No. 17-1397

In the Supreme Court of the United States

Steve Spencer,

Petitioner,

v.

Chris Abbott, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Do those working in a state prison comply with the Eighth Amendment simply by responding to a prisoner's serious medical needs with *some* medical care, even if inadequate, as five circuits have held, or must the prison meet a higher standard of providing *adequate* medical care, as five other circuits have held?

2. Should the doctrine of qualified immunity be modified or overruled?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is the deleterious effect that qualified immunity has on the power of citizens to vindicate their constitutional rights, and the subsequent erosion of accountability among public officials that the doctrine encourages.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Over the last half-century, the doctrine of qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based. The text of 42 U.S.C. § 1983 ("Section 1983") makes no mention of immunity, and the common law of 1871 did not include any across-the-board defense for all public officials. With limited exceptions, the baseline assumption at the founding and throughout the nineteenth century was that public officials were strictly liable for unconstitutional misconduct. Judges and scholars alike have thus increasingly arrived at the conclusion that the contemporary doctrine of qualified immunity is unmoored from any lawful justification and in serious need of correction.[2]

The Tenth Circuit's decision in this case throws the shortcomings of qualified immunity into sharp relief, and highlights one anomalous facet of the doctrine in

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[2] *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *Thompson v. Clark*, No. 14-CV-7349, slip op. at 13–24 (E.D.N.Y. June 11, 2018) (discussing how qualified immunity "has recently come under attack as over-protective of police and at odds with the original purpose of section 1983"); Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT (Fall 2017) (essay by judge on the U.S. District Court for the Eastern District of Wisconsin); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Jon O. Newman, Opinion, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://perma.cc/9R6N-323Z (article by senior judge on the U.S. Court of Appeals for the Second Circuit); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (forthcoming 2018), *available at*: https://ssrn.com/abstract=3127031.

particular—the one-sided litigation advantage it grants defendants, in the form of interlocutory appeals. Brian Maguire brought Section 1983 claims against staff members of a Utah state prison, alleging deliberate indifference to his serious medical needs in violation of the Eighth Amendment. The district court denied the Defendants' motion for summary judgment, a decision which appellate courts generally lack jurisdiction to review. Under traditional principles of civil procedure, Maguire would be entitled to a jury trial.

But because the defendants invoked qualified immunity, they were allowed to take an immediate appeal, pursuant to this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), which held that the denial of a claim of qualified immunity is a "final decision" within the meaning of 28 U.S.C. § 1291. This holding was not based on the text or history of Section 1983, nor even on the supposed common-law origins of qualified immunity, but solely based on the policy considerations discussed in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The application of the collateral order doctrine in this case is thus a procedural invention piled atop a substantive legal fiction. The Petition therefore presents that "appropriate case" to reconsider qualified immunity, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment), because the only basis for appellate jurisdiction is a legal doctrine without any sound textual or historical basis.

If the Court is inclined to reconsider qualified immunity, it should not hesitate to do so based on *stare decisis*. The inherently amorphous nature of the "clearly established law" standard announced in *Har-*

low has precluded the doctrine from effecting the stability and predictability that justify respect for precedent in the first place. Moreover, the Court has already indicated its willingness to treat qualified immunity as a judge-made, common-law doctrine, and thus appropriate for reconsideration. *See Pearson v. Callahan*, 555 U.S. 223, 233-34 (2009). And qualified immunity has not created the sort of reliance interests that this Court is obliged to respect. Continued adherence to the doctrine would simply prolong the inability of citizens to effectively vindicate their constitutional rights.

ARGUMENT

I. THE DOCTRINE OF QUALIFIED IMMUNITY IS UNTETHERED FROM ANY STATUTORY OR HISTORICAL JUSTIFICATION.

A. The text of 42 U.S.C. § 1983 does not provide for any kind of immunity.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Yet few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. As currently codified, Section 1983 provides in relevant part:

> ***Every person who***, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, ***subjects***, or causes to be subjected, ***any citizen*** of the United States or other person within the jurisdiction thereof ***to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured*** in an action at law, suit in equity, or other proper proceeding for redress,

> except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphases added). Notably, "the statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language just says that any person acting under state authority who causes the violation of any federal right "shall be liable to the party injured."

This unqualified textual command makes sense in light of the statute's historical context. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, itself part of a "suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[3] This purpose would have been undone by anything resembling modern qualified immunity jurisprudence. The Fourteenth Amendment itself had only been adopted three years earlier, in 1868, and the full sweep of its broad provisions was obviously not "clearly established law" by 1871. If Section 1983 had been understood to incorporate qualified immunity, then Congress's attempt to address rampant civil rights violations in the post-war South would have been toothless.

Of course, no law exists in a vacuum, and a statute will not be interpreted to extinguish by implication longstanding legal defenses available at common law. *See Forrester v. White*, 484 U.S. 219, 225-26 (1988). In the context of qualified immunity, the Court correctly

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[3] Baude, *supra*, at 49.

frames the issue as whether or not "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)). But the historical record shows that the common law of 1871 did not, in fact, provide for such immunities.

B. From the founding through the passage of Section 1983, good faith was not a defense to constitutional torts.

The doctrine of qualified immunity amounts to a kind of generalized good-faith defense for all public officials, as it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. But the relevant legal history does not justify importing any such freestanding good-faith defense into the operation of Section 1983; on the contrary, the sole historical defense against constitutional violations was *legality*.[4]

In the early years of the Republic, constitutional claims typically arose as part of suits to enforce general common-law rights. For example, an individual might sue a federal officer for trespass; the defendant would claim legal authorization to commit the alleged trespass in his role as a federal officer; and the plaintiff would in turn claim that the trespass was unconstitutional, thus defeating the officer's defense.[5] As many

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[4] *See* Baude, *supra*, at 55-58.

[5] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506-07 (1987). Of course, prior to the Fourteenth

scholars over the years have demonstrated, these founding-era lawsuits did not permit a good-faith defense to constitutional violations.[6]

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[7] which involved a claim against an American naval captain who captured a Danish ship off the coast of France. Federal law authorized seizure only if a ship was going *to* a French port (which this ship was not), but President Adams had issued broader instructions to also seize ships coming *from* French ports. *Id.* at 178. The question was whether Captain Little's reliance on these instructions was a defense against liability for the unlawful seizure.

The *Little* decision makes clear that the Court seriously considered but ultimately rejected the very rationales that would come to support the doctrine of qualified immunity. Chief Justice Marshall explained that "the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse

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Amendment, "constitutional torts" were almost exclusively limited to federal officers.

[6] *See generally* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3-14, 16-17 (2017); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14-21 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414-22 (1986).

[7] *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863 (2010) ("No case better illustrates the standards to which federal government officers were held than *Little v. Barreme*.").

from damages." *Id.* at 179. He noted that the captain had acted in good-faith reliance on the President's order, and that the ship had been "seized with pure intention." *Id.* Nevertheless, the Court held that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* In other words, the officer's only defense was legality, not good faith.

This "strict rule of personal official liability, even though its harshness to officials was quite clear,"[8] persisted through the nineteenth century. Its severity was mitigated somewhat by the prevalence of successful petitions to Congress for indemnification.[9] But indemnification was purely a legislative remedy; on the judicial side, courts continued to hold public officials liable for unconstitutional conduct without regard to a good-faith defense. *See, e.g.*, *Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891) (Holmes, J.) (holding liable members of a town health board for mistakenly killing an animal they thought diseased, even when ordered to do so by government commissioners).

Most importantly, the Court originally rejected the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Court held that a state statute violated the Fifteenth Amendment's ban on racial discrimination in voting. *Id.* at 380. The defendants argued that they could not be liable for money damages under Section 1983, because they acted on a good-faith belief that the statute

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[8] Engdahl, *supra*, at 19.

[9] Pfander & Hunt, *supra*, at 1867 (noting that public officials succeeded in securing private legislation providing indemnification in about sixty percent of cases).

was constitutional.[10] The Court noted that "[t]he nonliability . . . of the election officers for their official conduct is seriously pressed in argument," but it ultimately rejected any such good-faith defense. *Id.* at 378.

While the *Myers* Court did not elaborate much on this point, the lower court decision it affirmed was more explicit:

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910). This forceful rejection of any general good-faith defense "is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983's enactment."[11]

C. The common law of 1871 provided limited defenses to particular torts, not general immunity for all public officials.

The Court's primary rationale for qualified immunity is the purported existence of similar immunities that were well-established in the common law of 1871. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t

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[10] *See* Br. for Pls. in Error at 23-45, *Myers v. Anderson*, 238 U.S. 368 (1915) (Nos. 8-10).

[11] Baude, *supra*, at 58 (citation omitted).

common law, government actors were afforded certain protections from liability"). But to the extent contemporary common law included any such protections, these defenses were incorporated into the elements of particular torts.[12] In other words, a good-faith belief in the legality of the challenged action might be relevant to the *merits*, but there was nothing like the freestanding immunity for all public officials that characterizes the doctrine today.

For example, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826), held that a U.S. naval officer was not liable for capturing a Portuguese ship that had attacked his schooner under an honest but mistaken belief in self-defense. *Id.* at 39. The Court found that the officer "acted with honourable motives, and from a sense of duty to his government," *id.* at 52, and declined to "introduce a rule harsh and severe in a case of first impression," *id.* at 56. But the Court's exercise of "conscientious discretion" on this point was justified as a traditional component of admiralty jurisdiction over "marine torts." *Id.* at 54-55. In other words, the good faith of the officer was incorporated into the *substantive* rules of capture and adjudication, not treated as a separate and freestanding defense.

Similarly, as the Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." *Id.* at 556-57. But this defense was not a protection from liability for unlawful conduct. Rather, at common law, an officer who acted with good faith and probable cause

[12] *See generally* Baude, *supra*, at 58-60.

simply did not commit the tort of false arrest in the first place (even if the suspect was innocent).

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity.[13] *Pierson* involved a Section 1983 suit against police officers who arrested several people under an anti-loitering statute that the Court subsequently found unconstitutional. Based on the common-law elements of false arrest, the Court held that "the defense of good faith and probable cause . . . is also available to [police] in the action under [Section] 1983." *Id.* Critically, the Court extended this defense to include not just a good-faith belief in probable cause for the *arrest*, but a good-faith belief in the legality of the *statute* under which the arrest itself was made. *Id.* at 555.

Even this first extension of the good-faith aegis is questionable as a matter of constitutional and common-law history. Conceptually, there is a major difference between good faith as a factor that determines whether conduct was unlawful in the first place (as with the tort of false arrest), and good faith as a defense to liability for admittedly unlawful conduct (as with enforcing an unconstitutional statute). As discussed above, the baseline historical rule both at the founding and in 1871 was strict liability for constitutional violations. *See Anderson*, 182 F. at 230 (anyone who enforces an unconstitutional statute "does so at

[13] Baude, *supra*, at 52.

his known peril and is made liable to an action for damages by the simple act of enforcing a void law").[14]

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue—false arrest—admitted a good-faith defense at common law. But the Court's qualified immunity cases soon discarded even this loose tether to history. By 1974, the Court had abandoned the analogy to those common-law torts that permitted a good-faith defense. *See Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). And by 1982, the Court disclaimed reliance on the subjective good faith of the defendant, instead basing qualified immunity on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Court's qualified immunity jurisprudence has therefore diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support, and the relevant history establishes a baseline of strict liability for constitutional violations—at most providing a good-faith defense against claims analogous to some common-law torts. Yet qualified immunity functions today as an across-the-board defense, based on a "clearly established law" standard that was unheard of before the late twentieth century. In short,

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[14] *See also* Engdahl, *supra*, at 18 (a public official "was required to judge at his peril whether his contemplated act was actually authorized . . . [and] judge at his peril whether . . . the state's authorization-in-fact . . . was constitutional"); Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927) ("Prior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts.").

the doctrine has become exactly what the Court assiduously sought to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

II. QUALIFIED IMMUNITY SUBVERTS TRADITIONAL PRINCIPLES OF APPELLATE JURISDICTION AND PROCEDURAL FAIRNESS.

A. In the absence of qualified immunity, the Tenth Circuit would have lacked jurisdiction to consider Defendants' interlocutory appeal.

The Tenth Circuit based its decision in this case on the first prong of the qualified immunity analysis, and held that Maguire had not, in fact, demonstrated a violation of his constitutional rights. *Spencer v. Abbott*, No. 16-4009, 2017 U.S. App. LEXIS 24668, at *20-21 (10th Cir. Dec. 5, 2017). Therefore, this is not a case in which the application of *Harlow*'s "clearly established law" standard precluded a civil rights plaintiff from obtaining relief, even though the court had concluded that the defendants had acted unlawfully. But the legal propriety of qualified immunity is still a determinative issue here, because it provides the only basis for the Tenth Circuit's jurisdiction to decide this merits question in the first place.[15]

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[15] Of course, the Petition also argues that the Tenth Circuit was wrong on the merits, and that certiorari is warranted to resolve a circuit split on the question of whether *some* medical care, no matter how slight or inadequate, suffices to defeat an Eighth Amendment deliberate-indifference claim. *See* Pet. at 9–20. This issue is cert-worthy in its own right; *amicus* is simply explaining why this

Maguire's Section 1983 suit claimed that the Defendants' unconstitutional misconduct caused him to suffer a severe stroke. The complaint alleged—and discovery evidenced—that prison officials misdiagnosed Maguire's stroke as a mere muscle spasm (and later as a seizure), ignored his protestations that the problem was more serious than they claimed, left him alone in his cell to suffer, and ignored his repeated cries for help throughout the night. *See* Pet. at 4-6. The Defendants moved for summary judgment, but the district court held that—because of the patently unreasonable nature of the misdiagnosis and the repeated denials of Maguire's pleas for emergency aid—a reasonable jury could infer that the Defendants acted with deliberate indifference to Maguire's serious medical needs, in violation of the Eighth Amendment. *Id.* at 6-7.

Under traditional principles of civil procedure, Maguire would then have been entitled to a jury trial. The courts of appeals have jurisdiction only over "final decisions," 28 U.S.C. § 1291, and the denial of a motion for summary judgment usually does not qualify as a final decision. *See Ortiz v. Jordan*, 562 U.S. 180, 188 (2011). But in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court created an exception for denials of qualified immunity, and held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision.'" *Id.* at 530. Therefore, the Tenth Circuit's only basis for jurisdiction was a doctrine that, as discussed above, lacks any proper legal foundation.

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case would also be an appropriate vehicle for the Court to reconsider qualified immunity itself.

B. Applying the collateral order doctrine to denials of qualified immunity is legally unjustified, unfair to civil rights plaintiffs, and pragmatically ineffective.

If the Court agrees that qualified immunity ought to be reconsidered, then the proper result would be to vacate the Tenth Circuit's decision for lack of jurisdiction, and remand to the district court. But even aside from the problems with qualified immunity itself, application of the collateral order doctrine to denials of immunity rests on shaky legal and practical foundations.

The primary rationale for the Court's decision in *Mitchell* was the idea that qualified immunity is "an *immunity from suit* rather than a mere defense to liability" and is "effectively lost if a case is permitted to go to trial." 472 U.S. at 526. Therefore, the Court reasoned, if appellate courts cannot immediately review the denial of qualified immunity, then the district court's decision would be "effectively unreviewable." *Id.* at 527.

But while that *reasoning* may be sound enough, the Court identified no traditional legal basis for its key premise—that qualified immunity should operate as immunity from suit itself. Even though qualified immunity supposedly arises from "certain protections from liability" afforded to public officials "[a]t common law," *Filarsky*, 566 U.S. at 383, the *Mitchell* Court invoked no common-law basis for this understanding of the defense. Instead, the Court relied purely on the policy rationales articulated in *Harlow*:

> [T]he "consequences" with which we were concerned in *Harlow* are not limited to liability for

> money damages; they also include "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S., at 816. Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[inquiries] of this kind can be peculiarly disruptive of effective government." *Id.* at 817.

Mitchell, 472 U.S. at 526. Whatever the merit of these considerations, they certainly do not reflect an attempt to "interpret the intent of Congress in enacting § 1983," as "guided . . . by the common-law tradition." *Malley*, 475 U.S. at 335. Application of the collateral order doctrine—no less than the recognition of qualified immunity itself—was simply a "freewheeling policy choice" made by the Court. *Id.*

Yet even from a policy perspective, permitting interlocutory appeals for denials of immunity comes up short. Most obviously, this procedural aspect of qualified immunity imposes a one-sided disadvantage on civil rights plaintiffs, and makes any civil rights lawsuit longer and more expensive, no matter how meritorious the underlying claim. Plaintiffs essentially must prevail on appeal before they can even get to trial, which may well exhaust the already limited resources that most civil rights plaintiffs possess, or even deter meritorious claims from being brought in the first place.[16]

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[16] *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492 (2011) (discussing interviews with over 40 prominent civil rights attorneys or law firms, and noting

But the collateral order doctrine also fails to achieve the professed benefits for government defendants that motivated the Court to establish this rule in the first place. Judge James Gwin, of the Northern District of Ohio, discussed this concern in detail in a recent opinion critiquing the *Mitchell* decision:

> In the typical case, allowing interlocutory appeals actually increases the burden and expense of litigation both for government officers and for plaintiffs. Additional expense and burden result because an interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a trial that (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal.

Wheatt v. City of E. Cleveland, No. 1:17-CV-377, 2017 U.S. Dist. LEXIS 200758, *8-9 (N.D. Ohio Dec. 6, 2017).[17]

In short, permitting interlocutory appeals of qualified immunity is impractical and not legally justified.

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that "[n]early every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage," and that for some, it was "the primary factor when evaluating a case for representation").

[17] *See also* Schwartz, *supra*, at 130 ("[T]here is no basis to conclude that qualified immunity reduces the costs of Section 1983 litigation, and reason to believe it actually increases costs in some cases.").

The Tenth Circuit's decision in this case highlights this particular procedural concern, which provides yet another compelling reason why the Court should reconsider qualified immunity entirely.

III. *STARE DECISIS* SHOULD NOT PRECLUDE THE COURT FROM RECONSIDERING QUALIFIED IMMUNITY.

The legal and practical infirmities of qualified immunity have not gone unnoticed by members of this Court. *See Kisela v. Hughes*, 584 U.S. ___, No. 17-467, slip op. at 15 (Apr. 2, 2018) (Sotomayor, J., dissenting) (the Court's "one-sided approach to qualified immunity" has "transform[ed] the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity for executive officials, . . . we have diverged from the historical inquiry mandated by the statute."); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 USC § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials, . . . we have diverged to a substantial degree from the historical standards.").

Unless and until this tension is addressed, the Court will "continue to substitute [its] own policy preferences for the mandates of Congress." *Ziglar*, 137 S.

Ct. at 1872. Fortunately, the Petition at issue presents exactly that "appropriate case" for the Court to "reconsider [its] qualified immunity jurisprudence." *Id.* And if the Court is inclined to reconsider qualified immunity, it should not hesitate to do so for any reasons sounding in *stare decisis.*

First, the doctrine has failed to produce the "stability, predictability, and respect for judicial authority" that comprise the traditional justifications for *stare decisis*. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The "clearly established law" standard announced in *Harlow* has proven hopelessly malleable, because there is no simply objective way to define the level of generality at which it should be applied. The Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). But for more specific guidance, the Court has stated simply that "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 742). The difficulty, of course, is that this instruction is circular—how to identify clearly established law depends on whether the illegality of the conduct was clearly established.

It is therefore no surprise that lower courts have struggled to consistently apply the Court's precedent. Since the "clearly established law" standard was announced in *Harlow*, the Court has decided 31 qualified immunity cases[18]—only twice has the Court ever

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[18] *See* Baude, *supra*, at 82, 88-90 (identifying cases from 1982–2017); *see also Kisela v. Hughes*, 584 U.S. ___, No. 17-467, slip

found that conduct violated clearly established law,[19] and all but two of the cases granting qualified immunity *reversed* the lower court's decision.[20] Notwithstanding this aggressive disposition of cases, however, lower court judges persist in their confusion on the nebulous question of how similar the facts of a prior case must be for the law to be "clearly established."[21]

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op. (Apr. 2, 2018); *District of Columbia v. Wesby*, 583 U.S. ___, No. 15-1485, slip op. (Jan. 22, 2018).

[19] *See Groh v. Ramirez*, 540 U.S. 551 (2004); *Hope v. Pelzer*, 536 U.S. 730 (2002); Baude, *supra*, at 82, 88-90.

[20] *See* Baude, *supra*, at 84 & n.228.

[21] From the last year alone: *Compare, e.g.*, *Demaree v. Pederson*, 887 F.3d 870, 884 (9th Cir. 2018) (denying immunity because of "a very specific line of cases . . . which identified and applied law clearly establishing that children may not be removed from their homes without a court order or warrant absent cogent, fact-focused reasonable cause to believe the children would be imminently subject to physical injury or physical sexual abuse"), *with id.* at 891 (Zouhary, J., concurring and dissenting in part) (arguing that no case addressed "circumstances like these, where the type of abuse alleged is sexual exploitation, and it would take a social worker at least several days to obtain a removal order"); *Latits v. Phillips*, 878 F.3d 541, 553 (6th Cir. 2017) (granting immunity because prior cases "did not involve many of the key[] facts in this case, such as car chases on open roads and collisions between the suspect and police cars"), *with id.* at 558 (Clay, J., concurring in part and dissenting in part) ("It is a truism that every case is distinguishable from every other. But the degree of factual similarity that the majority's approach requires is probably impossible for any plaintiff to meet."); *Sims v. Labowitz*, 885 F.3d 254, 264 (4th Cir. 2017) (denying immunity because "well-established Fourth Amendment limitations . . . would have placed any reasonable officer on notice that [ordering a teenage boy to masturbate in front of other officers] was unlawful"), *with id.* at 269 (King, J., dissenting) ("[N]o reasonable police officer or lawyer would have considered this search warrant . . . to violate

Second, qualified immunity is not entitled to the "special force" that is traditionally accorded *stare decisis* in the realm of statutory precedent. *Hilton*, 502 U.S. at 202. It is doubtful whether qualified immunity should even be characterized as "statutory interpretation," as it is not an interpretation of any particular word or phrase in Section 1983. In practice, the doctrine operates more like federal common law—a realm in which *stare decisis* is less weighty, precisely because the Court is expected to "recogniz[e] and adapt[] to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

But the most compelling reason not to treat qualified-immunity precedent with special solicitude is that this Court itself has not done so in the past. In *Harlow*,

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a clearly established constitutional right."); *Allah v. Milling*, 876 F.3d 48, 59 (2d Cir. 2017) (granting immunity because "[d]efendants were following an established DOC practice" and "[n]o prior decision . . . has assessed the constitutionality of that particular practice"), *with id.* at 62 (Pooler, J., concurring in part, dissenting in part, and dissenting from the judgment) ("I do not see how these [solitary confinement] conditions were materially different from 'loading [him] with chains and shackles and throwing him in a dungeon.'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)) (second alteration in original); *Young v. Borders*, 850 F.3d 1274, 1281 (11th Cir. 2017) (Hull, J., concurring in the denial of rehearing en banc) ("The dissents define clearly established federal law at too high a level of generality . . . ."), *with id.* at 1292 (Martin, J., dissenting in the denial of rehearing en banc) ("In circumstances closely resembling this case, this Court held that an officer's use of deadly force was excessive even though the victim had a gun."); *see also Harte v. Bd. of Comm'rs*, 864 F.3d 1154, 1158, 1168, 1198 (10th Cir. 2017) (splintering the panel into three conflicting opinions on whether the various acts of misconduct violated clearly established law).

for example, the Court replaced subjective good-faith assessment with the "clearly established law" standard. 457 U.S. at 818-19. And the Court created a mandatory sequencing standard in *Saucier v. Katz*, 533 U.S. 194 (2001)—requiring courts to first consider the merits and then consider qualified immunity—but then overruled *Saucier* in *Pearson v. Callahan*, 555 U.S. 223 (2009), which made that sequencing optional.

Indeed, the *Pearson* Court squarely considered and rejected the argument that *stare decisis* should prevent the Court from reconsidering its qualified immunity jurisprudence. The Court noted in particular that the *Saucier* standard was a "judge-made rule" that "implicates an important matter involving internal Judicial Branch operations," and that "experience has pointed up the precedent's shortcomings." *Id.* at 233-34. As this brief has endeavored to show, the same charges could be laid against qualified immunity more generally. It would be a strange principle of *stare decisis* that permitted modifications only as a one-way ratchet in favor of *greater* immunity (and against the grain of text and history to boot).

Third, *stare decisis* does not justify adhering to precedent that continues subjecting individuals to unconstitutional conduct. *See Arizona v. Gant*, 556 U.S. 332, 348 (2009). While qualified immunity is not itself a constitutional rule, it has the effect of abetting constitutional violations, because it vitiates the very statute that was intended to secure and vindicate constitutional rights. The mere fact that some state officials may have come to view the protection of the doctrine as an entitlement "does not establish the sort of reliance interest that could outweigh the countervailing

interest that all individuals share in having their constitutional rights fully protected." *Id.* at 349.

CONCLUSION

Sound textual analysis, informed legal history, judicial prudence, and basic justice all weigh in favor of reconsidering qualified immunity, and this case is an appropriate vehicle for that reconsideration. For the foregoing reasons, and those described by the Petitioner, this Court should grant certiorari.

Respectfully submitted,

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