Nos. 22-1151, 22-1157

In The Supreme Court of the United States

CITY OF ARLINGTON, TEXAS; CRAIG ROPER,

Petitioners,

v.

DE'ON L. CRANE, et al.,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE TEXAS MUNICIPAL LEAGUE INTERGOVERNMENTAL RISK POOL, TEXAS ASSOCIATION OF COUNTIES, TEXAS ASSOCIATION OF COUNTIES RISK MANAGEMENT POOL, COMBINED LAW ENFORCEMENT ASSOCIATIONS OF TEXAS, TEXAS MUNICIPAL POLICE ASSOCIATION, LOUISIANA MUNICIPAL ASSOCIATION, NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, TEXAS POLICE CHIEFS ASSOCIATION, MISSISSIPPI MUNICIPAL LEAGUE, AND MISSISSIPPI MUNICIPAL SERVICE CORPORATION, IN SUPPORT OF THE CITY OF ARLINGTON AND CRAIG ROPER'S PETITIONS FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

Interest of *Amici Curiae* 1

Summary of the Argument 4

Reasons For Granting the Petitions 6

A. The *Crane* Opinion Conflicts with Decisions of this Court and Circuit Courts Concerning Important Issues of Federal Law 6

1. The *Crane* Decision Conflicts with this Court's Precedent Concerning Danger to Police Officers and Others..... 7

2. *Crane* Presents Important Issues for Review Because Police Officers Frequently Face Threats of Serious Harm 10

3. The *Crane* Decision Conflicts with This Court's Precedent Concerning the "Obvious Case" Exception 12

4. The *Crane* Decision Conflicts with Other Circuit Courts' Analyses and Holdings..... 15

B. The Fifth Circuit's Inconsistent Holdings Jeopardize Police and Community Safety..... 17

TABLE OF CONTENTS—Continued

Page

1. The Fifth Circuit's Irreconcilable Holdings Give Officers No Fair Warning Concerning Their Potential Liability in Split-Second Use-of-Force Cases..... 17

2. This Court Should Grant the Petitions to Provide Clarity to Judges, Law Enforcement, and the Public..... 20

C. The Court Should Address the Fifth Circuit's Sidelong Challenge to this Court's Long-Established Law Concerning Traffic Stops 23

Conclusion..... 26

TABLE OF AUTHORITIES

Page

CASES

Adams v. Williams, 407 U.S. 143 (1972).....7

Arizona v. Johnson, 555 U.S. 323 (2009).....7, 22, 25

Ashcroft v. al-Kidd, 563 U.S. 731 (2011).... 14, 19, 20, 21

Baker v. Coburn, 68 F.4th 240 (5th Cir. 2023)..... 18, 19, 20, 22

Brosseau v. Haugen, 543 U.S. 194 (2004)..... 8, 9, 13, 17 .....21, 22

Burghardt v. Ryan, No. 21-3906, 2022 WL 1773420 (6th Cir. June 1, 2022.....16

Carney v. Adams, 141 S. Ct. 493 (2020) 23

Carroll v. Carman, 574 U.S. 13 (2014) 21

Chimel v. California, 395 U.S. 752 (1969).....8

City and County of San Francisco v. Sheehan, 575 U.S. 600 (2015) 21

City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) 14

Clark v. Bowcutt, 675 Fed. App'x 799 (10th Cir. 2017).....16

Crane v. City of Arlington, 50 F.4th 453 (5th Cir. 2022)..... 4, 5, 8, 12-15, 18-21, 26

D.C. v. Wesby, 138 S. Ct. 577 (2018).....13

Delaware v. Prouse, 440 U.S. 648 (1979).....25, 26

Fenwick v. Pudimott, 778 F.3d 133 (D.C. Cir. 2015).....16

Graham v. Connor, 490 U.S. 386 (1989).....8, 13

TABLE OF AUTHORITIES—Continued

Page

Gordon v. Bierenga, 20 F.4th 1077 (6th Cir. 2021) 16

Harmon v. City of Arlington, 16 F.4th 1159 (5th Cir. 2021) 13

Hermiz v. City of Southfield, 484 Fed. App'x 13 (6th Cir. 2012).....16

Hope v. Pelzer, 536 U.S. 730 (2002).....12, 13, 17

Kansas v. Glover, 140 S. Ct. 1183 (2020) 25

Kisela v. Hughes, 138 S. Ct. 1148 (2018).....13, 21

Long v. Slaton, 508 F.3d 576 (11th Cir. 2007).....9

Maryland v. Wilson, 519 U.S. 408 (1997) 7, 8

McCullough v. Antolini, 559 F.3d 1201 (11th Cir. 2009) 16

Michigan v. Long, 463 U.S. 1032 (1983).....7

Michigan v. Summers, 452 U.S. 692 (1981).....8

Mitchell v. Forsyth, 472 U.S. 511 (1985).....6

Mitchell v. Miller, 790 F.3d 73 (1st Cir. 2015).....16

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).....23, 25

Mullenix v. Luna, 577 U.S. 7 (2015) ... 9, 14, 17, 18, 21, 22

Navarette v. California, 572 U.S. 393 (2014).....25

New York v. Belton, 453 U.S. 454 (1981).....8

Pace v. Capobianco, 283 F.3d 1275 (11th Cir. 2002) 16

Pearson v. Callahan, 555 U.S. 223 (2009) 19, 20

TABLE OF AUTHORITIES—Continued

Page

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 7

Plumhoff v. Rickard, 572 U.S. 765 (2014) 19, 21

Ramirez v. Guadarrama, 844 Fed. App'x 710 (5th Cir. 2021).....21

Reichle v. Howards, 566 U.S. 658 (2012).....17, 21

Reynolds v. Addis, No. 21-1454, 2022 WL 10738325 (6th Cir. Apr. 11, 2022) 17

Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021)....13, 21

Robinson v. Arrugueta, 415 F.3d 1252 (11th Cir. 2005) 17

Rodriguez v. U.S., 575 U.S. 348 (2015) 25

Romero v. City of Grapevine, 888 F.3d 170 (5th Cir. 2018) 8

Ryburn v. Huff, 565 U.S. 469 (2012).....9

Shanks v. City of Arlington, No. 4:22-CV-00573-P, 2022 WL 17835509 (N.D. Tex. Dec. 21, 2022).....21

Spencer v. City of Orlando, Florida, 725 Fed. App'x 928 (11th Cir. 2018) 15

Stanton v. Sims, 571 U.S. 3 (2013) 21

Taylor v. Barkes, 575 U.S. 822 (2015).....21

Taylor v. Riojas, 141 S. Ct. 52 (2020) 12, 13

Tennessee v. Garner, 471 U.S. 1 (1985).....8, 13, 22

Thomas v. Moody, 653 Fed. App'x 667 (11th Cir. 2016) 15

U.S. v. Robinson, 414 U.S. 218 (1973).....7

TABLE OF AUTHORITIES—Continued

Page

U.S. v. Arvizu, 534 U.S. 266 (2002) 25

Utah v. Strieff, 579 U.S. 232 (2016) 25, 26

Virginia v. Moore, 553 U.S. 164 (2008) 24

White v. Pauly, 580 U.S. 73 (2017) 14

Whren v. U.S., 517 U.S. 806 (1996) 24

Williams v. City of Grosse Pointe Park, 496 F.3d 482 (6th Cir. 2007).....16

Wilson v. Layne, 526 U.S. 603 (1999).....19

Wood v. Moss, 572 U.S. 744 (2014).....21

Wyatt v. Cole, 504 U.S. 158 (1992) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV..... 13, 14, 17, 24

U.S. Const. amend. VIII 12, 17

RULES

Sup. Ct. R. 37 1

Sup. Ct. R. 37.2 1

OTHER AUTHORITIES

Elliott Averett, Note, *An Unqualified Defense of Qualified Immunity*, 21 GEO. J. L. & PUB. POL'Y 241 (2023).....6

| News | dailyitem.com 24

TABLE OF AUTHORITIES—Continued

Page

RAFAEL A. MANGUAL, CRIMINAL (IN)JUSTICE: WHAT THE PUSH FOR DECARCERATION AND DEPOLICING GETS WRONG AND WHO IT HURTS THE MOST (2022) 24

Sherman, L., *Equal Protection by Race with Stop and Frisk: a Risk-Adjusted Disparity (RAD) Index for Balanced Policing*, CAMBRIDGE JOURNAL OF EVIDENCE-BASED POLICING (2021) https://link.springer.com/article/10.1007/s41887-021-00065-4 24

https://abc13.com/hpd-officer-shot-suspect-shoots-during-traffic-stop-n-houston-shooting-flees-scene-ella-boulevard/12703606/ 11

https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/le/leoka 10

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https://ucr.fbi.gov/leoka/2017/resource-pages/tables/table-80.xls 10

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TABLE OF AUTHORITIES—Continued

Page

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https://www.korncountry.com/2023/02/05/2-officers-shot-during-mitchell-traffic-stop/ 11

https://www.policeforum.org/staffing2023 6

https://www.respondersafety.com/news/struck-by-incidents/yearly-fatality-reports/ 11

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INTEREST OF *AMICI CURIAE*

Amici collectively represent thousands of local governmental entities and law enforcement agencies, tens-of-thousands of citizens, and hundreds-of-thousands of police officers. *Amici* and their members are strongly interested in obtaining clear guidance from this Court relating to appropriate use of force and acceptable traffic stop procedures, in furtherance of community and law enforcement safety, and to enable officers to make reasonable and lawful decisions in protecting the public. *Amici* seek to assist this Court by providing insight and perspective into issues concerning law enforcement and municipal liability.

The Texas Municipal League Intergovernmental Risk Pool ("TMLIRP") is a self-insurance pool encompassing over 2,500 governmental entities in Texas, including over 930 municipalities that have law-enforcement liability coverage through TMLIRP.[1]

The Texas Association of Counties ("TAC") is a non-profit corporation with all 254 Texas counties as members. The TAC Board of Directors represents associations of County Judges and Commissioners, District

[1] Counsel of record for all parties received timely notice under Supreme Court Rule 37.2 of *amici's* intent to file this brief. No counsel for any party in this matter and no party: (1) authored this brief in whole or in part; or (2) contributed money that was intended to fund the preparation or submission of this brief. No person, other than TMLIRP, TAC, RMP, CLEAT, TMPA, LMA, NAPO, TPCA, MML, MMSC, and their members or counsel, contributed money that was intended to fund the preparation or submission of this brief. *Amici* submit this brief pursuant to Supreme Court Rule 37.

and County Attorneys, Sheriffs, Justices of the Peace, and Constables.

The TAC Risk Management Pool ("RMP") is an intergovernmental risk pool sponsored by TAC which provides risk coverages to its 212 county members, 174 special district and other local government entity members, and their officers, employees, and volunteers.

Formed in 1926, the Louisiana Municipal Association ("LMA") provides education, advocacy, and service to 305 local governmental entities throughout Louisiana, including a constituency of over 8,000 municipal police officers. LMA wholly owns Risk Management, Inc. ("RMI"), which administers self-funded indemnity programs for Louisiana municipalities, including law enforcement professional liability for over 1,700 municipal police officers.

The Mississippi Municipal League ("MML") represents all municipalities in Mississippi and provides legislative advocacy, benefits programs, and training. The Mississippi Municipal Service Company ("MMSC") administers the Mississippi Municipal Liability Plan, which provides liability coverage, including law enforcement coverage, to most municipalities in Mississippi.

Founded in 1978, the National Association of Police Organizations ("NAPO") is a nationwide alliance of organizations committed to advancing the interests of law enforcement officers. NAPO represents over 1,000 police units and associations, over 241,000 sworn

officers, and more than 50,000 citizens mutually dedicated to fair and effective law enforcement.

The Combined Law Enforcement Associations of Texas ("CLEAT") represents over 25,000 Police Officers, Detention Officers, and other Law Enforcement Professionals across Texas. CLEAT advocates for the fair and consistent application of the law for First Responders.

Founded in 1950, the Texas Municipal Police Association ("TMPA") represents over 31,000 state, county, and local police officers and public safety employees across Texas. TMPA promotes professionalism in law enforcement through training, education, and representation.

Founded in 1958, the Texas Police Chiefs Association ("TPCA") promotes, encourages, and advances the professional development and high ethical standards of senior police management personnel throughout Texas. TPCA's membership of 1,550 includes the law enforcement management personnel of over 330 cities and agencies representing a population served of more than 15 million.

Amici collectively represent hundreds-of-thousands of law enforcement officers who daily face safety concerns in connection with traffic stops and arrests. This Court recognizes the dangers police officers routinely encounter in those settings and understands that the Constitution permits them to use lethal force when they reasonably believe that a suspect poses a threat of serious harm to officers or others.

The Fifth Circuit's decision in *Crane* sets a dangerous precedent in conflict with multiple decisions of this Court because it teaches police officers that they must stand down when faced with a non-compliant suspect—even one with multiple outstanding warrants—who refuses to relinquish control of a running vehicle, unless and until the vehicle moves. The Fifth Circuit's rule needlessly places officers, passengers, and bystanders in danger. Indeed, the harrowing injuries Officer Bowden suffered when Crane's car twice ran over her illustrate this point beyond dispute. The video evidence demonstrates that the Fifth Circuit's rule is unworkable, as officers could not have reacted to the car's sudden movement in time to prevent serious injury to Officer Bowden. ROA.1021 (23:53:28–23:53:35).

Amici submit this brief to emphasize the exceptional importance of the questions presented in the petitions for writ of certiorari and to urge the Court to grant these petitions.

SUMMARY OF THE ARGUMENT

The Court should grant Officer Roper and the City of Arlington's petitions for writ of certiorari because the Fifth Circuit has decided important federal questions in ways that: (1) conflict with decisions of this Court; (2) conflict with decisions of other circuit courts of appeals and with other decisions of the Fifth Circuit; (3) interfere with common policing practices designed

to protect officers and the law-abiding public they serve; and (4) raise the specter of potential municipal liability for actions that conform with this Court's precedent.

Six Fifth Circuit judges recognize that their Circuit's analysis of qualified immunity in split-second use-of-force cases is broken in a way that the Fifth Circuit itself cannot, or will not, repair. This Court should resolve the far-reaching issues which arise from the *Crane* opinion, including: (1) proper application of the rare "obvious case" exception to this Court's oft-repeated requirement that courts define clearly established law with specificity when analyzing qualified immunity; (2) appropriate police conduct in connection with traffic stops and arrests; and (3) the potential, if any, for municipal liability arising from constitutionally permissible traffic stops.

Amici share the frustration of the six Fifth Circuit judges who forcefully disagree with the panel's qualified immunity analysis and bemoan the uncertainty and confusion the *Crane* opinion creates. Pet. App. 38a–43a.[2] *Amici* urge this Court to grant the petitions for writ of certiorari to address these important issues which affect police safety, public safety, police recruitment and training, and law enforcement policies throughout the county.

[2] Throughout this brief, *amici* refer to material contained in the appendix to Officer Roper's petition.

REASONS FOR GRANTING THE PETITIONS

A. The *Crane* Opinion Conflicts with Decisions of this Court and Circuit Courts Concerning Important Issues of Federal Law.

One important—and necessary—purpose of qualified immunity is to enable law enforcement officers to protect one another and the public without fear of exposure to crippling damages claims. *E.g.*, *Wyatt v. Cole*, 504 U.S. 158, 167–68 (1992) (qualified immunity protects government's ability to perform its traditional functions and, by safeguarding government, protects the public at large); *Mitchell v. Forsyth*, 472 U.S. 511, 525–26 (1985) (the public interest is served when officials act with independence and without fear of consequences, such as distraction from governmental duties, inhibition of discretionary action, and deterrence of able people from public service) (citations omitted). In addition, officers regularly face significant danger. Uncertainty in the law increases this danger, encourages timid responses to crime, and interferes with the increasingly difficult task[3] of hiring and retaining skilled peace officers.

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[3] *See*, *e.g.*, https://www.washingtonpost.com/national-security/2023/05/27/police-vacancies-hiring-recruiting-reform/ (law enforcement agencies throughout the country are experiencing unprecedented difficulty hiring and retaining qualified officers); https://www.policeforum.org/staffing2023 (survey of 182 law enforcement agencies shows staffing of sworn officers is down by nearly 5% since 2020, and officers are retiring faster than they can be replaced), last visited on June 26, 2023; *see also*, *e.g.*, Elliott Averett, Note, *An Unqualified Defense of Qualified Immunity*, 21 GEO. J. L. & PUB. POL'Y 241, 273–77 (2023) (exploring the

1. The *Crane* Decision Conflicts with this Court's Precedent Concerning Danger to Police Officers and Others.

This Court characterizes the government's interest in officer safety as "'legitimate and weighty,'"[4] and it has long recognized that "traffic stops are 'especially fraught with danger to police officers.'" *Johnson*, 555 U.S. at 330 (quoting *Michigan v. Long*, 463 U.S. 1032, 1047 (1983)); *see also*, *e.g.*, *Mimms*, 434 U.S. at 110 (rejecting the argument that "traffic violations necessarily involve less danger to officers than other types of confrontations"). Indeed, this Court has "specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile," noting that "'a significant percentage of murders of police officers occurs when the officers are making traffic stops.'" *Mimms*, 434 U.S. at 110 (quoting *U.S. v. Robinson*, 414 U.S. 218, 234, n.5 (1973) and citing *Adams v. Williams*, 407 U.S. 143, 148, n.3 (1972) ("'According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.'")). This Court has stressed that the "risk of harm to both the police and the occupants of a stopped vehicle is minimized . . . if the officers routinely exercise unquestioned command of the situation." *Johnson*, 555 U.S. at 330–31 (cleaned up) (citing *Maryland v. Wilson*, 519 U.S. 408, 414 (1997)

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disproportionate increase in crime and reduction in law enforcement staffing since Colorado repealed qualified immunity).

[4] *Arizona v. Johnson*, 555 U.S. 323, 331 (2009) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam)).

and *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981)). Traffic stops are more dangerous when, as in *Crane*, the vehicle contains passengers. *Wilson*, 519 U.S. at 413 ("Regrettably, traffic stops may be dangerous encounters . . . the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer.").[5]

This Court recognizes that a police officer may use lethal force when he reasonably believes that a suspect poses a threat of serious physical harm to officers or others. *Brosseau v. Haugen*, 543 U.S. 194, 197–98 (2004) (per curiam); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The *Crane* opinion violates this Court's precedent and imposes unrealistic and dangerous expectations on police officers by second-guessing an officer's on-scene assessment of danger and by requiring officers to wait until a suspect uses a deadly weapon before resorting to lethal force. *Cf.* Pet. App. 16a–19a; *Romero v. City of Grapevine*, 888 F.3d 170, 177 (5th Cir. 2018) ("Recognizing that 'police officers are often forced to make split second judgments . . . about the amount of force that is necessary in a particular situation,' the Supreme Court has warned against 'second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation.'" (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989) and

[5] This Court recognizes that officer safety is imperiled if weapons are within drivers' or passengers' reach during an arrest. *See*, *e.g.*, *New York v. Belton*, 453 U.S. 454, 460 (1981); *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

Ryburn v. Huff, 565 U.S. 469, 477 (2012) (per curiam)); *Mullenix v. Luna*, 577 U.S. 7, 17 (2015) (per curiam) ("'the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect'") (quoting *Long v. Slaton*, 508 F.3d 576, 581–82 (11th Cir. 2007)). This Court understands that a car can be a deadly weapon and that an officer's decision to prevent a car from potentially injuring others can be reasonable. *Brosseau*, 543 U.S. at 200.

Under this precedent, Officer Roper had probable cause to perceive a threat of serious physical harm to officers or others when he and his colleagues approached a suspect in the driver's seat of an automobile which contained passengers, one of whom reached under his seat—possibly for a weapon—and the officers found themselves unable to exercise unquestioned command of the situation, as Crane, the unlicensed driver with multiple outstanding warrants, defied the officers' repeated instructions and remained behind the wheel of a vehicle that he refused to turn off.[6] The Fifth Circuit disregarded this Court's decisions concerning the significant danger officers face in connection with traffic stops—particularly when a passenger reaches under a seat in the vehicle—and wrongly concluded that the officers faced no threat of harm unless and until Crane's car began to move. Pet. App.

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[6] ROA.1021 (23:50:34–23:52:29); ROA.1004. Crane's car shook, its engine revved, and its tires spun. Pet. App. 7a, 15a. The danger of the situation manifested when Officer Bowden was run over twice in seven seconds. ROA.1021 (23:53:28–23:53:35).

14a–16a. The Court should grant review to correct the Fifth Circuit's novel and dangerous requirement that police officers wait until a stopped vehicle begins to move before using force to prevent harm to officers or others.

2. *Crane* Presents Important Issues for Review Because Police Officers Frequently Face Threats of Serious Harm.

The FBI's data collection, Law Enforcement Officers Killed and Assaulted ("LEOKA"), shows that, in 2017, when Crane twice ran over Officer Bowden, 60,211 officers were assaulted[7] and 46 officers were feloniously killed.[8] In 2017, ten percent of law enforcement officers were assaulted.[9]

The danger to police officers has increased since then. LEOKA data show that from 2019-2022, an average of 57 officers were feloniously killed each year.[10] In 2019, the last year for which this information is publicly available, LEOKA data show that nearly twelve percent of officers were assaulted.[11] Two of the 18 felonious police officer deaths occurring during the first

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[7] https://ucr.fbi.gov/leoka/2017/resource-pages/tables/table-80.xls, last visited on June 26, 2023.

[8] https://ucr.fbi.gov/leoka/2019/resource-pages/tables/table-1.xls, last visited on June 26, 2023.

[9] https://ucr.fbi.gov/leoka/2017/resource-pages/tables/table-80.xls.

[10] https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/le/leoka, last visited on June 26, 2023.

[11] https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-80.xls, last visited on June 26, 2023.

four months of 2023 "involved the use of a vehicle as a weapon." *Id*. At least fourteen officers have been shot at or shot—four fatally—in connection with traffic stops during the first five months of 2023.[12]

Police officers face additional dangers in conducting traffic stops. When officers step out of their vehicles to conduct traffic stops, they are exposed to the dangers of vehicles traveling around them. Consequently, officers must concentrate their attention on two fronts—the traffic stop and the traffic. The Emergency Safety Responder Institute ("ESRI") has been compiling struck-by-vehicle fatality data for emergency responders since 2019.[13] Each year from 2019-2022, seventeen to thirty police officers lost their lives in struck-by-vehicle accidents.[14] These numbers do not account for

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[12] Kentucky sheriff's deputy killed while conducting traffic stop (wlky.com); https://www.jsonline.com/story/news/crime/2023/04/09/2-wisconsin-police-officers-killed-cameron-chetek-during-traffic-stop-shooting/70096428007/; https://listen.sdpb.org/crime-courts/2023-05-08/south-dakota-connected-officer-killed-following-wisconsin-traffic-stop; https://www.wjcl.com/article/charleston-county-traffic-stop-deadly-shooting/43824497; https://whyy.org/articles/philadelphia-police-officer-shot-west-shooting-gun-violence/; https://www.korncountry.com/2023/02/05/2-officers-shot-during-mitchell-traffic-stop/; https://padailypost.com/2023/01/13/officer-injured-in-shooting/; https://abc13.com/hpd-officer-shot-suspect-shoots-during-traffic-stop-n-houston-shooting-flees-scene-ella-boulevard/12703606/; https://www.wbtv.com/2023/03/29/gunman-fires-shots-officer-during-shelby-traffic-stop-damages-patrol-car/; https://wilsoncountysource.com/video-suspect-arrested-after-officer-involved-shooting-during-traffic-stop-in-madison/, last visited on June 26, 2023.

[13] https://www.respondersafety.com/news/struck-by-incidents/yearly-fatality-reports/, last visited on June 26, 2023.

[14] *Id.*

near-misses and injuries, sometimes severe, which officers suffer in connection with traffic stops.

Crane hurts public safety in the first instance by discouraging officers from making traffic stops. The opinion's stand down rule then exposes officers to even greater danger, and, by inhibiting police action in tense, uncertain, and rapidly evolving situations, the opinion also interferes with officers' ability to protect the public. This Court should grant the petitions to correct these problems.

3. The *Crane* Decision Conflicts with This Court's Precedent Concerning the "Obvious Case" Exception.

In *Hope v. Pelzer*, 536 U.S. 730, 738 (2002), this Court recognized that a constitutional violation may be obvious. This Court's reasoning in *Hope* depended upon the intrinsic cruelty of prison guards' alleged conduct of chaining a shirtless prisoner to a hitching post for seven hours in the blazing sun, refusing him water, and taunting him. *Id*. at 745 (the "obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment"); *see also Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (finding an obvious Eighth Amendment violation when a prisoner was housed, naked, for days in cells that were freezing and covered in feces and sewage).

By contrast, in a Fourth Amendment excessive force case with facts similar to those in *Crane*, this Court found the case "far from the obvious one where *Graham* and *Garner* alone offer a basis for decision." *Brosseau*, 543 U.S. at 199. In *Brosseau*, an officer shot a suspect who refused to leave a parked car, started the car, and *may have* begun to drive. *Id*. at 196–97. As in *Crane*, in *Brosseau* the parties disputed whether the officer fired before or after the car began to move. *Id*. Nevertheless, this Court recognized that the officer was entitled to qualified immunity because "this area is one in which the result depends very much on the facts of each case." *Id*. at 200. Neither *Brosseau* nor *Crane* involve allegations of extreme, cruel conduct like *Hope* and *Taylor*, so neither *Brosseau* nor *Crane* fall within the "obvious case" exception to the plaintiffs' need to identify highly similar precedent to demonstrate that the law was clearly established.

Indeed, the "obvious case" exception applies only rarely and generally not to excessive force cases. *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018); *Harmon v. City of Arlington*, 16 F.4th 1159, 1167 (5th Cir. 2021) ("obvious" cases "are so rare that the Supreme Court has *never* identified one in the context of excessive force") (emphasis in original); *see also Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (use of force against a suspect who had a knife in his pocket was "not an obvious case"); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (use of lethal force against a woman holding a kitchen knife who failed to comply with two commands was "far from an obvious case"). As to excessive force

claims, this Court has "repeatedly told courts not to define clearly established law at too high a level of generality" and repeatedly noted that specificity is especially important in the Fourth Amendment context. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) and *Mullenix*, 577 U.S. at 12); *White v. Pauly*, 580 U.S. 73, 80 (2017).

Nevertheless, the *Crane* panel found Officer Roper's use of force an obvious Fourth Amendment violation because the panel thought that a non-compliant, unlicensed driver with multiple outstanding warrants who was behind the wheel of a running vehicle containing three passengers—one of whom reached under his seat—did not present a risk of serious harm to the three surrounding police officers or others unless and until the vehicle began to move. Pet. App. 16a. Sadly, two seconds after the vehicle began to move, it ran over one of the officers and, seconds later, ran over her again. ROA.1021 (23:53:28–23:53:35). Despite the obvious accuracy of Officer Roper's on-scene threat assessment, the Fifth Circuit proscribed his use of force.

This case presents an ideal vehicle to enable this Court to address lower courts' misapplication of the rare "obvious case" exception because it illustrates the depth of the Fifth Circuit's inconsistency on this question. In May of 2023, the Fifth Circuit declined to find an obvious Fourth Amendment violation and recognized a police officer's entitlement to qualified immunity under nearly identical circumstances as those presented in *Crane*. *Infra* at 18–19. This Court should

grant review of *Crane* because, by requiring police officers to stand down in the midst of tense, uncertain, and rapidly evolving confrontations, the Fifth Circuit's unprecedented and inconsistent expansion of the "obvious case" exception endangers police officers, passengers, and the public.

4. The *Crane* Decision Conflicts with Other Circuit Courts' Analyses and Holdings.

This Court should grant review because the Fifth Circuit's characterization of Officer Roper's conduct as an obvious constitutional violation and the court's determination that no threat of serious harm existed before Crane's car moved conflict with cases from the First, Sixth, Tenth, Eleventh, and District of Columbia Courts of Appeals.

Sister circuits recognize that officers making split-second decisions may reasonably perceive a threat of serious harm justifying lethal force even when a vehicle is stationary or when nobody is in the vehicle's path. *Spencer v. City of Orlando, Florida*, 725 Fed. App'x 928, 932–33 (11th Cir. 2018) (no constitutional violation when officer fatally shot driver who was trying to restart his stopped vehicle, explaining, "the officers were not required to wait until [the driver] successfully restarted the car and drove toward them before they defended themselves"); *Thomas v. Moody*, 653 Fed. App'x 667, 672–73 (11th Cir. 2016) (granting qualified immunity when officer fatally shot a driver in a stopped vehicle who did not respond to the officer's

commands);[15] *Gordon v. Bierenga*, 20 F.4th 1077, 1083 (6th Cir. 2021) ("Deadly force is justified against 'a driver who objectively appears ready to drive into an officer or bystander with his car.'") (quoting *Hermiz v. City of Southfield*, 484 Fed. App'x 13, 16 (6th Cir. 2012)); *Burghardt v. Ryan*, No. 21-3906, 2022 WL 1773420, *2 (6th Cir. June 1, 2022) (no violation of clearly established law because "what matters is that [the vehicle] remained a threat to strike any of them when they opened fire") (citing *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 487 (6th Cir. 2007)); *Mitchell v. Miller*, 790 F.3d 73, 80 (1st Cir. 2015) ("the test is not whether a person was actually directly in the path of the car, but whether it was reasonable for [the officer] to believe—at the point when events were rapidly unfolding—that someone was at risk of serious physical harm"); *Clark v. Bowcutt*, 675 Fed. App'x 799, 810 (10th Cir. 2017) (quoting *McCullough v. Antolini*, 559 F.3d 1201, 1207 (11th Cir. 2009) ("'We have . . . consistently upheld an officer's use of force and granted qualified immunity in cases where the decedent used *or threatened to use* his car as a weapon to endanger officers or civilians'")) (emphasis added).

Sister circuits reject application of the "obvious case" analysis to officers' split-second decisions about lethal force. *E.g.*, *Fenwick v. Pudimott*, 778 F.3d 133, 137 (D.C. Cir. 2015) (the constitutional question in a case involving lethal force against a driver who clipped

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[15] *See also id*. at 672 (no constitutional violation occurs when officers open fire at the same time that a vehicle begins moving) (citing *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002)).

a police officer with his side-view mirror was "far from obvious"); *Reynolds v. Addis*, No. 21-1454, 2022 WL 1073832, *5 (6th Cir. Apr. 11, 2022) ("we note that *Hope* is an Eighth Amendment case, and the Supreme Court has since repeatedly warned that specificity is especially important in the Fourth Amendment context to clearly establish law for officers[16] . . . *Hope* does not stand for the proposition that plaintiffs in Fourth Amendment cases do not need to offer any similar cases to demonstrate that an officer should have been on notice that his conduct violated the constitution.") (citing *Hope*, 536 U.S. at 739); *Robinson v. Arrugueta*, 415 F.3d 1252, 1256 (11th Cir. 2005) (the clearly established analysis in a case involving the threat of harm from a vehicle "'must be undertaken in light of the specific context of the case'") (citing *Brosseau*, 125 S. Ct. at 599).

B. The Fifth Circuit's Inconsistent Holdings Jeopardize Police and Community Safety.

1. The Fifth Circuit's Irreconcilable Holdings Give Officers No Fair Warning Concerning Their Potential Liability in Split-Second Use-of-Force Cases.

This Court recognizes the importance of "ensuring that officials can reasonably anticipate when their conduct may give rise to liability for damages." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (cleaned up, citation omitted). "[T]he crux of the qualified immunity test is

[16] Citing *Mullenix*, 577 U.S. at 12.

whether officers have fair notice that they are acting unconstitutionally." *Mullenix*, 577 U.S. at 21 (citation omitted). The Fifth Circuit provides police officers with no fair notice concerning split-second decisions about using force because the court is starkly inconsistent in its qualified immunity analyses and rulings.

Shortly after the Fifth Circuit denied rehearing en banc in *Crane*, a Fifth Circuit panel issued its opinion in *Baker v. Coburn*, 68 F.4th 240 (5th Cir. 2023). In *Baker*, police officers pulled up behind a stolen car that was parked at a gas station pump. The driver failed to comply with commands to roll down the windows and let the officers see his hands, instead turning on the car. One officer stepped in front of the car. *Id*. at 242–44. The parties dispute whether the officer began shooting into the car before or after the car began to move, but the video evidence shows that the car did not begin moving until after the officer began shooting. *Id*. at 243, n.3. The driver died at the scene. *Id*. at 244.

In *Baker*, as in *Crane*, a police officer who was in a position to be injured by a vehicle used lethal force against a non-compliant suspect who was behind the wheel of a vehicle which was running but, arguably, not moving at the time of the shots. *Cf*. *id*. at 242–44; Pet. App. 6a–8a. However, the Fifth Circuit's analysis and decisions in *Baker* and in *Crane* are wholly inconsistent.

In *Crane*, the Fifth Circuit denied qualified immunity, characterizing the officer's conduct as an obvious constitutional violation. Pet. App. 23a. By contrast, in *Baker*, the Fifth Circuit found no obvious constitutional violation. *Baker*, 68 F.4th at 244–46. Instead, the *Baker* panel required the plaintiffs to frame the clearly established law inquiry with specificity and granularity such that "'the right's contours [are] sufficiently definite that any reasonable official in the officer's shoes would have understood that he was violating it.'" *Id.* (citing *al-Kidd*, 563 U.S. at 742 and quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)) (cleaned up, citations omitted). After noting that the driver had ignored multiple commands from the officers and that there was concern about the car being used as a weapon,[17] the Fifth Circuit held, as to the shots fired *before the vehicle began moving*, that "plaintiffs have not pointed to sufficient authority clearly establishing that [the officer's] conduct violated the law under the specific circumstances he was facing, and thus he is entitled to qualified immunity." *Id*. at 247.

Given the Fifth Circuit's inconsistent holdings, it could not have been clearly established in February of 2017 that Officer Roper's conduct would violate Crane's constitutional rights. *See*, *e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 245 (2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 618 (1999) for the proposition that "'[i]f judges . . . disagree on a constitutional question,

[17] *Baker*, 68 F.4th at 246–47.

it is unfair to subject police to money damages for picking the losing side of the controversy.'"). Indeed, at least six Fifth Circuit judges sharply disagree with the *Crane* panel's decision. Pet. App. 38a–43a.[18] When properly applied, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *al-Kidd*, 563 U.S. at 743 (citation omitted). Officer Roper "deserves neither label," not least because six Fifth Circuit judges found no fault with his actions and three additional Fifth Circuit judges subsequently found no clearly established violation under nearly identical circumstances. *Pearson*, 555 U.S. at 245; *al-Kidd*, 563 U.S. at 743; Pet. App. 38a–43a; *Baker*, 68 F.4th at 242–47.

2. This Court Should Grant the Petitions to Provide Clarity to Judges, Law Enforcement, and the Public.

This Court should grant review because the Fifth Circuit's inconsistent qualified immunity holdings leave defendants, judges, and citizens confused and uncertain. Pet. App. 39a (Ho, J., noting that the Fifth Circuit's qualified immunity decisions are "confusing to citizens and police officers alike" and quoting with approval the dissent's observation that "'we sow the seeds of uncertainty in our precedents—which grow into a briar patch of conflicting rules, ensnaring

[18] Chief Judge Richman, who voted to rehear the case en banc, did not explain her reasoning. Pet. App. 37a.

district courts and litigants alike.' ") (quoting Pet. App. 43a (Oldham, J., joined by Jones, Smith, Duncan, and Wilson, JJ., dissenting from denial of rehearing en banc)).[19]

This Court has not hesitated to correct circuit courts that improperly deny immunity.[20] This Court should grant review of *Crane* for the same reasons it granted review in *Mullenix*, as the parallels between these cases are marked. As in *Mullenix*, the Fifth Circuit in *Crane* improperly: (1) identified a fact issue precluding summary judgment for an officer asserting qualified immunity;[21] (2) found an officer's action objectively unreasonable because the factors that justified deadly force in other cases were absent;[22] (3) used the precise formulation of allegedly "clearly established" law that the Supreme Court has repeatedly rejected as

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[19] *See also*, *e.g.*, *Shanks v. City of Arlington*, No. 4:22-CV-00573-P, 2022 WL 17835509, *2 (N.D. Tex. Dec. 21, 2022) (noting that the Fifth Circuit's application of the qualified immunity test "is often a morass of unpredictability") (comparing *Crane v. City of Arlington*, 50 F.4th 453, 458 (5th Cir. 2022) with *Ramirez v. Guadarrama*, 844 Fed. App'x 710, 712–17 (5th Cir. 2021)).

[20] *E.g.*, *Rivas-Villegas*, 142 S. Ct. at 8–9; *Wesby*, 138 S. Ct. at 591; *Mullenix*, 577 U.S. at 16–19; *Taylor v. Barkes*, 575 U.S. 822 826–27 (2015); *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611, n.3 (2015) ("the Court often corrects lower courts when they wrongly subject individual officers to liability") (citing *Carroll v. Carman*, 574 U.S. 13, 17 (2014)); *Wood v. Moss*, 572 U.S. 744 (2014); *Plumhoff*, 572 U.S. at 765; *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); and *Reichle*, 566 U.S. at 658); *Kisela*, 138 S. Ct. at 1153–54; *see also*, *e.g.*, *al-Kidd*, 563 U.S. at 741; *Brosseau*, 543 U.S. at 201.

[21] *Cf. Mullenix*, 577 U.S. at 10; Pet. App. 15a–16a, 19a.

[22] *Cf. Mullenix* 577 U.S. at 11; Pet. App. 16a, 20a.

too broad;[23] (4) used the general test from *Garner*;[24] and (5) denied qualified immunity when no Supreme Court precedent squarely governed the situation.[25]

Additionally, the Court should grant review because, given the confusing state of the law, law enforcement agencies are left uncertain about how to train their officers to deal with non-compliant suspects who remain in running vehicles during traffic stops. Should they train officers to "exercise unquestioned command of the situation" under this Court's precedent? *Johnson*, 555 U.S. at 330–31 (and cases cited therein). Should they train officers that they may use lethal force when they are concerned that a non-compliant suspect may use a vehicle as a weapon, under the Fifth Circuit's holding in *Baker*? *Baker*, 68 F.4th at 242–47. Or should they train officers to continue negotiating with non-compliant suspects who remain in control of a deadly weapon, or simply let such suspects go, under the Fifth Circuit's inconsistent holding in *Crane*? Pet. App. 5a–8a, 18a.

The *Crane* opinion rewards suspects for resisting police officers' lawful commands and punishes officers for taking action aimed at protecting themselves and the public. The Court should correct the perverse

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[23] *Cf. Mullenix* 577 U.S. at 12 (citing *Brosseau*, 543 U.S. at 199); Pet. App. 21a.

[24] *Cf. Mullenix* 577 U.S. at 12–13 (citing *Garner*, 471 U.S. at 1); Pet. App. 21a.

[25] *Cf. Mullenix* 577 U.S. at 15–16; Pet. App. 13a, 20a–23a.

incentives the *Crane* decision engenders and protect police officers and the public by clarifying the law.

C. The Court Should Address the Fifth Circuit's Sidelong Challenge to this Court's Long-Established Law Concerning Traffic Stops.

The Court should also grant the petitions because the *Crane* decision includes an advisory opinion concerning potential municipal liability for constitutionally permissible traffic stops which: (1) conflicts with this Court's precedent about legitimate law enforcement practices geared toward community safety; (2) introduces additional confusion for law enforcement entities and officers; and (3) discourages officers from fulfilling their sworn duties.

The *Crane* opinion begins with a discussion of pretextual traffic stops unrelated to Crane's claims, which only allege excessive force. Pet. App. 2a–4a.[26] The Fifth Circuit notes that, "[w]hile several major cities have restricted the practice, in much of America, police traffic stops still seine for warrants" and suggests that local policies permitting such stops could support municipal liability under *Monell*.[27] Pet. App. 3a. In support of this position, the Fifth Circuit invokes questionable secondary sources and policy decisions of distant

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[26] The panel lacked jurisdiction to opine about pretextual traffic stops because *Crane* presents no live dispute on this issue. *Carney v. Adams*, 141 S. Ct. 493, 498 (2020).

[27] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

municipalities, which do not purport to reflect the varied economic, demographic, and political considerations that other communities face. Pet. App. 2a–4a.[28] It is difficult to follow the Fifth Circuit's reasoning on this point, as this Court finds "it obvious that the Fourth Amendment's meaning [does] not change with local law enforcement practices." *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (citing *Whren v. U.S.*, 517 U.S. 806, 815 (1996)).

Pretextual traffic stops are constitutionally permissible and are "a cornerstone of law enforcement practice." *Whren*, 517 U.S. at 810. Traffic stops and associated license and warrant checks serve important safety interests.[29] This Court has long recognized that

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[28] *Amici* question the reliability of the panel's perception of discrimination in traffic stops, which appears to be based on flawed methodology. *See*, *e.g.* Sherman, L., *Equal Protection by Race with Stop and Frisk: a Risk-Adjusted Disparity (RAD) Index for Balanced Policing*, CAMBRIDGE JOURNAL OF EVIDENCE-BASED POLICING (2021) https://link.springer.com/article/10.1007/s41887-021-00065-4, last visited on June 26, 2023; *See also* RAFAEL A. MANGUAL, CRIMINAL (IN)JUSTICE: WHAT THE PUSH FOR DECARCERATION AND DEPOLICING GETS WRONG AND WHO IT HURTS THE MOST, 22–30, 138–45 (2022) (relating racial disparities in policing to racial disparities in the communities which experience the greatest serious crime); State police data show no racial profiling in recent study of traffic stops | News | dailyitem.com, last visited on June 26, 2023 (no signs of racial profiling in 440,000 traffic stops in Pennsylvania in 2022).

[29] For example, a recent traffic stop for a minor offense resulted in the rescue of a woman who had been kidnapped at gunpoint. https://www.cbsnews.com/news/south-carolina-officer-rescues-woman-help-me-traffic-stop-north-myrtle-beach/, last visited on June 26, 2023.

states have a vital safety interest in "ensuring that only those qualified to do so are permitted to operate motor vehicles . . . and hence that licensing . . . requirements are being observed." *Delaware v. Prouse*, 440 U.S. 648, 658 (1979).[30] This Court recognizes that routine warrant checks are a precaution for officer safety,[31] particularly in the context of traffic stops, which "are 'especially fraught with danger to police officers.'" *Rodriguez*, 575 U.S. at 356 (quoting *Johnson*, 555 U.S. at 330); *see also Prouse*, 440 U.S. at 658–60. Nevertheless, the Fifth Circuit criticized Officer Bowden for failing to "send the family on" after learning that the object thrown out of the car was not drug-related,[32] even though Crane lacked a driver's license and had multiple outstanding warrants, including a felony warrant relating to a charge for evading arrest. Pet. App. 5a.

The *Crane* opinion introduces needless confusion by suggesting that municipalities may face liability under *Monell* for following law enforcement policies that bear this Court's imprimatur. *Crane* also creates widespread confusion for police officers who are charged with enforcing licensing requirements and

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[30] *See also Kansas v. Glover*, 140 S. Ct. 1183, 1188 (2020).

[31] *Utah v. Strieff*, 579 U.S. 232, 241 (2016) (citing *Rodriguez v. U.S.*, 575 U.S. 348, 355 (2015)).

[32] This did not invalidate Officer Bowden's traffic stop, which was based on her belief that someone threw drug paraphernalia out of the window. *Navarette v. California*, 572 U.S. 393, 403 (2014) ("we have consistently recognized that reasonable suspicion 'need not rule out the possibility of innocent conduct.'") (quoting *U.S. v. Arvizu*, 534 U.S. 266, 277 (2002)).

arresting suspects with outstanding warrants. *Prouse*, 440 U.S. at 658; *Streiff*, 579 U.S. at 240. The Court should grant review to correct this confusion.

CONCLUSION

The *Crane* decision conflicts with this Court's and circuit courts' rulings, imposes a "stand down" rule which undermines officers' authority, and encourages timidity, rather than reasonable action in support of public safety. The Court should grant the petitions to correct these errors.

Respectfully submitted,

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