No. 19-1291

In the Supreme Court of the United States

Charles Hamner,

Petitioner,

v.

Danny Burls, Warden, et al.,

Respondents.

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

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

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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 focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional 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 erosion of accountability 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 THE 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 freestanding 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 need of correction.[2]

The Eighth Circuit's decision in this case would push qualified immunity farther still from any anchor of legitimacy, removing the need for those accused of violating constitutional liberties to raise the defense at

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[2] *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *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."); *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) (noting "disquiet over the kudzu-like creep of the modern [qualified] immunity regime"); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

all. The facts of the case make plain the danger of allowing this wayward drift to continue. Charles Hamner was placed in solitary confinement after alerting prison authorities about a planned attack against a prison guard. No rationale was provided for the transfer, nor did Hamner have any meaningful way to challenge the decision. He was alone for 23 hours a day, often in total darkness, and subjected to a strip search the few times he was allowed to leave his cell. The Eighth Circuit not only declined to decide whether this confinement amounted to a constitutional violation, but dismissed the case on grounds of its own initiative, raising qualified immunity sua ponte. *See* Pet. at 2-7.

This refusal to reach the merits of the case is part of a regrettable trend. Following *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), courts have increasingly chosen not to decide whether alleged misconduct amounts to a violation of constitutional rights,[3] leaving "standards of official conduct permanently in limbo." *Camreta v. Green*, 563 U.S. 692, 706 (2011). It is increasingly urgent that the Court take up this issue, as contemporary qualified-immunity doctrine is not just legally unfounded—it is also proving practically unworkable in the lower courts, and it is severely undermining official accountability across the nation.

If the Court is inclined to reconsider qualified immunity, it should not hesitate to do so based on *stare*

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[3] *See* Andrew Chung et al., *For Cops who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.

decisis. The amorphous nature of the "clearly established law" test has precluded the doctrine from effecting the stability and predictability that normally justify respect for precedent. Moreover, the Court has already treated qualified immunity as a judge-made, common-law doctrine, and thus appropriate for revision. *See Pearson*, 555 U.S. at 233-34. Continued adherence to the doctrine would not serve valid reliance interests, but would only 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.

Notwithstanding that the Petition does not call upon the Court to reconsider qualified immunity entirely, the Court should still consider the questions presented with an eye toward the doctrine's fundamentally shaky legal foundations. It is troubling enough that lower courts increasingly refuse to reach the merits of Section 1983 claims and that the judges here raised qualified immunity sua sponte. But the fact that they do so in reliance on a doctrine that itself lacks a proper foundation in the text or history of Section 1983 means it is all the more important for this Court to put a halt to the most egregious applications of that doctrine.

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. Rarely can one comfortably cite the entirety of an applicable federal statute in a brief, but this case is an exception. As currently codified, Section 1983 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, 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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 a protected right "shall be liable to the party injured."

Section 1983's 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, a "suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[4] This statutory 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 implications of its broad provisions were 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 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 is a kind of generalized good-faith defense for all public officials, as it protects "all but the plainly incompetent or those who

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

knowingly violate the law." *Malley*, 475 U.S. at 341. But the relevant legal history does not justify importing any such defense into the operation of Section 1983; on the contrary, the sole historical defense against constitutional torts was *legality*.[5]

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 as a federal officer; and the plaintiff would in turn claim the trespass was unconstitutional, thus defeating the officer's defense.[6] As many scholars over the years have demonstrated, these founding-era lawsuits did not permit a good-faith defense to constitutional violations.[7]

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[8] which involved a claim against

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

[6] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506-07 (1987). Of course, prior to the Fourteenth Amendment, "constitutional torts" were almost exclusively limited to federal officers.

[7] *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).

[8] *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

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* Court seriously considered but ultimately rejected Captain Little's defense, which was based on the very rationales that would later 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 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,"[9] persisted through the nineteenth century. Its severity was mitigated somewhat by the prevalence of successful

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which federal government officers were held than *Little v. Barreme*.").

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

petitions to Congress for indemnification.[10] But 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 was constitutional.[11] 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

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[10] Pfander & Hunt, *supra*, at 1867 (noting that, in the early Republic and antebellum period, public officials secured indemnification from Congress in about sixty percent of cases).

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

> 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."[12]

C. The common law of 1871 provided limited defenses to certain 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 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.[13] In other words, good faith 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

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

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

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

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity.[14] *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

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

[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 was 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 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 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 his known peril and is made liable to an action for damages by the simple act of enforcing a void law").[15] And of course, the Court had *already* rejected incorporation of a good-faith defense into Section 1983 in the *Myers* case—which *Pierson* failed to mention, much less discuss.

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at

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[15] *See also* Engdahl, *supra*, at 18 (a public official "was required to judge at his peril whether his contemplated act was actually authorized . . . [and] . . . 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.").

issue—false arrest—admitted a good-faith defense at common law. One might then have expected qualified immunity doctrine to adhere generally to the following model: determine whether the analogous tort permitted a good-faith defense at common law, and if so, assess whether the defendants had a good-faith belief in the legality of their conduct.

But the Court's qualified immunity cases soon discarded even this loose tether to history. In 1974, the Court abandoned the analogy to common-law torts that permitted a good-faith defense. *See Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). And in 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, 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. THE COURT SHOULD GRANT CERTIORARI TO PREVENT THE ERROENEOUS EXPANSION OF A FLAWED DOCTRINE

The Eighth Circuit's opinion amounts to a transformative *expansion* of the qualified immunity doctrine. By raising the issue of immunity sua sponte, the panel effectively treated qualified immunity as a jurisdictional element. Such treatment is not in line with this Court's precedent, which views qualified immunity as an affirmative defense that must be raised by the defendant. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Federal courts generally lack the authority to consider waived defenses. *Wood v. Milyard*, 566 U.S. 463, 470-72 (2012). In *Angarita v. St. Louis County*, 981 F.2d 1537 (8th Cir. 1992), even the Eighth Circuit itself applied these principles to a belated assertion of qualified immunity, holding that "[b]y failing to raise this issue with the district court, appellants failed to preserve this issue for appeal." *Id.* at 1548.

The implication of the Eighth Circuit's ruling in this case is that courts, instead of neutrally adjudicating claims and defenses under traditional rules of civil and appellate procedure, should instead take it upon themselves to render one-sided aid to parties by identifying and developing defenses that the parties themselves failed to raise. This Court rebuked just such an approach last month. "In our adversarial system of adjudication, we follow the principle of party presentation . . . '[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" *United States v. Sineneng-Smith,* 140 S. Ct. 1575, 1579 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)).

The Court should be especially vigilant against countenancing such a practice with respect to a defense that itself lacks any proper legal basis, and which regularly denies relief to victims whose rights were violated.

III. THE COURT SHOULD RECONSIDER THE "CATCH-22" OF *PEARSON* DISCRETION.

The legal and practical infirmities of qualified immunity have not gone unnoticed by members of this Court. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] 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 . . . 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 . . . we have diverged to a substantial degree from the historical standards.").

A growing chorus of lower-court judges have also recognized the serious legal and practical problems with qualified immunity. *See, e.g.*, *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) ("I write separately to register my disquiet over

the kudzu-like creep of the modern immunity regime. Doctrinal reform is arduous, often-Sisyphean work . . . . But immunity ought not be immune from thoughtful reappraisal."); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 U.S. Dist. LEXIS 132455, *46 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment.").[16]

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[16] *See also Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, No. CIV 16-0765, 2018 U.S. Dist. LEXIS 147840, *57 n.10 (D. N.M. Aug. 30, 2018) ("The Court disagrees with the Supreme Court's approach [to qualified immunity]. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy."); *Thompson v. Clark*, No. 14-CV-7349, 2018 U.S. Dist. LEXIS 105225, *26 (E.D.N.Y. June 11, 2018) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny."); *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) (criticizing the Supreme Court's decision to permit interlocutory appeals for denials of qualified immunity); 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); Jon O. Newman, Opinion, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016) (article by senior judge on the Second Circuit); Stephen Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219 (2015) (article by former judge of the Ninth Circuit).

Unless and until these tensions are addressed, the Court will "continue to substitute [its] own policy preferences for the mandates of Congress." *Ziglar*, 137 S. Ct. at 1872. At the very least, the Court should reconsider its decision in *Pearson v. Callahan*, 555 U.S. 223 (2009), which permitted lower courts to grant qualified immunity without even deciding whether the plaintiff's constitutional rights were violated. That "discretion"—which courts exercise with increasing frequency—has resulted in a perverse "Catch-22": plaintiffs can only overcome qualified immunity if the law is clearly established, but qualified immunity prevents the law from becoming clearly established in the first place.

A. The *Pearson* framework is practically unworkable and fails to promote stability and predictability in the law.

Although *stare decisis* is a "vital rule of judicial self-government," it "does not matter for its own sake." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). Rather, it is important precisely "because it 'promotes the evenhanded, predictable, and consistent development of legal principles.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). The rule therefore "allows [the Court] to revisit an earlier decision where experience with its application reveals that it is unworkable." *Id.* Qualified immunity—especially the self-defeating standard articulated in *Pearson*—is a textbook example of an unworkable doctrine that has utterly failed to provide the "stability, predictability, and respect for judicial authority" that comprise the traditional justifications for *stare decisis* in the first place. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Judge Erickson's reluctant concurrence below discusses the persistent practice of courts granting immunity, without even deciding upon the merits of the constitutional claim at issue. Although lower courts have the *discretion* to resolve qualified immunity cases in such a manner, "the inexorable result is 'constitutional stagnation'—fewer courts establishing law at all, much less *clearly* doing so," *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part). As another Eighth Circuit judge recently explained: "There is a better way. We should exercise our discretion at every reasonable opportunity to address the constitutional violation prong of qualified immunity analysis, rather than defaulting to the 'not clearly established' mantra." *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (en banc) (Grasz, J., dissenting).

The lack of precedent setting forth circumstances in which unconstitutional misconduct violates "clearly established law" has serious and negative effects. Without such decisions, the law is perennially unsettled, in effect transforming qualified immunity into absolute immunity. This state of affairs has been aptly described as a "Catch-22" in which "[p]laintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before." *Zadeh,* 928 F.3d at 479.

These statements are not mere conjecture. A Reuters report examining excessive force lawsuits made under Section 1983 found that while courts ruled in favor of plaintiffs in 55-57% of excessive force claims between 2005 and 2010, that number fell steadily in

the decade after *Pearson*. Only 43% of plaintiffs requesting relief for these claims between 2017 and 2019 were above to overcome qualified immunity.[17] Since *Pearson*, "appeals courts have increasingly ignored the question of excessive force. In such cases, when the court declines to establish whether police used excessive force in violation of the Fourth Amendment, it avoids setting a clearly established precedent for future cases, even for the most egregious acts of police violence. In effect, the same conduct can repeatedly go unpunished." *Id.*

While this petition presents a different constitutional issue than the subject of the *Reuters* study, it is wrought through the same flawed analysis—and reaches the same flawed result. As the Petition notes, 62.5% of Section 1983 lawsuits involving solitary confinement were stonewalled by qualified immunity before the constitutional question was reached. Pet. at 21. One is left to wonder how many of these plaintiffs were deprived of a remedy simply because courts had declined to resolve the same question in a prior case.

To the extent that judicial precedent fails to promote the goals of stability and predictability, *stare decisis* is entitled to proportionally less consideration. *See Johnson*, 135 S. Ct. at 2562. That is exactly the case with qualified immunity—especially *Pearson* discretion—so it would therefore be especially appropriate for the Court to reconsider this precedent.

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[17] Andrew Chung et al., *For Cops who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.

B. The Court has repeatedly rejected the idea that *stare decisis* precludes reconsideration of qualified immunity.

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. Although the doctrine is nominally derived from Section 1983, it is doubtful whether qualified immunity should even be characterized as "statutory interpretation." It is not, of course, an interpretation of any particular word or phrase in Section 1983. In practice, the doctrine operates more like free-standing federal common law, and lower courts routinely characterize it as such.[18] And in the realm of federal common law, *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).

The most compelling reason not to treat this precedent with special solicitude is that this Court itself has not done so in the past. In *Pierson*, for example, the Court created a good-faith defense to suits under Section 1983, after having rejected the existence of any such defenses in *Myers*. Then in *Harlow*, 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

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[18] *See, e.g.*, *Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009); *Woodson v. City of Richmond*, 88 F. Supp. 3d 551, 577 (E.D. Va. 2015); *Jones v. Pramstaller*, 678 F. Supp. 2d 609, 627 (W.D. Mich. 2009).

qualified immunity—but then overruled *Saucier* in *Pearson v. Callahan*, 555 U.S. 223 (2009), which made that sequencing optional.

Indeed, the *Pearson* Court explicitly considered and rejected the argument that *stare decisis* should prevent the Court from reconsidering its qualified immunity jurisprudence. The Court noted 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. The same charges could be laid against *Pearson* itself. 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).

C. Qualified immunity undermines official accountability and precludes individuals from vindicating their constitutional rights.

This brief has focused primarily on the legal, historical, and doctrinal arguments against contemporary qualified immunity doctrine. But the reason these arguments *matter* is that qualified immunity is no mere technical error; rather, the practical effect of the doctrine is to all but eviscerate our best means of ensuring official accountability.

The civil remedy created by Section 1983 exists not just to provide a remedy for citizens whose rights are violated, but also—at a structural level—"to hold public officials accountable when they exercise power irresponsibly." *Pearson*, 555 U.S. at 231. A robust civil remedy is especially important today, given that other

means of accountability tend to fall short—especially with respect to law enforcement. Internal disciplinary mechanisms are virtually toothless. *See, e.g.*, Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. TIMES (Nov. 18, 2015).[19] Successful criminal prosecutions are few and far between. *See* Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015). And neither typically provides the financial and injunctive redress to victims' families and communities that Section 1983 was meant to offer.[20]

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

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[19] *See also* U.S. Dep't of Justice, Investigation of the Ferguson Police Department 83 (Mar. 4, 2015), *available at* https://perma.cc/XYQ8-7TB4 ("Even when individuals do report misconduct, there is a significant likelihood it will not be treated as a complaint and investigated.").

[20] Police themselves agree: according to a 2017 Pew Research Center survey of more than 8,000 sworn police officers, an astonishing 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable." Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017), *available at* https://pewrsr.ch/2z2gGSn.

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

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant certiorari.

Respectfully submitted,

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