides a remedy when one person interferes with the civil rights of another").

The very creation of the NJCRA thus addresses additional and unaddressed remedies and implicates broader constitutional considerations and protections than provided for in Federal civil rights violation cases. Mr. Bland's NJCRA claims must be analyzed with a more voluminous reading of state protections

regarding the use of deadly force in New Jersey; those protections were not considered by the Third Circuit in its determination and thus are not collaterally estopped. Jones, 287 N.J. Super. at 496; State v. Pierce, 136 N.J. 184, 208 (1994); Hempele, 120 N.J. at 211.

POINT II

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT ON QUALIFIED IMMUNITY GROUNDS.

A. The Grant of Qualified Immunity on Summary Judgment Was Improper Because Contested Foundational and Material Facts Exist That Should Be Heard and Determined by a Jury.

Qualified immunity is effectively lost if a case is allowed to go to trial. Mitchell, 472 U.S. at 526; see also Kirk v. City of Newark, 109 N.J. 173, 182 (1988). As a direct result, a defendant's entitlement to qualified immunity is a question of law to be decided as early on in the proceedings as possible and preferably on a motion for summary judgment or dismissal. Wildoner v. Borough of Ramsey, 162 N.J. 375, 387 (2000). Indeed, a key aim "of the summary judgment rule is to . . . dispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); see also Friedman v. Martinez, 242 N.J. 449, 472 (2020).

Summary judgment is granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995). To decide whether a genuine issue of material fact exists, the trial court must "draw[] all legitimate inferences from the facts in favor of the non-moving party." Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016). The court must also "grant all the favorable inferences to the non-movant." Leang v. Jersey City Bd. of Educ., 399 N.J. Super. 329, 355 (App. Div. 2008), aff'd in part, rev'd in part, 198 N.J. 557 (2009).

To prevail on a summary judgment motion, defendants must show that plaintiffs' claims were so deficient as to warrant dismissal of their complaint. Butkera v. Hudson River Sloop "Clearwater," Inc., 300 N.J. Super. 550, 557 (App. Div. 1997). Where, as here, a party appeals from an order granting summary judgment, this Court must first determine whether the moving party demonstrated there were no genuine disputes as to material facts, and then decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div. 2006), certif. denied, 189 N.J. 104 (2006). Here, the Defendants failed to show that no genuine disputes of fact existed and the trial judge's legal application and subsequent decision was incorrect.

As previously noted, in determining whether critical facts are in dispute requiring the attention of a jury, a court must assume a plaintiff's version of the facts to be true and give that plaintiff the benefit of all favorable inferences. Puzzlingly, the trial court noted that "[t]he facts surrounding the carjacking incident are hotly disputed" (Pa005), yet uncritically adopted the factual summation offered by the Third Circuit. That synopsis, itself, details a foundational, disputed material fact as to both Mr. Bland's Civil Rights Act claims and to the Defendants' assertion of qualified immunity: namely, whether the officer's firing of 60 rounds was, in fact, triggered by seeing the car Mr. Bland was in move or hearing the car's engine revving.⁵ The veracity of this disputed fact is central to the question of the reasonableness of the Defendants' actions, and was fully ignored both by the trial court and the Third Circuit.

While the issue of a grant of qualified immunity is one for a trial judge to determine, "[w]here historical or foundational facts that are critical to those determinations are disputed, the jury should decide those disputed facts on special

⁵ The Third Circuit itself noted that while "[t]he Newark officers stated that they fired their weapons because they saw the Audi moving or heard it revving, indicating that it was still capable of flight. Bland disputed this assertion, arguing instead that the Audi became inoperable once it crashed into the scaffolding."

interrogatories. The jury's role 'should be restricted to the who-what-when-where-why type of historical fact issues. Based on the jury's factual findings, the trial judge must then make the legal determination of whether qualified immunity exists. Schneider v. Simonini, 163 N.J. 336, 359 (2000) (citations omitted) (emphasis added).

While qualified immunity claims are specifically decided through summary judgment to prevent unjustified litigation and to ensure that the immunity does, in fact, remain an immunity from suit, where critical facts are legitimately in dispute, those questions must be put to a jury to decide whether a claim of qualified immunity is, in fact, factually valid. Here, given the contested material facts at the core of this matter, the trial court judge usurped the factfinding role of a jury regarding Defendants' shooting and gave greater weight to a qualified immunity claim than to the disputed facts that may have fatally destabilized that claim by establishing the Defendants' actions as unreasonable.

Such judicial action not only removes the ability of a Plaintiff in a Civil Rights Act claim to properly litigate a harm, but it also does damage to the fundamental principle that jury trials are a bedrock part of our system of civil justice and that the fact-finding functions of a jury deserve a high degree of respect and judicial deference. Caldwell v. Haynes,

136 N.J. 422, 432 (1994). "The two conflicting accounts of what occurred at the time of the shooting, and any other disputed issues of material fact, must be submitted to a jury for resolution . . . [a]fter the jury makes its ultimate findings, the trial court can determine the merits of the application for qualified immunity." Baskin, ___ N.J. (slip. op. at *11).

B. The Grant of Qualified Immunity on Summary Judgment Was Improper Because the Defendants' Conduct Was Demonstrably Unreasonable When Viewed in the Light Most Favorable to the Plaintiff.

Neither Defendants' seizure of Mr. Bland nor their belief in the legality of such acts was reasonable. Even if their understanding of the legality of the seizure was a mistake of law, such mistakes of law in New Jersey are themselves unreasonable. State v. Puzio, 379 N.J. Super 378, 383-384 (App. Div. 2005) ("We cannot countenance an officer's interference with personal liberty based upon an entirely erroneous understanding of the law."). By allowing Mr. Bland to bring his claim of an unconstitutional seizure to a jury and denying Defendants a grant of qualified immunity, this Court increases the right to safety of all New Jersey's residents and encourages law enforcement officials to honor fundamental constitutional principles.

1. *Firing 60 Times on an Unarmed Man in a Fully Disabled Vehicle is Objectively Unreasonable.*

Apprehension by use of deadly force is a seizure for the purposes of Fourth Amendment analysis and the right to be free from "unreasonable searches and seizures" is a constitutional right. See Garner, 471 U.S. at 7. The "use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." Baskin, ___ N.J. (slip. op. at *15), citing Saucier, 533 U.S. at 201-02.

For a constitutional right to be clearly established as violated, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Gormley, 218 N.J. at 113. In determining whether the right allegedly violated is "clearly established," it must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 635 (1987) (emphasis added). To understand the error below, then, "we must," as the United States Supreme Court put it, "still sloss our way through the factbound morass of 'reasonableness.'" Scott v. Harris, 550 U.S. 372, 383 (2007). In determining reasonableness, "[o]fficials are expected to 'apply general, well-developed legal principles,' in 'analogous factual situations.'" Gormley, 218 N.J. at 114 (citations omitted).

There were three parts to Mr. Bland's interactions with Defendants in the instant case: the initial high-speed pursuit, a stop on Lincoln Park, a one-way street, and the terminus of the chase. In its summation of Mr. Bland's behavior, the Third Circuit catalogued his offenses: driving at high speeds, disregarding traffic signals, driving the wrong way down a one-way street, colliding with two occupied police vehicles, attempting to flee Defendants' gunshots and failing to surrender. Bland v. City of Newark, 900 F.3d 77, 84 (3d Cir. 2018). At no time during any point of the chase did any of the many police officers involved view Mr. Bland with a weapon. Id. at 82. Put another way, Mr. Bland was engaged in several dangerous traffic violations that the Defendants answered with deadly force.

At the terminus of the chase, the vehicle Mr. Bland was driving became so completely entangled in scaffolding surrounding the building, that the State's own Police Crime Scene Investigation Unit photographs showed it would have been impossible for the vehicle to move in any direction because of the car's cracked axle, the chassis that was sitting on the pavement, and the engine that could not possibly have revved. Plaintiff-Respondent Br. at 40. Viewed in the light most favorable to Mr. Bland, the car he was driving was entirely incapacitated. Given that officers never observed a gun or other

weapon on Mr. Bland at any point during the course of the chase, the level of threat Mr. Bland posed at the terminus of the chase was altogether different from that at the beginning of the chase; Mr. Bland no longer posed an immediate threat to the Defendants when they shot into the car 60 times.⁶ See Attorney General's Use of Force Policy, <https://www.nj.gov/oag/dcj/agguide/useofforce2001.pdf>.

New Jersey's broader legal principles regarding use of deadly force by officers is clear: "what is reasonable in one minute can become unreasonable in the next if the justification for the use of force has ceased" as it did here. Baskin, ___ N.J. (slip op. at *28), citing Lytle v. Bexar County, 560 F.3d 404, 413 (5th Cir. 2009); see also Lamont v. New Jersey, 637 F.3d 177, 184 (3d Cir. 2011) ("Even where an officer is initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force has vanished."); Waterman v. Batton, 393 F.3d 471, 481 (4th Cir. 2005) ("[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."); Ellis v. Wynalda, 999 F.2d 243, 247 (7th Cir. 1993) ("When an

⁶ This lack of immediate danger and the fact that Mr. Bland did not try to flee the car also underscores that the Defendants did not act in accordance with statutory mandates and the Attorney General's policies around use of force.

officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity.”). While the facts of this case are not identical to those in Baskin, a comparison between the two is worthwhile.

In Baskin, the plaintiff attempted to elude the police in his car, crashed it into the defendant officer’s patrol vehicle, and then fled on foot with a visible firearm. As the Court ruled in denying a grant of qualified immunity, however, while that gun may have initially served as sufficient justification for deadly force, it was no longer true when the plaintiff dumped the gun and faced the defendant officer with his hands above his head. Here, while Mr. Bland made no clearly defined act of surrender, the car that was the cause of danger was neutralized and there was never a weapon present that created an ongoing, clear, apparent or imminent danger.

In New Jersey, where no immediate and continuing harm is presented to either officers or the public, it is not objectively reasonable to shoot a person suspected of committing a crime when a person no longer poses a threat.⁷ N.J.S.A. 2C:3-7(d); Attorney General’s Use of Force Policy,

⁷ While an officer is entitled to use lethal force if a New Jerseyan resists arrest, such force must be “reasonably necessary to overcome the resistance”, which, given the debated facts, may have already been overcome before the officers began shooting. State v. Mulvihill, 57 N.J. 151, 156 (1970).

<https://www.nj.gov/oag/dcj/agguide/useofforce2001.pdf> (noting that "imminent" danger does not necessarily mean instantaneous but requires some form of active threat); see also Baskin, ___ N.J. (slip op. at *9). Given that the issue in dispute is whether the car Mr. Bland was driving was clearly posing a threat to officers, the Defendants' actions simply cannot be construed as a reasonable use of deadly force.

The grant of summary judgment based on qualified immunity should be reversed and denied.

CONCLUSION

For all these reasons, this Court should reverse the trial court and consider Mr. Bland's Civil Rights Act claims, send the disputed material facts to a jury for examination, and, if those facts are found to demonstrate the unreasonableness of their actions, order the trial court to deny Defendant-Appellants' request for qualified immunity.

Respectfully submitted,



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