No.

In the Supreme Court of the United States

AMANDA N. REICH & ELISE DAVIDSON, successor administratrix of the estate of JOSHUA STEVEN BLOUGH,

Petitioners,

v.

CITY OF ELIZABETHTOWN, KENTUCKY, MATTHEW MCMILLEN & SCOT RICHARDSON,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this Section 1983 police-shooting case, the district court struck the sworn affidavit of petitioner Amanda Reich from the summary judgment record, and then used the absence of that affidavit to conclude that there was no genuine dispute of fact material to respondents' claim of qualified immunity for shooting and killing petitioner's mentally ill fiancé.

The questions presented are:

1. Whether the Sixth Circuit's extreme approach to the "sham-affidavit" rule should be overturned in favor of the more flexible standards prevailing in other circuits.

2. Whether the Court should recalibrate or reverse the doctrine of qualified immunity.

RELATED PROCEEDINGS

Reich v. *City of Elizabethtown*, No. 16-cv-429
(W.D. Ky. Nov. 16, 2018)

Reich v. *City of Elizabethtown*, No. 18-6296
(6th Cir. Dec. 12, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Amanda N. Reich and Elise Davidson, successor administratrix of the estate of Joshua Steven Blough, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (App., *infra*, 1a-40a) is reported at 945 F.3d 968. The Sixth Circuit's order denying rehearing en banc (App., *infra*, 71a) is unreported. The district court's decision granting summary judgment to respondents (App., *infra*, 41a-70a) is unreported, but is available at 2018 WL 6028719.

JURISDICTION

The judgment of the court of appeals was filed on December 19, 2019, and a timely petition for en banc rehearing was denied on January 24, 2020. The Court's order of March 19, 2020, extended the time to file this petition to June 22, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 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 * * *.

STATEMENT

Two police officers (respondents Matthew McMillen and Scot Richardson) shot and killed Joshua Blough. They did so notwithstanding that his fiancé, petitioner Amanda Reich, begged them to let her intercede and address the mental health crisis Blough was experiencing.

In petitioner's Section 1983 suit, a central dispute was the physical distance between Blough and the officers who killed him. Respondents claimed that Blough, holding a pocketknife, was within six to eight feet when they shot him. By contrast, petitioner testified at her deposition that she did not "feel comfortable" estimating, but when pressed put the distance at twenty feet—and in all events "far enough away that * * * he wasn't a direct threat to them." App., *infra*, 27a-29a.

After respondents filed a summary judgment motion based on their six-to-eight-foot version of events, petitioner returned to the scene of the shooting, which she had avoided for nearly two years because of the emotional trauma involved. Crime scene photographs taken by the Kentucky State Police provided the precise location of respondents' police cruisers (from where the officers shot Blough) and the bloody patch on the grass where Blough had collapsed (the place he was standing when shot). Petitioner set up cones marking these exact positions. She then measured the distances between them with a tape measure. The results? Blough had been over twenty-five feet away from the nearest officer when he was shot.

Invoking the sham-affidavit rule, however, the district court disregarded petitioner's affidavit reporting these results. That doctrine is designed to prevent parties from creating fact issues where no dispute actually

exists—thereby avoiding summary judgment by sleight-of-hand—by simply contradicting their own deposition testimony in an affidavit that amounts to a "transparent sham[]." *E.g.*, *Tippens* v. *Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986). As numerous courts have noted, "the sham affidavit rule is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence," and the doctrine therefore "should be applied with caution." *Van Asdale* v. *International Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009).

The Sixth Circuit, however, has developed "a particularly robust version of the sham affidavit doctrine." *Jiminez* v. *All Am. Rathskeller, Inc.*, 503 F.3d 247, 254 (3d Cir. 2007). Applying those principles here, the Sixth Circuit affirmed the exclusion of petitioner's affidavit notwithstanding the obvious justification for the change in testimony—that petitioner had returned to the location of the shooting and taken measurements—and ignoring substantial record evidence corroborating petitioner's version of events.

Having excluded petitioner's affidavit, the court concluded, based on the officers' account, that Blough's Fourth Amendment rights were not violated when respondents shot and killed him. Covering all its bases, the Sixth Circuit further explained that, even if it *had* considered the affidavit, it could find no clearly established law rendering the officers' conduct unconstitutional. That is, qualified immunity protected the officers even under petitioner's version of the facts.

This Court should review and reject both holdings of the Sixth Circuit below.

First, The Sixth Circuit's "robust" version of the sham-affidavit rule far outsteps the conceptual and

practical justifications for the doctrine, inviting judges to improperly weigh evidence and evaluate credibility at the summary-judgment stage. As this case demonstrates, that legal impropriety leads to substantial injustice.

Second, as "a growing, cross-ideological chorus of jurists and scholars" has recognized, "recalibration of contemporary immunity jurisprudence" is long overdue. *Zadeh* v. *Robinson*, 902 F.3d 483, 499-500 (5th Cir. 2018) (Willett, J., concurring dubitante). Indeed, "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe." *Baxter* v. *Bracey*, No. 18-1287, Slip Op. at 4 (U.S. June 15, 2020) (Thomas, J., dissenting from denial of certiorari). This Court should grant certiorari to provide the necessary "recalibration."

A. Legal Background

1. This Court's qualified immunity doctrine shields public officials from suit under Section 1983 "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 589 (2018) (quotation marks omitted). The consequence of this regime—indeed, the intended consequence—is that many violations of constitutional rights go unremedied.

Things were not always this way. Enacted in 1871 as part of Congress's efforts to combat lawlessness during Reconstruction, Section 1983 provides a cause of action for violations of legal or constitutional rights perpetrated "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983.

In *Pierson* v. *Ray*, 386 U.S. 547 (1967), fifteen white and black clergymen were arrested when they

attempted to use segregated facilities in Mississippi, and sued the officers for false arrest and imprisonment. *Id.* at 549-550. The Court concluded that, because "the defense of good faith and probable cause" applied to "the common-law action for false arrest and imprisonment," it was available as a defense to the Section 1983 suit. *Id.* at 557. Ultimately, the Court reasoned that, in enacting Section 1983, Congress did not "abolish wholesale" then-existing "common-law immunities." *Id*. at 554.

Subsequently, in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), the Court drew on judicial and legislative immunity doctrines (*id*. at 239 n.4)—not doctrines that historically provided immunity to police officers. The Court noted that its decision was driven by "policy consideration[s]," including the risk that officials may "fail to make decisions when they are needed" or may "not fully and faithfully perform the duties of their offices." *Id*. at 241-242. The Court concluded that "[t]hese considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government." *Id*. at 247. The Court determined that this immunity required "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief." *Id*. at 247-248.

Qualified immunity fully emerged in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Again the Court focused on perceived policy concerns about litigation against public officials: "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id*. at 814. In light of these policies, the Court abandoned the subjective good faith requirement it had adopted in *Scheuer* and other cases. *Id*. at 816-817. The Court restated the immunity doctrine to "hold

that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 818. In reaching this conclusion, the Court relied on neither statutory text nor common law.

2. Because "[q]ualified immunity is an immunity from suit rather than a mere defense to liability" (*Pearson* v. *Callahan*, 555 U.S. 223, 237 (2009) (quotation marks omitted)), the defense is usually litigated at the summary-judgment stage. Normal summary-judgment procedures therefore apply. See generally *Tolan* v. *Cotton*, 572 U.S. 650 (2014). One such doctrine is the sham-affidavit rule.

As the Court has repeatedly explained, "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan*, 572 U.S. at 656 (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). The trial court must therefore "view the evidence in the light most favorable to the opposing party" (*id.* at 657 (quotation marks omitted)) and "may not make credibility determinations or weigh the evidence" (*Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)).

Rule 56 further provides that "an affidavit or declaration" may be "used to * * * oppose" summary judgment, so long as the affidavit (1) is "made on personal knowledge"; (2) "set[s] out facts that would be admissible in evidence"; and (3) "show[s] that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

Despite this clear language, the courts of appeals have developed an exception allowing district courts to

disregard so-called "sham" affidavits for purposes of summary judgment. As one court of appeals described the doctrine: "[A] party may not create a material issue of fact to defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict." *Jiminez*, 503 F.3d at 251 (quoting *Baer* v. *Chase*, 392 F.3d 609, 624 (3d Cir. 2004)). "At the same time, however, it must be recognized that the sham affidavit rule is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence." *Van Asdale*, 577 F.3d at 998.

This Court has never had occasion to address the propriety of the rule, or its proper scope. Cf. *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-807 (1999) (collecting circuit cases for the proposition that "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement * * * without explaining the contradiction or attempting to resolve the disparity," but "not necessarily endors[ing] these cases").

B. Factual Background

While certain details of the killing that gave rise to this lawsuit are contested, the broad outline of events is undisputed. On July 7, 2015, petitioner Amanda Reich set out to drive her fiancé, Joshua Blough, to be admitted for psychiatric hospitalization. App., *infra*, 3a. Having earlier stopped taking his schizophrenia medication, Blough had been having hallucinations, but had agreed to be admitted to the hospital the day before.

On the way to the facility, Blough became upset, got out of the car at a red light, and walked into an

empty field. App., *infra*, 4a. He had a three-inch pocketknife in his hand. *Ibid*.

Unable to convince Blough to get back in the car, Reich called 9-1-1. App., *infra*, 4a. Officer Matthew McMillen of the Elizabethtown Police Department responded to the scene, where Reich informed him of Blough's mental state. *Id*. at 4a-5a. Officer Scot Richardson later spotted Blough in a parking lot, and they eventually converged on Blough walking in a grassy residential area, where Reich unsuccessfully attempted to calm her fiancé down. *Id*. at 5a-6a.

At a certain point, the officers "told Reich to get out of the way" and ordered Blough "to put the knife down." App., *infra*, 6a. Blough did not drop the knife, instead saying "you're gonna have to kill me mother****er." *Ibid*. What happened next is disputed—but it ended with Officer Richardson firing two shots into Joshua Blough's back and chest, killing him. *Id*. at 6a-7a.[1]

Reich testified that Blough "took a step forward toward [the officers] and then he turned around to run. It's like he realized at that moment what was really going on, you know." D. Ct. Dkt. 61-3, at 102:19-21. Blough "got to take one or two steps" away from the officers before he was shot. *Id.* at 105:5. Another eyewitness similarly told the Kentucky State Police investigators that she thought Blough "was going to try to get away when they came towards him and they shot him." D. Ct. Dkt. 61-10, at 1; see App., *infra*, 6a n.1, 47a n.3.

Respondents, on the other hand, contend that Blough did not turn around, but was continuing to walk toward Officer Richardson when both officers

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[1] Officer McMillen also fired one shot, but it missed. App., *infra*, 47a.

fired. App., *infra*, 6a. As the district court found, "[t]here is disagreement about whether Blough continued to step toward Officer Richardson or turned the other direction the moment before he was shot." *Id*. at 47a n.3. It is undisputed, though, that one of the two shots that killed Joshua Blough hit him in the back. *Id* at 17a.[2]

The most conspicuous factual dispute—and the one on which this case largely turns—is about how far away Blough was from Officer Richardson when Richardson shot and killed him.

Immediately after the shooting, Officer Richardson reported to Kentucky State Police investigators that Blough was "somewhere between 10-12 feet" away. D. Ct. Dkt. 55-6, at 17. At their depositions, the two officers testified in lockstep—verbatim—that the distance was "six to eight feet." App., *infra*, 34a; see D. Ct. Dkt. 61-14, at 92:12-13; D. Ct. Dkt. 61-11 at 152:15-16.[3]

Under questioning from opposing counsel, Reich's deposition testimony included the following descriptions of the distance between Richardson and Blough:

- "far enough away that it—they—he wasn't a direct threat to them."
- "about 20 [feet]."

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[2] The Sixth Circuit majority disregarded the fact that Blough was shot in the back, observing that "the officers fired from different spots." App., *infra*, 17a. As the dissent points out, however, "[t]his reasoning * * * ignores the testimony of [respondents'] own ballistics expert—who opined that the two bullets that struck Blough came from *just* Officer Richardson's gun." *Id*. at 35a.

[3] Officer Richardson sat in on Officer McMillen's deposition, before being deposed himself. D. Ct. Dkt. 61-14, at 5:11-13; D. Ct. Dkt. 61-11, at 3.

- "it was probably 20 feet being when he took a step toward them."
- "I don't feel comfortable with the—the estimated length of—you know, I don't feel comfortable with it. Because it's been a long time and I just don't feel comfortable with estimating on that."
- "far enough that he wasn't a threat to them."

App., *infra*, 27a-29a.

As further detailed below, Reich would later return to the location where her fiancé was killed, in order to reconstruct the scene aided by the Kentucky State Police's crime-scene photographs.[4] App., *infra*, 73a. Based on that reconstruction, the measured distance from Blough to Officer Richardson was twenty-five and a half feet. *Id.* at 74a. Blough was even further from Officer McMillen—over thirty-six feet. *Ibid*.

C. Proceedings Below

Petitioners filed suit against Officers Richardson and McMillen, and the city of Elizabethtown, under Section 1983, bringing a claim for excessive force under the Fourth Amendment along with various state-law claims.

1. After the close of discovery, respondents moved for summary judgment on grounds of qualified immunity. They characterized the evidence as demonstrating that Blough was six to eight feet away from Officer Richardson when he fired, and relied heavily on case law finding deadly force justified against knife-wielding suspects at similarly close ranges. See D. Ct. Dkt. 55-1, at 13, 16, 20-22 (relying on *Rhodes* v.

[4] Though the Kentucky State Police investigators marked evidence and took photographs, they apparently did not measure the distance between the officers' positions and Blough's body.

McDaniel, 945 F.2d 117 (6th Cir. 1991) (four to six feet); and *Rucinski* v. *County of Oakland*, 644 F. App'x 338 (6th Cir. 2017) (five feet)).

Faced with respondents' distance-based legal theory, Reich and her counsel returned to the scene of the shooting to obtain measurements. As she would explain, Reich had understandably been avoiding the location where her fiancé had been killed, "due to the severe emotional and mental trauma [she] suffered witnessing [his] shooting death." App., *infra*, 72a; see also *ibid.* ("I could not bear the anxiety it would cause to return to the scene.").

For her reconstruction, Reich used the extensive crime-scene photographs taken by Kentucky State Police investigators. Those photographs clearly showed both the officers' police cruisers—where they had been standing at the time of the shooting—and the location where Blough was shot, each in relation to static terrain features including a ditch, a stop sign, and cracks in the street's paving surface. App., *infra*, 76a, 78a-81a. Using those landmarks, she was able to place cones at the locations where all the actors—Blough, herself, and Officers Richardson and McMillen—had been standing at the moment Richardson shot Blough. *Id.* at 73a; see *id.* at 77a.

Reich then used a tape measure to definitively measure the distance between the cones, with the result that Blough had been 25 feet, 6 inches from Officer Richardson when Richardson shot him. App., *infra*, 74a. Blough had been even further from Officer McMillen and Reich herself: 36 feet, 4 inches and 34 feet, 6 inches, respectively. *Ibid.*

Reich swore an affidavit reporting this procedure and its results, complete with photographs of the reconstructed scene taken from the same angles as the

Kentucky State Police crime-scene photos.[5] See App., *infra*, 72a-81a. This affidavit and the distances it contained formed a key part of her summary judgment opposition, which highlighted the factual disputes as to the distances involved and whether Blough had turned to run before he was shot. See generally D. Ct. Dkt. 61.

2. The district court "decline[d] to consider" Reich's affidavit under the sham-affidavit rule. App., *infra*, 52a. Omitting any mention of the fact that Reich's reconstruction of the scene was based on contemporaneous Kentucky State Police photographs, the court expressed hostility to the notion that Reich could accurately "recreate the scene in detail" based on her "current recollection of the events" "nearly two years after the shooting," when she earlier "did not 'want to guess about it'" in her deposition. *Id.* at 51a.[6] Asserting instead that "[t]here is no other support in the record" for the affidavit's distance calculations, the court described the affidavit as "contradictory," "self-serving," and "improper." *Id.* at 51a-52a. The district court therefore excluded the affidavit under the Sixth Circuit's case law on the sham-affidavit rule. See *id.* at 52a (citing, *e.g.*, *Reid* v. *Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1984)).

With the affidavit excluded, the district court concluded at the first prong of the qualified-immunity analysis that "the officers' response was reasonable under the circumstances," and the shooting therefore

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[5] Examples of those photographs are included in the appendix, *infra*, 76a-81a. The full set of photographs is available at D. Ct. Dkt. 63-3.

[6] The court also did not mention that Reich in fact *did* "guess about it" in her deposition, and provided a number—twenty feet—very similar to the one generated by her measurements. App., *infra*, 51a.

did not violate Blough's Fourth Amendment rights. App., *infra*, 57a.

3. In a 2-1 decision, a panel of the Sixth Circuit affirmed both determinations.

As to the sham-affidavit rule, the majority found that "Reich's affidavit plainly contradicts her deposition testimony," reasoning that because "Reich said that she did not know" the distance between Blough and Officer Richardson at her deposition, "[h]er affidavit, asserting that she *does know*, therefore contradicts." App., *infra*, 11a. The court could find "no persuasive justification for this contradiction." *Ibid.*

The panel majority went on to conclude that, even "generously viewing [the] affidavit as noncontradictory," it was nevertheless "an attempt to create a sham fact issue" because it was prepared in response to respondents' summary judgment motion. App., *infra*, 11a. The panel also appeared suspicious of Reich's motives, offering that "she waited until after discovery closed and she could no longer be deposed to offer her revised view." *Id.* at 12a. The court therefore affirmed the exclusion of the affidavit.

On the merits of the qualified immunity issue, the panel held under *Graham* v. *Connor*, 490 U.S. 386 (1989), that "the totality of the circumstances gave the officers probable cause to believe that Blough posed a threat of serious physical harm to them and others," and that the shooting therefore did not violate the Fourth Amendment. App., *infra*, 15a. In reaching this conclusion, the court relied heavily on the factual proposition that Blough was "six to twelve feet" from Richardson when he fired. *Id*. at 16a-17a; see also *id*. at 19a ("within feet").

The majority also held that even considering Reich's affidavit, any constitutional violation was not

clearly established, and the officers were therefore entitled to qualified immunity: "[F]or the same reasons the officers did not violate constitutional law by shooting Blough if he was five feet away, they did not violate *clear* constitutional law by shooting Blough if he was twenty-five to thirty-six feet away." App., *infra*, 21a-22a.

Judge Moore dissented on both points. As she explained, "there are two sides to this story: the officers' view—which the majority details with great care," and "Reich's view—which the majority sweeps under the rug." App., *infra*, 26a.

First, Judge Moore would have held that "Reich's affidavit * * * neither directly contradicts her deposition testimony nor fails to explain any inconsistencies between them." App., *infra*, 31a. "Rather, it is easy to understand why she could not answer questions about the distance between the actors present at the scene of the shooting during her deposition and why she was able to furnish that information in the subsequent affidavit." *Ibid*. That is, "Reich explained any inconsistency between her deposition testimony and her affidavit: she had initially avoided returning to the site of the shooting because it was emotionally traumatic to do so, but then summoned up the courage when it became necessary to clarify her earlier testimony." *Id*. at 33a.

As to qualified immunity, Judge Moore relied on decades-old case law which "established that reasonable police officers do *not* shoot non-compliant persons brandishing knifes when they are *not* advancing toward another individual in the immediate area, even if the person is mentally ill, suicidal, and/or yelling threats to the officers." App., *infra*, 39a (citing *Sova* v. *City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998)). Viewing the facts in the light most favorable to Reich—rather than weighing the credibility of conflicting tes-

timony—"a reasonable juror could find that [respondents] violated this clearly established law when they shot Blough." App., *infra*, 39a. As Judge Moore put it, "[p]olice officers may be entitled to a number of unique defenses in civil litigation, but a watered-down summary-judgment standard is not one of them." *Id*. at 36a.

Finally, Judge Moore noted "that, in recent years, jurists and scholars from across the ideological spectrum have questioned whether we should accept [the] premises" of qualified immunity. App., *infra*, 36a n.1 (citing *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1161-1162 (2018) (Sotomayor, J., dissenting); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871-1872 (2017) (Thomas, J., concurring); *Zadeh*, 902 F.3d at 498-500 (Willett, J., concurring dubitante); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018)). And she cautioned against the "impossibly high standard" imposed by too-stringent application of qualified immunity, "where [plaintiffs] must dredge up a mirror-image case (that happened to arise in this circuit, and happened to result in a decision by this court) to have any hopes of surviving a qualified-immunity challenge at summary judgment." *Id.* at 40a. As she concluded, "because history rhymes far more often than it repeats exactly, we cannot, and should not, condition a Fourth Amendment plaintiff's access to a jury trial on their meeting such an onerous burden." *Ibid.*

The Sixth Circuit denied a petition for rehearing en banc, with Judge Moore again noting her dissent. App., *infra*, 71a. This petition followed.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to address the two doctrines that conspired to deny petitioner her day in court for the killing of her fiancé: qualified immunity and the sham-affidavit rule.

I. THE COURT SHOULD RESOLVE THE ACKNOWLEDGED CIRCUIT SPLIT ON THE SCOPE OF THE SHAM-AFFIDAVIT RULE.

A. The circuits are split as to the application of the sham-affidavit rule.

While "[e]very circuit has some form of 'sham affidavit' rule" (*Van Asdale*, 577 F.3d at 998), the courts of appeals vary widely in their interpretation and application of the general principle. Unlike the Sixth Circuit below, the majority of circuits apply the rule flexibly, with due regard for "the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence." *Ibid.*

1. The **Eleventh Circuit**, for example, "allows a court to disregard an affidavit" only "in *limited* circumstances * * * when, *without explanation*, it *flatly* contradicts [the affiant's] prior deposition testimony for the *transparent purpose* of creating a genuine issue of fact where none existed previously." *Furcron* v. *Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1306 (11th Cir. 2016) (emphases added). And it holds that "the [sham-affidavit] rule should be applied 'sparingly because of the harsh effect it may have on a party's case.'" *Id.* at 1307 (quoting *Allen* v. *Board of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1316 (11th Cir. 2007)).[7]

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[7] Courts in the Eleventh Circuit also explicitly place the burden of proving an affidavit's "sham" nature on the party seeking to exclude it. See, *e.g.*, *Brantley* v. *Ferrell Elec., Inc.*, 112 F. Supp. 3d

Similarly, in the **Fifth Circuit**, "a district court may refuse to consider statements made in an affidavit that are *so markedly inconsistent* with a prior statement as to constitute an *obvious* sham." *Winzer* v. *Kaufman Cty.*, 916 F.3d 464, 472-473 (5th Cir. 2019) (quotation marks omitted; emphases added) (reversing district court's exclusion of affidavit signed by Section 1983 excessive-force plaintiff); see also *Kennett-Murray Corp* v. *Bone*, 622 F.2d 887, 894 (5th Cir. 1980) ("In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an earlier deposition.").

The **Ninth** and **Tenth Circuits** likewise "recognize[] that the sham affidavit rule should be applied with caution." *Van Asdale*, 577 F.3d at 998 (quotation marks omitted); accord *Law Co.* v. *Mohawk Constr. & Supply Co.*, 577 F.3d 1164, 1169 (10th Cir. 2009) ("We have described cases in which an affidavit raises but a sham issue as 'unusual.'"). And they further hold that in order to exclude an affidavit, a district court must make an explicit factual finding that the affidavit is not only contradictory, but "actually a 'sham.'" *Van Asdale*, 577 F.3d at 998; accord *Law Co.*, 577 F.3d at 1169 ("We explicitly require that a district court first 'determine whether the conflicting affidavit is simply an attempt to create a sham fact issue' before excluding it from summary judgment consideration.") (quoting *Durtsche* v. *American Colloid Co.*, 958 F.2d 1007, 1010 n.2 (10th Cir. 1992)).

1348, 1356 (S.D. Ga. 2015) ("[T]he movant bears a heavy burden to exclude a declaration or affidavit as a sham."); *In re Stand 'N Seal Prods. Liab. Litig.*, 636 F. Supp. 2d 1333, 1335 (N.D. Ga. 2009) (same). By contrast, the Sixth Circuit here faulted petitioner for failing to demonstrate that her affidavit was *not* a sham. App., *infra*, 11a-12a.

Another group of courts—the **Second, Third,** and **Federal Circuits**—limit the doctrine by "refus[ing] to disregard" even an "otherwise questionable affidavit" as long as "there is independent evidence in the record to bolster" the affidavit's assertions. *Jiminez*, 503 F.3d at 254; accord *Gemmy Indus. Corp.* v. *Chrisha Creations Ltd.*, 452 F.3d 1353, 1359 (Fed. Cir. 2006) (refusing to strike contradictory affidavit because "there was credible evidence supporting the contradiction"); *Palazzo ex rel. Delmage* v. *Corio*, 232 F.3d 38, 43-44 (2d Cir. 2000) (same, explaining that "when such other evidence is available, the concern that the proffered issue of fact is a mere 'sham' is alleviated"). The **D.C. Circuit** similarly will not exclude an affidavit where "the shifting party can offer persuasive reasons for believing the supposed correction is more accurate than the prior testimony." *Galvin* v. *Eli Lilly & Co.*, 488 F.3d 1026, 1030 (D.C. Cir. 2007) (quotation marks omitted).

2. As the Third Circuit has explicitly acknowledged, however, the "flexible approach" used by the courts above stands in stark contrast to the "particularly robust version of the sham affidavit doctrine" adopted by the **Sixth, Seventh,** and **Eighth Circuits**. *Jiminez*, 503 F.3d at 254; see App., *infra*, 8a-12a; *Herring* v. *Canada Life Assur. Co.*, 207 F.3d 1026, 1030-1031 (8th Cir. 2000) (asserting that the appropriate *exceptions* to the sham-affidavit rule—rather than the rule itself—are "narrow" and "unique"); *James* v. *Hale*, 959 F.3d 307, 316 (7th Cir. 2020) ("In this circuit the sham-affidavit rule prohibits a party from submitting an affidavit that contradicts the party's prior deposition or other sworn testimony.").

In the Sixth Circuit in particular, a later affidavit need not even contradict the earlier deposition testimony in order to be considered a sham. App., *infra*, 9a (court may "determine[] that the affidavit constitutes

an attempt to create a sham fact issue" even "if no direct contradiction exists") (quoting *Aerel, S.R.L.* v. *PCC Airfoils, L.L.C.*, 448 F.3d 899, 908 (6th Cir. 2006)). That is, the rule in most other circuits is that a contradiction of earlier testimony is a necessary, though not sufficient, condition for disregarding an affidavit. In the Sixth Circuit, a contradiction is not even necessary. *Ibid.*

Further—as discussed below—independent corroborating evidence is apparently not enough to save an affidavit from "sham" status in the Sixth Circuit. See pages 21-22, *infra*.

The Sixth Circuit's rigid application of the sham-affidavit rule below thus represents a minority position within an acknowledged and enduring circuit split.[8]

B. The Sixth Circuit's approach is inconsistent with the purposes of the sham-affidavit rule and results in manifest injustice.

The Sixth Circuit's exceptionally vigorous version of the sham-affidavit rule—as exemplified by this case—is inconsistent with the values underlying the doctrine.

1. As discussed above (at 6), the baseline rule on summary judgment is that judges may *not* weigh conflicting evidence or make credibility determinations, and that affidavits *are* an acceptable form of evidence. See *Reeves*, 530 U.S. at 150; Fed. R. Civ. P. 56(c)(4). As the exception to that doctrinal baseline, the sham-

[8] Separately, the courts of appeals are split on the standard of review for sham-affidavit rulings. Most circuits, including the Sixth, review only for abuse of discretion, while the Second and D.C. Circuits apply de novo review. See *Galvin*, 488 F.3d at 1030 n.* (identifying split and collecting cases).

affidavit rule requires justification—and when the rule outgrows its justifications, it should be pared back.

As the Second Circuit explained the basis for the sham-affidavit rule in the seminal case on the subject, "[t]he object of summary judgment is 'to discover whether one side has no real support for its version of the facts, and thereby to avoid unnecessary trials.'" *Perma Research & Dev. Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969) (citation omitted). "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Ibid.* The animating principle is that a party may not *create* an issue of fact *solely* by stating facts in an affidavit that she has already disavowed in her deposition, when otherwise there would be "no real support" for her case. *Ibid.* In other words, "[t]he rationale underlying the sham affidavit rule is that a party ought not be allowed to manufacture a bogus dispute with himself to defeat summary judgment." *Nelson* v. *City of Davis*, 571 F.3d 924, 928 (9th Cir. 2009) (emphasis omitted).

Thus, as another court of appeals put it, "[a] definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." *Tippens*, 805 F.2d at 953. If, given the totality of the circumstances, the affidavit is not such a "transparent sham[]," it exceeds the role of the court on summary judgment to exclude it: "To allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point

in time and with which words the witness * * * was stating the truth." *Id.* at 953-954.

But the Sixth Circuit has developed a doctrine under which almost laughably trivial inconsistencies may trigger exclusion. As the court below stated: "Reich said that she did not know [the distance between Blough and Officer Richardson]. Her affidavit, asserting that she *does know*, therefore contradicts." App., *infra*, 11a. But that is not contradictory at all: Reich did not "feel comfortable with estimating" the precise distance at the time of her deposition (*id*. at 29a) because it had been nearly two years and she had avoided returning to the scene (*id*. at 72a-73a).[9] Later, she returned and quite literally measured the distances in question, and her affidavit was based on that exercise. *Id.* at 74a. Obviously, both statements can be true. And as a leading treatise explains, "later testimony may be credited" as against earlier denials of knowledge if "subsequently acquired knowledge * * * explain[s] the discrepancy." 11 *Moore's Federal Practice* § 56.94[5][b] (2020).

By seemingly rejecting the concept that it is possible to refresh a witness's recollection (cf. Fed. R. Evid. 612), the Sixth Circuit's application of the rule is far afield from the purposes of the sham-affidavit doctrine. Rather, it has become exactly the kind of trap for the unwary that other courts warn against. See *Van Asdale*, 577 F.3d at 998 ("Aggressive invocation of the rule * * * threatens to ensnare parties who may have simply been confused during their deposition testimony and may encourage gamesmanship by opposing attor-

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[9] In any event, she also repeatedly testified at her deposition to a distance of "20 feet," which matches the 25.5-foot measured distance quite closely. App., *infra*, 28a.

neys."); *Furcron*, 843 F.3d at 1307 ("[T]he rule should be applied sparingly because of the harsh effect it may have on a party's case.").

Indeed, the Sixth Circuit's law has developed to a point where an affidavit may be excluded as a sham even if it does *not* contradict earlier testimony. App., *infra*, 11a-12a. (quoting *Aerel*, 448 F.3d at 908). This is a rule completely cut loose from its conceptual underpinnings.

2. Similarly, if the purpose of the sham-affidavit rule is to prevent needless trials on "formal or pretended" factual issues (*Tippens*, 805 F.2d at 953) for which there is "no real support" (*Perma Research*, 410 F.2d at 578), an affidavit should not be excluded as a sham if its assertions are corroborated by other evidence. To the contrary, "when such other evidence is available, the concern that the proffered issue of fact is a mere 'sham' is alleviated." *Palazzo*, 232 F.3d at 44; accord, *e.g.*, *Jiminez*, 503 F.3d at 254; 11 *Moore's Federal Practice* § 56.94[5][c] (2020) ("[W]hen there is independent evidence in the record to bolster an otherwise questionable affidavit * * * courts usually refuse to disregard the affidavit because the concern that the affidavit was offered simply to create a sham dispute as to a factual issue is alleviated.")

Indeed, "[t]he main practical reason supporting the sham affidavit doctrine is that prior depositions are more reliable than affidavits." *Jiminez*, 503 F.3d at 253; see also *Perma Research*, 410 F.2d at 578 ("The deposition of a witness will usually be more reliable than his affidavit, since the deponent was * * * available to opposing counsel for cross-examination."). But where the affidavit is corroborated by other evidence, that inherent asymmetry is diminished, and the case presents a fact issue for trial.

The Sixth Circuit has broken free of that restraint, too. As the dissent pointed out, "despite the considerable differences between Reich's affidavit's measurements and the distance estimates that McMillen and Richardson offered at their depositions, the locations of the cones placed by Reich more or less line up with the scene described by the officers." App., *infra*, 29a-30a. In the officers' telling, and in Reich's affidavit, "Blough had been shot at the edge of the grass and the street [and] the officers had been in the middle of the street (because they had parked in the right lane and were standing beside the drivers' side of their vehicles)." *Id.* at 30a. That is, the *locations* provided by Reich are corroborated by other record evidence; the discrepancy is in the *distances*—which are based on a tape measure, not on Reich's mere say-so. But the majority did not find it necessary even to respond to this notion—because it is not relevant under Sixth Circuit law.

Consider the photographs reproduced at pages 76a and 77a of the appendix: one contemporary crime-scene photograph from the Kentucky State Police, and one taken during Reich's reconstruction. Reich has placed Officer Richardson at the rear corner of his squad car—precisely where his own deposition testimony places him before he "ran up" and then "retreat[ed] again" D. Ct. Dkt. 61-14, at 69:23-74:7 (Richardson deposition); see also D. Ct. Dkt. 61-11, at 94:16-18 (McMillen deposition) (Richardson and McMillen "were on the right-hand side of the street"). Additional crime-scene photographs show a shell casing at that same location. App., *infra*, 78a-79a.

Reich's placement of Blough on the grass several feet back from the edge of the street is also corroborated by the officers' testimony, and by the pool of blood captured in the Kentucky State Police photographs. See D. Ct. Dkt. 61-11, at 95:19 (McMillen deposition)

(Blough "went down * * * in the grass area"); D. Ct. Dkt. 61-14, at 76:21 (Richardson deposition) (Blough fell "right in th[e] vicinity" of where he was standing when shot); App., *infra*, 80a-81a (photographs of blood-stains on the grass).

With the relative positions of the actors given by Reich thus corroborated, the only remaining step was to measure the distance between them—and no one suggests that Reich was somehow untruthful about what the tape measure reported.[10]

If anything, Reich's affidavit is *more* probative than the officers' account, as she is the only one who has physically measured—rather than estimating—the distances involved. At the very least, though, the corroboration of the affidavit by physical and testimonial evidence creates a factual issue that can hardly be described as "sham" or "bogus" (*Nelson*, 571 F.3d at 928). By allowing the affidavit to be discarded nonetheless, the Sixth Circuit's doctrine improperly expands the judge's role to weighing the evidence, which is flatly prohibited at the summary judgment stage. See *Tolan*, 572 U.S. at 656 ("[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'") (quoting *Anderson*, 477 U.S. at 249).

The Court should therefore grant certiorari to make clear that the Sixth Circuit's aggressive version

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[10] The distance Reich measured between Blough and Officer Richardson (25.5 feet) is also corroborated by her own initial deposition testimony, in which she twice estimated the distance at "20 feet." App., *infra*, 28a.

of the sham-affidavit doctrine is inconsistent with fundamental summary-judgment principles.[11]

II. THE COURT SHOULD RECALIBRATE OR REVERSE QUALIFIED IMMUNITY.

The Court should also reevaluate qualified immunity. Led by Justices of this Court, a chorus of voices has raised substantial questions regarding the doctrine's scope and legal foundation. The Court should address the criticisms leveled, resolving the issue one way or the other. Until then, qualified immunity will be asserted in thousands of cases each year—often as a defense to shocking constitutional violations. And the doctrine will continue to result in constitutional stagnation, with certain rights remaining perpetually undeveloped.

Review of qualified immunity is additionally warranted because the current doctrine is devoid of any statutory or common-law support. Rather, the doctrine grew wholesale from this Court's broad policy assessments. And time has shown that—even if those policy judgments could support the doctrine—qualified immunity does not accomplish its stated goals.

A. The Court should examine the qualified immunity doctrine.

The scope and viability of the prevailing qualified immunity doctrine requires careful evaluation: Significant criticisms have surfaced; the doctrine presently leads to stagnation in the refinement of governing constitutional standards; and the issue arises with considerable frequency.

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[11] The issue also arises constantly. A Westlaw search for "sham" within three words of "affidavit" returned 235 federal opinions issued within the past twelve months alone.

1. In recent years, criticism of prevailing qualified immunity doctrine has been widespread and sustained. As Justice Thomas flatly put it, "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe." *Baxter*, Slip Op. at 4 (Thomas, J., dissenting from denial of certiorari). To the contrary, "the Court adopted the test not because of 'general principles of tort immunities and defenses,' but because of a 'balancing of competing values' about litigation costs and efficiency." *Ibid.* (quoting *Malley* v. *Briggs*, 475 U.S. 335, 339 (1986), and *Harlow*, 457 U.S. at 816). Because the Court's "analysis is no longer grounded in the common-law backdrop against which Congress" drafted Section 1983, the Court no longer is "interpreting the intent of Congress in enacting the Act." *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) (quoting *Malley*, 475 U.S. at 342) (quotation marks omitted; alteration incorporated). Justice Thomas has thus urged that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Id*. at 1872; see also *Baxter*, Slip. Op. at 6.

Justice Sotomayor has likewise expressed concerns regarding the current reaches of the doctrine. *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting). Because "[n]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials," Justice Sotomayor cautioned that the current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers." *Ibid*. In the Fourth Amendment context, the result is to "gut[]" its "deterrent effect." *Ibid*. More broadly, this "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." *Ibid*.

Judges across the lower courts have taken note—raising sharp concerns regarding the current state of qualified immunity. Judge Willett, for example, recently added his "voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Zadeh*, 902 F.3d at 499-500 (Willett, J., concurring dubitante). Judge Willett continued:

> To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer.

Zadeh v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

These concerns are broadly recognized. See *Morrow* v. *Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.) ("Some—including Justice Thomas—have queried whether the Supreme Court's post-*Pierson* qualified-immunity cases are 'consistent with the common-law rules prevailing when [Section] 1983 was enacted in 1871.'") (alteration incorporated); *Rodriguez* v. *Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.) ("Some argue that the 'clearly established' prong of the analysis lacks a solid legal foundation."); *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.) ("Scholars have criticized [the qualified immunity] standard."); *Ventura* v. *Rutledge*, 2019 WL 3219252, at *10 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete re-examination of the doctrine which, as it is currently

applied, mandates illogical, unjust, and puzzling results in many cases."); *Thompson* v. *Clark*, 2018 WL 3128975, at *10 (E.D.N.Y. 2018) (Weinstein, J.) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny.").

In critiquing prevailing doctrine, Judge James Browning supplied a district court's perspective: "Factually identical or highly similar factual cases are not * * * the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way." *Quintana* v. *Santa Fe Cty. Bd. of Comm'rs*, 2019 WL 452755, at *37 n.33 (D.N.M. 2019). In Judge Browning's view, the current "obsession with the clearly established prong" improperly "assumes that officers are routinely reading Supreme Court and [court of appeals] opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work." *Ibid*. That is not how police operate: "in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles." *Ibid*. In requiring a "highly factually analogous case," this Court's jurisprudence "has either lost sight of reasonable officer's experience or it is using that language to mask an intent to create 'an absolute shield for law enforcement officers.'" *Ibid*.

2. The current state of qualified immunity jurisprudence leaves significant violations of constitutional rights without vindication. "This current 'yes harm, no foul' imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part).

And, given the frequent use of qualified immunity, courts fail to refine the contours of constitutional rights, perpetually locking in the cycle of immunity. Indeed, that is just what happened here, with the court of appeals flatly declining to assess whether—with her affidavit taken into account—petitioner has made out a claim for a constitutional violation. App., *infra*, 20a (concluding only that "[s]hooting Blough from a distance of twenty-five to thirty-six feet would not have violated any *clearly established* right.") (emphasis added).

This now occurs frequently, with courts "avoid[ing] scrutinizing the alleged offense by skipping to the simpler second prong." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part). See also *Sims* v. *City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (noting that the case was the "fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation."); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37-38 (2015) (finding a post-*Pearson* decrease in the willingness of circuit courts to decide constitutional questions). This result, when compounded with lower courts' restrictive reading of the "clearly established" standard, has produced an "Escherian Stairwell" in which "[p]laintiffs must produce precedent even as fewer courts are producing precedent." *Zadeh*, 928 F.3d at 479-480 (Willett, J., concurring in part and dissenting in part).

3. Review is also warranted because these questions recur with enormous frequency. A Westlaw search found around 6,000 federal opinions mentioning qualified immunity in 2018 alone. And, each year, tens of thousands of lawsuits are filed that may implicate qualified immunity. See Civil Federal Judicial Case-

load Statistics, tbl. C-2 (Mar. 31, 2018) (identifying that, for 12 months ending in March 2018, 15,020 "other civil rights" lawsuits, 20,673 prisoner civil rights cases, and 10,947 prison condition cases were filed—virtually all of which could involve a qualified immunity defense). This issue is not going away.

B. This case is a compelling vehicle for examining qualified immunity.

This is a compelling case for the Court to evaluate the scope of qualified immunity, because the doctrine makes the difference in the outcome. Once petitioner's affidavit is properly considered (see *supra* pages 16-25), it is qualified immunity—in particular, the clearly established law prong—that does the work in the court of appeals' opinion. See App., *infra*, 21a-22a ("[F]or the same reasons the officers did not violate constitutional law by shooting Blough if he was five feet away, they did not violate *clear* constitutional law by shooting Blough if he was twenty-five to thirty-six feet away.").

What is more, the court of appeals could only reach that result by placing an "impossibly high standard" on petitioner to "dredge up a mirror-image case." App., *infra*, 40a. Sixth Circuit case law recognizes that it is clearly established that police may not shoot even a non-compliant, suicidal, knife-wielding suspect, provided he is not charging towards the officers or bystanders. See *Studdard* v. *Shelby Cty.*, 934 F.3d 478, 481-482 (6th Cir. 2019) (citing *Sova*, 142 F.3d at 900-901); App., *infra*, 37a-38a. Given the factual disputes about the distance and whether Blough had turned to run before being shot, it is hard to see how much closer a precedent could be to the circumstances of this case (viewed, of course, in the light most favorable to petitioner). But it was not close enough for the majority. App., *infra*, 21a ("Reading *Sova* and *Studdard* would

not impress upon every reasonable officer the clear understanding that it is illegal to shoot someone behaving like Blough if that person is twenty-five feet away from one officer and thirty-six feet away from another."). Qualified immunity is what stands between petitioner and her day in court.

C. Qualified immunity is inconsistent with the text and history of Section 1983.

Review is additionally warranted because qualified immunity, as currently formulated, bears no relation to either the text of Section 1983 or the common-law immunities from which it sprang. See *Ziglar*, 137 S. Ct. at 1869-1872 (Thomas, J., concurring); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018).

1. The current qualified immunity doctrine has no basis in the text of Section 1983. The Court has acknowledged this point time and again—Section 1983 "on its face admits of no immunities" (*Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976)), and "[Section 1983's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted" (*Owen* v. *City of Independence*, 445 U.S. 622, 635 (1980)).

Rather than growing out of any textual hook, qualified immunity was borne out of a putative "good faith" defense to a few specific torts. *Pierson* v. *Ray*, 386 U.S. 547, 554-556 (1967). It is now applied to all Section 1983 claims. But no such free-standing defense existed at common law. See *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) ("[S]ome evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine").

Indeed, the current doctrine bears no resemblance whatsoever to any common-law immunity defense. The

modern test refers to whether the right in question was clearly established. See *Harlow*, 457 U.S. at 818. This reflects, the Court itself acknowledges, "principles not at all embodied in the common law" when Section 1983 was enacted. *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987); see also *Baxter*, Slip. Op. at 4 ("There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe.").

2. Rather than emanating from text or history, qualified immunity was informed by judge-made policy determinations. In particular, the Court was concerned with the imposition of personal liability on public officials and the burden of litigation. See *Harlow*, 457 U.S. at 813-814 (addressing perceived social costs of claims against government officials). But, as Justice Thomas observed, these "qualified immunity precedents * * * represent precisely the sort of freewheeling policy choices that [the Court has] previously disclaimed the power to make." *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) (quotation marks and alteration omitted); See also *Baxter*, Slip. Op. at 4.

Beyond that, qualified immunity has proven not to accomplish the goals it seeks. As for officer liability, indemnification is the norm. One study found that officers in a sample of settlements for police misconduct only paid 0.02% of the damages paid to plaintiffs, demonstrating the strong protection already afforded by indemnification. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). And there is evidence that qualified immunity plays no meaningful role in alleviating litigation burdens. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 48-51 (2017). While justified solely by judicially identified policy aims, decades of experience have proven that those goals are not meaningfully advanced by the doctrine.

3. No factors counsel in favor of retaining qualified immunity in its current fashion. The Court has previously altered its judge-made rules regarding Section 1983 immunity, without serious hesitation. See, *e.g.*, *Pearson* v. *Callahan*, 555 U.S. 223, 233-235 (2009) (overruling *Saucier* v. *Katz*, 533 U.S. 194 (2001)); *Harlow*, 457 U.S. at 815-818 (overruling subjective-good faith requirement identified in *Scheuer* and other authorities). Having been "tested by experience" (*Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-174 (1989)), existing doctrine has proven not just ineffective at accomplishing its stated ends, but affirmatively detrimental to litigants and the law alike.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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