No. 18-1173

IN THE
Supreme Court of the United States

I.B. AND JANE DOE, *Petitioners*,

v.

APRIL WOODARD, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Brief *Amicus Curiae* of Gun Owners Foundation, Gun Owners of America, Inc., Public Advocate of the United States, Downsize DC Foundation, DownsizeDC.org, The Heller Foundation, Conservative Legal Defense and Education Fund, Fitzgerald Griffin Foundation, and Restoring Liberty Action Committee in Support of Petitioners

JOSEPH W. MILLER
RESTORING LIBERTY
ACTION COMMITTEE
P.O. Box 83440
Fairbanks, AK 99708
Attorney for Amicus Curiae RLAC

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
HERBERT W. TITUS
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*

**Counsel of Record*

April 10, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, Downsize DC Foundation, The Heller Foundation, Conservative Legal Defense and Education Fund, and Fitzgerald Griffin Foundation are nonprofit educational, legal, and religious organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). Gun Owners of America, Inc., Public Advocate of the United States, and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Restoring Liberty Action Committee is an educational organization.

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

Petitioners are a minor child (I.B.) and her mother (Jane Doe) who brought suit against an El Paso (Colorado) County Department of Human Services

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

("DHS") caseworker, April Woodard, for a warrantless and egregious violation of the then four-year-old girl's body. That violation included taking the girl from her Head Start class at a public (government) school in Colorado Springs, undressing the girl against her will (and without her mother's consent), visually examining the child's body, and photographing her private areas using a cell phone. *See* Doe v. Woodard, 912 F.3d 1278, 1285-86 (10th Cir. 2019).

The offense was not the action of one misguided individual making a split second decision in the field. Rather, social worker Woodard was sent to the government school to investigate a tip, and then instructed by her DHS superior Christina Newbill to perform the strip search. Moreover, the undressing and photographing appear to have been routinely performed on minor children pursuant to what defendants described as an "'unwritten, but well-established county-wide policy or custom'" which did not require obtaining "'parental consent or a court order.'" *Id*. at 1286.

The strip search performed was based solely on a tip from an "anonymous source," and carried out even though the Doe family had been the object of previously fraudulent reports of child abuse. The same DHS already had conducted "'half a dozen'" investigations in the Does' home, these tips were deemed "'false'" and "unfounded," but apparently this series of unfounded investigations gave the DHS no pause in acting on the current anonymous accusation. *Id*.

When social worker Woodard visited Ms. Doe at home the following day, she failed to inform Ms. Doe that she had stripped, inspected, and photographed her daughter. Ms. Doe, by contrast, cooperated fully. The case was closed, once more, "as unfounded." *Id.*

Afterward, the minor child told her mother that she would refuse to see social worker Woodard again because "'I don't like it when she takes all my clothes off.'" *Id.* When Ms. Doe confronted social worker Woodard about the strip search, social worker Woodard first lied, denying that it had occurred. Thereafter she admitted her actions, advising Ms. Doe that "a child abuse accusation and investigation takes priority over the mother's parental rights." *Id.*

Petitioners filed suit under 42 U.S.C. § 1983, alleging, *inter alia*, violation of the minor child's Fourth Amendment rights. The governmental defendants moved to dismiss based on, *inter alia*, qualified immunity, and the district court dismissed the action on the basis of that doctrine. *Id.* at 1287. The Tenth Circuit affirmed. *Id.* at 1285.

SUMMARY OF ARGUMENT

A Republic with a written constitution that limits government powers and enumerates rights of the People must have effective methods to ensure that government officials abide by those limitations and rights. One line of defense is the character and common sense of the officials, who make a solemn pledge to abide by the constitution and laws of the nation as a condition of entering government service.

However, the People need meaningful tools to check the lawless exercise of power of elected officials, appointed officials, and even low-level government bureaucrats, as in this case. The ability of Americans to bring a suit under 42 U.S.C. § 1983 is an effective way that Congress has provided to penalize government officials who act lawlessly, disrespecting the People. Unfortunately, over time, the federal judiciary has undermined the effectiveness of this statutory remedy with its doctrine of qualified immunity.

In this case, a bureaucrat did great harm to a defenseless four-year-old girl, robbing her of her natural modesty by seizing her from her Head Start class, forcibly removing her clothes to visually inspect her unclothed body, and compounding the offense by taking photographs — all based on an anonymous tip. The effects of such trauma can last a lifetime, and no social worker, even if authorized by her superior, and even if pursuant to a long-established policy, should have such a power. Moreover, the record reflects many reasons why a judge would not have issued a warrant for a bureaucrat to take these liberties with a little girl, which was just one of repeated indignities inflicted on Petitioner's family in a vain effort by DHS employees to find child abuse. Now that the social worker has injured the child, the Tenth Circuit has stepped in to retroactively validate the social worker's actions by cloaking her with complete immunity because it was able to distinguish on the facts prior abuses of children, and could find no "clearly established law." Such a ruling not only deprives

Petitioners of a remedy, it also places other children in jeopardy of future victimizations.

This case demonstrates the deeply flawed, judicially created doctrine of qualified immunity. That doctrine is built on a legal house of cards. Applied here, it assumes that the Fourth Amendment places no limit on an assault unless a court has previously ruled that it so applies. That dangerous doctrine can be seen to actually place federal courts over the Constitution (and statutes) of the land. The doctrine allows a remedy for some Fourth Amendment violations, while shielding others, based on the purely random happenstance as to whether a similar prior offense had occurred that was ruled on by this Court or the relevant Circuit Court. The doctrine is based on a demonstrably false belief that governmental workers had such immunity at common law, when it is known that officials involved in unlawful searches and seizures faced the risk of suit for trespass and false imprisonment. The doctrine assumes that government workers have perfect knowledge of thousands of court decisions, but could have no common sense understanding of the 24 words used by the Framers to identify the protection provided by the Fourth Amendment.

Ours is a government of laws, not of men. So proclaimed the great Chief Justice John Marshall in his acclaimed opinion in Marbury v. Madison. But, the Chief Justice warned, the United States would cease to deserve this accolade "if the laws furnish no remedy for the violation of a vested right." Marshall's opinion did not begin with him in 1803, but is deeply rooted in

the English common law, Sir William Blackstone having certified it in his Commentaries. As one of those sacred rights of Englishmen, the English colonists of North America claimed the remedial right as their own, tracing it back to Section 40 of the 1215 Magna Carta promise: "No one will we sell, to no one will we deny, or delay right or justice."

How does the modern Supreme Court's denial of a remedy to those injured by government officials who enjoy immunity for "good faith" violations of Section 1983 measure up? Not well at all according to the critics both on and off this Court. What is the solution for this failure? These *amici* urge this Court to reconsider its qualified immunity doctrine and return to the founding-era common law rule of strict liability for violations of § 1983. Anything less would betray the nation's solemn claim that it remains a government of laws, not of men.

The qualified immunity doctrine thwarts any remedy against not only Fourth Amendment violations, but also violations of other rights guaranteed by the Constitution, including the Second Amendment. Recently there has been a growth of "red flag laws," which allow a person's gun to be confiscated by a simple, *ex parte* petition of someone else who may or may not have that person's best interests in mind. Red flag laws combined with the doctrine of qualified immunity creates open season for law-abiding gun owners. These laws have already resulted in one death, with no measurable benefit.

ARGUMENT

I. THE QUALIFIED IMMUNITY DOCTRINE IS DEEPLY FLAWED.

A. The Tenth Circuit's Application of the Qualified Immunity Doctrine Barred a Congressionally Created Civil Remedy for Two Americans Whose Rights Were Violated Egregiously by State Officials.

The action below, for violation of Fourth Amendment rights, was brought under § 1983, which provides:

> 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.... [42 U.S.C. § 1983 (emphasis added).]

There is no qualified immunity provided for in § 1983 or in any other federal statute, and it is purely a judicially created doctrine which overrides an effort to obtain redress for the deprivation of a constitutional or statutory right. Based on excerpts from earlier cases,

the Tenth Circuit variously described the doctrine as follows (citations omitted):

- "shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law" (Doe at 1289);

- "[Q]ualified immunity ... protects 'all but the plainly incompetent or those who knowingly violate the law," (*id.*);

- "A constitutional right is clearly established if it is 'sufficiently clear that every[2] reasonable official would have understood that what he is doing violates that right,'" (*id.*);

- "The plaintiff must show there is a 'Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains,'" (*id.*);

- "'existing precedent must have placed the statutory or constitutional question beyond debate' for a right to be clearly established," (*id.*);

- "There 'need not be a case precisely on point' ... [b]ut ... 'clearly established law should not be

---

[2] Note the use of the term "every" rather than "the average" or "the well-informed" state worker. This test establishes a virtually unreachable standard. It is difficult to believe that there is any legal principle which is clearly known to "every" social worker.

> defined at a high level of generality... [but] a high degree of specificity,'" (*id.*); and
>
> • "[T]he salient question ... is whether the state of the law ... gave [the defendants] fair warning that their alleged treatment of [the plaintiffs] was unconstitutional" (*id.*).

Thus, the Tenth Circuit operated on its understanding that the judicially created qualified immunity doctrine granted state government agents total and complete immunity from a § 1983 action based on the deprivation of right when: neither the U.S. Supreme Court nor the Tenth Circuit had previously decided a case which was factually nearly identical to the violation alleged (and there was not virtual unanimity in identical cases arising in other circuits), thereby demonstrating that there was no "clearly established law" which state officials were required to follow.

The Tenth Circuit does acknowledge a line of cases where there could be "the rare alleged violation of minimal Fourth Amendment standards that is so 'obvious' that a factually similar case is unnecessary for the clearly established law standard." Doe at 1299. However, the Tenth Circuit concluded — remarkably — that "this argument fails" because "[t]his is not an obvious case where a body of relevant case law is not needed." *Id.* (citing District of Columbia v. Wesby, 138 S.Ct. 577, 591 (2018)).

When the Tenth Circuit, believing that it was following this Court's qualified immunity precedents,

took the position that petitioner I.B. and her mother Jane Doe had no right to bring an action under 42 U.S.C. § 1983 because it was not "clearly established law," these persons were rendered powerless to defend themselves against lawless government actors. Such decisions lead to disrespect not just of the judiciary, but of the government, incrementally breaking the bonds that hold together the nation. It has long been observed that "hard cases make bad law." Justice Oliver Wendell Holmes once opined that "[g]reat cases like hard cases make bad law." Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904). In this case, a hard case has revealed bad law, and hopefully a hard case will result in good law.

B. The Qualified Immunity Doctrine Assumes that the People's Constitution Was Insufficient to "Clearly Establish" Constraints on Government Officials unless and until Courts Sanctioned those Rules.

What is truly amazing about the qualified immunity doctrine as applied by the Tenth Circuit is that it assumed that the U.S. Constitution is not "clearly established law" unless the courts say that it is.

The first part of the Fourth Amendment limits the power of government by providing the assurance that:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated....

This assertion of a right is clear, and stated in 24 words. By the Amendment's text, there is no question that the People have a protected property interest in their "persons." The word "unreasonable" should be understood in the context of the understanding of the Framers, and no evidence has been offered to show that strip searches of four year olds by state officials would have been tolerated by the Framers. But even in a culture that has been looted of its modesty by our ruling elites, if "reasonableness" were viewed from the standpoint of the people today, there is little doubt that if the American people were polled on the issue as to whether their children could be strip searched, examined, and photographed on cell phones by state employees, acting without probable cause or judicial warrant, that their disgust at this practice would be clear and unambiguous. Only to those who view themselves to be part of our ruling elite, whether social workers who act in derogation of God-given parental rights "in the best interests of the child," or judges, would such searches not be understood to be clearly unreasonable.

As with all limitations on the power of government and all protections of the rights of the People, the issue raised by the Fourth Amendment is how the People can be assured of protection from unconstitutional searches and seizures by government officials. Stated another way, how can the Constitution be enforced when government agents treat the Constitution as a mere "parchment barrier"? Certainly there could be

possible remedies. The head of the Colorado DHS could be pressured to fire the offending worker or change the established policy. When unconstitutional searches and seizures result in prosecution of an individual, the exclusionary rule, when actually enforced, provides an individual a degree of protection against government abuse. And there could be political remedies, such as where the People vote out state officials who violate their rights, such as by defeating the Governor at the polls. But Congress saw fit to provide a civil action as a remedy which could be invoked by one aggrieved American without the need to rally a majority of his neighbors to the cause. It is not within the power of the Court to determine that statutes enacted by Congress are not "clearly established law." It certainly is not the role of the judiciary to determine that the People's Constitution is not itself "clearly established law."

C. The Qualified Immunity Doctrine Is Irrational Because It Randomly Protects Only those Rights Previously Recognized by "Established Legal Authority."

Whether or not Petitioners would be afforded a remedy for the wrong committed against them was dependent on an extraneous event — whether the Supreme Court or the Tenth Circuit fortuitously having faced a virtually identical fact situation, which was judicially found to constitute an unconstitutional search or seizure. In other words, whether a right is available would be determined by litigation to which the currently aggrieved parties were not participants

and might not even have been aware. It allows a statutory remedy to be afforded in a State in one Circuit, when the qualified immunity doctrine blocks that remedy in an adjoining State. Although there are numerous circumstances where circuits rule differently, until the issues are finally resolved by this Court, this type of disparate treatment is based on happenstance, not principle. Whether relief can be obtained has a quality of chance and randomness that should not be permitted to continue.

D. The Qualified Immunity Doctrine Impedes the Development of Fourth Amendment Case Law.

The Tenth Circuit cited Pearson v. Callahan, 555 U.S. 223, 236 (2009) for the proposition that "A court evaluating qualified immunity is free to 'exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'" Doe at 1289. Should the court initially consider the second prong — whether "'the constitutional right was clearly established at the time of the alleged violation'" — and rule against plaintiff, it would never reach the first prong — whether "'a constitutional violation occurred.'" *Id*. This allows courts to avoid clearly establishing anything. As Fifth Circuit Judge Don Willett noted in a concurring opinion:

> [Courts] avoid scrutinizing the alleged offense by skipping to the simpler second prong: no factually analogous precedent. Forgoing a

> knotty constitutional inquiry makes for easier sledding. But the inexorable result is "constitutional stagnation" — fewer courts establishing law at all, much less *clearly* doing so. [Zadeh v. Robinson, 902 F.3d 483, 498-99 (5th Cir. 2018) (Willett, J., concurring dubitante).]

This is exactly what happened below. The court first addressed the "clearly established" issue, and therefore skirted the need (and duty) to speak to the existence of a constitutional violation. Thus, in this case, and many others similar to it, there would never be a controlling Tenth Circuit decision on the issue of whether a warrantless strip search and photography of a young child by a social worker in fact violates the Fourth Amendment. Rather, social workers in the Tenth Circuit are signaled that they may proceed to invade the natural modesty of these children based on anonymous tips, or even less of a rationale, as it suits them.

E. The Qualified Immunity Doctrine Is Based on a Flawed Assumption about the Common Law.

In Pierson v. Ray, 386 U.S. 547 (1967), the Court explained the logic it followed to conclude that qualified immunity existed at common law. First, the Court stated that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Id.* at 553-54. Second, the Court stated that "[t]he legislative record

gives no clear indication that Congress meant to abolish wholesale all common-law immunities" when it enacted § 1983. *Id*. at 554. Then "the Court extended qualified immunity to officials who conducted themselves in good faith, without making any effort to determine whether any officials enjoyed such immunity at common law." Evan Bernick, "It's Time to Limit Qualified Immunity, Georgetown Law (Sept. 17, 2018).

Indeed, the comprehensive history uncovered by William J. Cuddihy in The Fourth Amendment: Origins and Original Meaning 602-179 (Oxford Univ. Press: 2009) demonstrates that those who perpetrated unlawful searches and seizures were not immunized for their wrongful actions, but instead were held responsible. He explained:

> For centuries before the American Revolution, Englishmen had contested searches and seizures by characterizing them in court as instances of trespass or false imprisonment. [*Id*. at 593.]

Additionally, Cuddihy explained that, after Entick v. Carrington, 19 Howell's State Trials (1765), and The Wilkes Cases, 19 Howell's State Trials (1763-68), the rule that applied was the **exact reverse** of the doctrine of qualified immunity:

> Until those cases, searches and seizures constituted wrongs **only when** a statute or precedent so declared and, even then, only the instigators of those wrongs were culpable.

> After the *Wilkes Cases*, searches and seizures were wrongs **unless** a statute or precedent declared otherwise, and agents as well as instigators were culpable. [Cuddihy at 594 (emphasis added).]

The qualified immunity doctrine should be re-examined in view of its flawed historical foundation.

F. The Qualified Immunity Doctrine Incentivizes State Actors to Perform Unconstitutional Searches and Seizures where They Do Not Believe that They Can Obtain Warrants.

This case provides an excellent illustration of a factual setting where it appears clear that no independent judicial magistrate, if asked, would have authorized a warrant. The second component of the Fourth Amendment provides:

> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Based on the facts set out in the Tenth Circuit's opinion, not only was there no probable cause that could be found, there was strong indication that the Doe family had been the object of a campaign of harassment. The record does not make clear whether the harassment came from third parties who made

anonymous tips or from the Department of Human Services itself.

As set out in the Statement, *supra*, the strip search was performed based solely on a tip from an "anonymous source," with no indication of the credibility of that source. Moreover, there was no visible bruising that would indicate child abuse that could corroborate such an "anonymous source." Second, the Doe family had been the object of numerous fraudulent reports of child abuse. The same DHS that authorized and conducted the strip search had conducted "'half a dozen'" investigations in the Doe home, and all of the tips that led to those numerous investigation ultimately were deemed "'false'" and "unfounded." *See* Doe at 1286. Although this series of unfounded investigations gave the DHS no pause in acting on the current anonymous accusation, if the affidavit seeking a warrant revealed that history, it is highly doubtful a warrant would have issued.

Indeed, one of the reasons, if not the primary reason, that a warrant would not be sought in a situation such as this, is the belief that it would be denied. If the affidavit submitted accurately revealed that the only possible justification was an anonymous tip, and the Doe family had been harassed on the same basis before, there would be no "probable cause." In order to obtain a warrant to do what the social worker April Woodard did to this little girl, she would have been required to lie by omitting relevant facts or including false statements. Such fabrication in affidavits would be unlikely to be caught or punished, but nonetheless, the qualified immunity doctrine

allows state workers to skip the ethical problem of signing a misleading affidavit, aware that she will be protected by the courts even if she knew that she was conducting an unconstitutional search and seizure.

G. The Qualified Immunity Doctrine Combined with the Special Needs Exception to the Fourth Amendment Warrant Requirement Creates Nothing but Uncertainty.

The Tenth Circuit concluded that the Supreme Court had "not addressed the special needs doctrine in the context of social workers' inspection of children upon suspicion of child abuse" (*id*. at 1291-92) even though it rejected the special needs doctrine to justify a search in a different child abuse context involving a hospital's testing of pregnant mothers. And, although the Tenth Circuit had rejected "special needs" justification for removing a minor child from a home for questioning about suspected abuse of another child, those cases were found to be too factually dissimilar. Lastly, other circuits have divided on the issue. *See id*. at 1292. Allowing reviewing courts the latitude to determine how close the fact of a prior precedent needs to be to the current case introduces nothing but confusion and uncertainty.

II. THE QUALIFIED IMMUNITY DOCTRINE BETRAYS THE RULE OF LAW.

"The government of the United States," Chief Justice John Marshall wrote in Marbury v. Madison, 5 U.S. 137 (1803), "has been emphatically termed a

government of laws, and not of men." *Id.* at 163. Continuing, the Chief Justice no less emphatically observed: "It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right." *Id.* Thus, he explained:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection [as evidenced] [i]n Great Britain [when] the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court. [*Id.*]

In support of this proposition, the Chief Justice summoned the wisdom of Sir William Blackstone who, in Volume 3 of his Commentaries on the Laws of England, affirmed that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" *Id.*

In further reliance on Blackstone, the Chief Justice concurred that, except for injuries that "fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals," "all possible injuries whatsoever [are] within the cognizance of the common law courts of justice," reiterating that "it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* As such, this right was, therefore, vested in those Englishmen who

were inhabitants of the English colonies of North America before the founding of the United States of America. *See* Declaration and Resolves of the First Continental Congress, reprinted in Sources of Our Liberties at 286-87 (R. Perry & J. Cooper, eds., Rev. ed., ABA Found.: 1978).

To better preserve this common law right, several states included a separate "civil remedies" guarantee in their constitutions. *See* Hans Linde, "Without 'Due Process,'" 49 OR. L. REV. 125, 136-38 (Feb. 1970). The clause came in a detail-laden form in Section 12 of the 1776 Delaware Declaration of Rights which reads:

> That every freeman for every injury done him in his goods, lands or person, by any other person, ought to have remedy by the course of the law of the land, and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land. [Sources at 339.]

Not to be surpassed, both the 1780 Constitution of Massachusetts and the 1784 Constitution of New Hampshire adopted an almost identical provision, Article XI of the Massachusetts document, reading:

> Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase

> it; completely, and without denial; promptly, and without delay; conformably to the laws. [Sources at 376.]

Although sometimes confused with the more well-known right of "due process of law," the right to a civil remedy to redress a civil wrong, has a different pedigree — the due process right relates back to the "law of the land" Section 39 of the English Magna Carta, while the right to a remedy relates back to Section 40 ("To no one will we sell, to no one will we deny, or delay right or justice."). *See* Linde at 138.

How does the court-developed immunity doctrine, as applied to § 1983 actions, measure up to the Blackstone/Marshall legacy of the rule of law? At the heart of the modern Court's qualified immunity doctrine is the claim that it is governed by the common law of good faith as it existed in 1871 — the year in which section 1983 was enacted by Congress." *See* Petition at 26. However, Justice Thomas has noted that the Court's current "analysis is no longer grounded in th[at] common-law backdrop," but has been engaged in its own "freewheeling policy choices." Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring). And, Justice Sotomayor recently has made known her displeasure with the "one-sided approach to qualified immunity [that] transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

The Petitioner is urging the Court to grant review not only for herself, but for the future, urging this Court "to reconsider its qualified-immunity jurisprudence." Pet. at 25. These *amici* join in this endeavor, giving special attention to the nation's founding era and the nation's covenant to build on the rule of law, as understood by Chief Justice Marshall in Marbury v. Madison.

In a challenging article, Professor William Baude has a section entitled, "Legality Instead of Good Faith" in which he gives an account of an 1804 opinion, rendered just one year after Marbury. William Baude, "Is Qualified Immunity Unlawful?," 106 CALIF. L. REV. 45 (2018). The question? Whether a naval Captain who relied on the President's instruction to capture a ship could be excused from liability even though the seizure was unlawful. Baude at 55-56. Even though the Chief Justice thought that the naval captain had "'seized with pure intention'" "[n]onetheless, the Court concluded, 'the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* at 56. "In other words," Professor Baude concluded, "good-faith reliance did not create a defense to liability – what mattered was legality." *Id.* For in Blackstone's and Marshall's day, a "'strict rule of personal official liability, even though its harshness to officials was quite clear,' was a fixture of the founding era." *Id.*

III. THE DOCTRINE OF QUALIFIED IMMUNITY PROVIDES A DISINCENTIVE FOR GOVERNMENT OFFICIALS TO RESPECT THE CONSTITUTIONAL RIGHTS OF AMERICANS.

Just last year, this Court summarily reversed a Ninth Circuit ruling that a police officer was not entitled to qualified immunity when he shot a woman who was holding a kitchen knife by her side. Kisela v. Hughes, 138 S.Ct. 1148 (2018). The officer had claimed that the woman he shot appeared to pose a threat to another woman standing nearby. Although the analysis of the case was fact intensive, it did not prevent this Court from deviating from its rule that it "rarely grant[s certiorari] when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. The Kisela case illustrates that Rule 10 is often honored in the breach by this Court when the case involves qualified immunity.

Additionally, demonstrating the peculiars of the qualified immunity doctrine, in Kisela, this Court overturned the Ninth Circuit's reliance on its own decision in Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997), which constituted clearly established precedent that the officer in Kisela was not justified in shooting the woman with the knife. *See* Kisela at 1154. Harris was the case brought against federal agents who were involved in the infamous Ruby Ridge, Idaho shootings that took place in August 1992. In Harris, the Ninth Circuit, to its credit, declined to grant qualified immunity to the federal agents who used deadly force

at the Weaver family cabin, despite their having clear instructions from their superiors "that they 'could and should' kill any adult male armed with a weapon in the vicinity of the Weaver cabin, regardless of whether he was threatening the officers or any other persons." Harris at 1202.

In Kisela, Justice Sotomayor dissented from the summary reversal. She drew much-needed attention to this Court's qualified immunity jurisprudence, explaining that it "sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." Kisela at 1162.

Yet, the trend seems to be in favor of expanding grants of qualified immunity, as in Kisela, and not denying it, as in Harris. Justice Sotomayor quoted Professor William Baude's article, "Is Qualified Immunity Unlawful?", *supra*, which concluded that "nearly all of the Supreme Court's qualified immunity cases come out the same way — by finding immunity for the officials." Indeed, he reported that the only two cases where this Court has declined qualified immunity were both well over 10 years ago. Baude at 82.

Making the matter all the more urgent, some 13 states have now enacted so-called "red flag laws," laws which permit issuance of an *ex parte* judicial order on the filing of a petition by law enforcement, family members, and in some states, teachers or school administrators. These laws authorize officials to seize

weapons — by force if necessary — without the commission of a crime or right to any type of adversarial hearing. It does not take a crystal ball to conclude that red lag laws combined with the doctrine of qualified immunity will result in the shooting of many Americans who have committed no crime whatsoever.

Red flag laws are being enacted under the promise that they will decrease gun violence as well as suicides. Such concern for public safety, it is asserted, justifies any infringement of Second Amendment rights. However, a recent study has shown that in the states that have had red flag laws for at least a two years, there has been no significant effect on violent crime or suicides. *See* John Lott & C. Moody, "Do Red Flag Laws Save Lives or Reduce Crime?" (Dec. 28, 2018), https://ssrn.com/abstract=3316573.

On the other hand, these red flag laws do result in more government violence against innocent Americans. For example, in Anne Arundel County, Maryland, on November 5, 2018, at 5:17 a.m., county police arrived at a home to serve a red flag protective order. After a pre-dawn struggle, at a time when raids cause confusion and danger reigns, the police shot and killed the man being forced to disarm, Gary J. Willis.[3] The *ex parte* protective order had been sought by just one family member, whose view of Mr. Willis was not shared by other family members, who described the

---

[3] *See* C. Campbell, "Anne Arundel police say officers fatally shot armed man while serving protective order to remove guns," *The Baltimore Sun* (Nov. 5, 2018).

subject as "harmless." Red flag laws will cause more and more of these dangerous situations to arise. And, if police officers are granted broad immunity to kill persons who have done nothing wrong, solely to enforce red flag searches and seizures based on the request of only one person, it will only incentivize police to, as Justice Sotomayor put it, "shoot first and think later." Kisela at 1162.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH W. MILLER
RESTORING LIBERTY ACTION COMMITTEE
P.O. Box 83440
Fairbanks, AK 99708
Attorney for Amicus Curiae RLAC

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
HERBERT W. TITUS
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*

**Counsel of Record*

April 10, 2019