20-5789

No. _____

SUPREME COURT OF THE UNITED STATES

GERARD NGUEDI, Pro Se,

Petitioner,

vs.

CITY OF NEW YORK,
BRIAN CAULFIELD,
BILL BRATTON,
NYPD POLICE OFFICER JOHN DOE #1
THROUGH NYPD Police Officer JOHN DOE #6
OFFICER CHRISTOPHE CARLUCCI, SHIELD NO. 3169,
OFFICER RAYMOND PHILLIPS, SHIELD NO. 10876,
OFFICER PETER SCOURTOS, SHIELD NO. 25214,

Respondents.

On Petition for a Writ of Certiorari to

the United States Court of Appeals

for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Are police officers entitled to qualified immunity as a matter of law—even if they use substantial force against non-threatening suspected misdemeanants to break in, beat and drug the suspect, who is neither fleeing, nor resisting arrest, nor posing a safety risk to anyone—so long as no prior case involves a virtually identical fact pattern?

II. PARTIES TO THE PROCEEDINGS BELOW

Petitioner Gerard Nguedi was the plaintiff in the United States District Court Southern District of New York and the plaintiff-appellant in the United States Court of Appeals for the Second Circuit. All Respondents were defendants-appellees in the Second Circuit. The City of New York, Bill Bratton, and Brian Caufield were defendants in the district court. The Complaint filed in the district court also cited three police officers and six other unidentified police officers, all of whom were involved in the violation of the rights of Petitioner.

III. STATEMENT OF RELATED CASES

United States District Court Southern District of New York:

Nguedi v. City of New York, No. 16-CV-4430 (RA) (Sept. 27, 2018).

United States Court of Appeals for the Second Circuit:

Nguedi v. City of New York, No. 18-3199 (May 6, 2020).

IV. TABLE OF CONTENTS

V. TABLE OF AUTHORITIES

1. Cases

2. Statutes

3. Other Authorities

4. Rules

5. Constitutional Provisions

VI. PETITION FOR WRIT OF CERTIORARI

Petitioner Gerard Nguedi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

VII. OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unofficially reported at *Nguedi v. City of New York*, No. 18-3199-cv (2d Cir. May 6, 2020). The opinion of the United States District Court Southern District of New York is unofficially reported at *Nguedi v. City of New York*, No. 16-CV-4430 (RA) (S.D.N.Y. Sep. 27, 2018).

VIII. JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on May 6, 2020. This petition is timely filed. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IX. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourth Amendment provides that, "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . 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[.]"

X. STATEMENT OF THE CASE

Since 1982, this Court has always held that although government officials are entitled to qualified immunity, this immunity is not absolute. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). According to this Court, such officials may be held liable for violating the Constitution only if they violate a "clearly established" rule of law. *Id.* The court of appeals' decision in the current case splits with four other circuits on a question of exceptional importance: whether an officer violates clearly established law by using substantial force against a non-threatening suspected misdemeanant who is neither fleeing nor resisting

force violates clearly established law even where the victim of that force does not comply entirely with a police officer's commands—and even if the plaintiff does not identify a prior case with virtually identical facts. *Westfall v. Luna*, 903 F.3d 534, 549 (5th Cir. 2018); *Ciolino v. Gikas*, 861 F.3d 296, 306 (1st Cir. 2017); *Kent v. Oakland Cty.*, 810 F.3d 384, 397 (6th Cir. 2016); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1286 (10th Cir. 2007). The Second Circuit's decision, however, differed with this clearly-established decision, hence having a prejudicial effect on Petitioner. The petition for certiorari should be granted to correct this anomaly.

1. The events at the heart of this case began in the early evening of March 1, 2016, when Gerard Nguedi was at home watching TV and posting messages on Facebook. On the material day, Petitioner's sister, Sabine Nguedi, called Petitioner a number of times, but Petitioner did not pick up any of her calls. Petitioner's sister then made a 911 call all the way from Maryland, probably worried that, based on Petitioner's Facebook posts and the fact that she had not spoken to him on phone, Petitioner could be unwell. The NYPD, responding to the 911 call, arrived at Petitioner's apartment for a "wellness check" and took the keys to Petitioner's house from the building staff under the command of the Building Manager, Bryant Caufield.

Nine NYPD Police Officers, accompanied by Mr. Caufield, arrived at Petitioner's door and started banging on it aggressively and loudly. Petitioner then partially opened the door and left the security chain on, just to speak to the officers and tell them that he was okay and did not request any help. The officers did not even have the courtesy to inform Petitioner why they were at his door nor did they inform him of the person who alerted them. Petitioner made a 911 call at the time the police was banging the Petitioner door, plaintiff provided 911 recording of where the operator never told him why the police was there, and only confused Petitioner by asking petitioner to talk to his sister, and failed to inform him that his sister had actually called 911.

After hanging the phone with 911 operator, since Petitioner still did not know why the officers were at his door and the officers nor the 911 operator that Petitioner had previously called did not clearly tell Petitioner that it was Petitioner's sister who had called 911 because of Petitioner's Facebook post, Petitioner refused to remove the door security chain and only spoke to the officers and Mr. Caulfield through the partly opened door. However, the officers, who were very aggressive, violent, and threatening, maintained that they would break the door if Petitioner refused to fully open it.

Acting on their promise, and with the help of Mr. Caufield, the police

batons on Petitioner's knees and elbows. Eventually, the officers drugged Petitioner with multiple drugs until Petitioner completely lost consciousness only to wake up in a hospital.

2. It is based on the above fact pattern that Gerard Nguedi sued by filing a complaint commencing the action on June 13, 2016, alleging that the officers had violated his 42 U.S.C. § 1981 and § 1983. Shortly after filing his lawsuit and serving the identified individuals, Petitioner requested the identity and names of the nine police officers who responded to Petitioner's sister's 911 call for a wellness check as described above. Petitioner was never provided with the address or contact information of these officers but just the names of three of the nine officers and their badge numbers.

On April 7, 2017, City of New York responded to the Court's February 6, 2017, Valentin Order by identifying Officer Christophe Carlucci, Shield No. 3169, Officer Raymond Phillips, Shield No. 10876, and Officer Peter Scourtos, Shield No. 25214 as the NYPD officers who broke into Petitioner's house without a warrant, drugged and beat Petitioner in his house on March 1, 2016. In response, Petitioner submitted a letter on February 9, 2017, observing that six John Doe officers were missing. The next day, Hon. Judge Abrams referred this case to Honorable James C. Francis for general pretrial matters. On May 15, 2017, Petitioner filed the operative Amended Complaint. On October 13, 2017, Honorable James C. Francis ordered counsel for the City of New York to "identify any police personnel not named in the Amended Complaint who were present at the time of the incident."

After the Court's October 13, 2017 Order, City of New York sent their "Letter Motion for Extension of Time for Discovery and Response to Court's October 13, 2017, Order" on October 20, 2017, after just three days to mainly request for an extension of time. Petitioner believed that Respondents' October 20, 2017, was, in fact, meant to request for an extension of time, only to realize that the motion for extension of time was, in fact, Respondents' final response to the court's October 13, 2017 Order.

On January 13, 2018, Petitioner e-mailed Mrs. Debra March to ask if she had any updates on the investigation for the disclosure of the identity of the additional 6 police officers, and that is when Mrs. March directed Petitioner to Respondents' October 20, 2017 letter (Respondents' request for extension of time). In the October 20, 2017 letter, City of New York identified one female NYPD officer named Andrea Turizo. The City justified their non-disclosure of her identity by saying that "her name was not initially disclosed in response to the court's February 6, 2017 Valentin Order because she did not match the

clearly asked for the identity of the nine NYPD police who were present at his house on the evening of March 1, 2016. Rather, City of New York lied and concealed her name and refused to let Petitioner amend his complaint to add her name as one of the individuals liable to the violation of the Petitioner's rights.

Respondents would thereafter file a motion for summary judgment for which the United States District Court Southern District of New York granted on September 27, 2018, citing (among others) that no genuine dispute of material fact existed. Petitioner then appealed the decision to the United States Court of Appeals for the Second Circuit.

At appeal, Petitioner presented arguments that:

a. The district court erred in law in shifting its role from issue finding to issue determination. In determining Motions of Summary Judgement brought under CPLR 3211, the court was required to determine whether there was a legal cause arising from the facts and not whether the alleged facts were credible, true and/or factual. The court made a finding that there were no other officers other than the four who were named by the City even though the circumstances necessitated a proper inquiry into the credibility of the City's claim which could only be achieved through a full trial as opposed to a Summary Judgment.

b. The court grossly erred in finding that former Police Commissioner Bill Bratton was already being sued by Petitioner in another lawsuit while the fact is that suit 16 CV 0636 has always been against the Federal Reserve only, even if he is mentioned.

c. The court erred in law by failing to give the allegations contained in the complaint, as supplemented by Petitioner's evidence and affidavit their most favorable intendment.

d. The court erred in dismissing Petitioner's claim based exclusively on the lack of a policy document to support Petitioner's case. The case was not purely based on documentary evidence so as to warrant such a drastic remedy of Summary Judgement. Whereas Petitioner's claim for irregular dispatch of about 9 NYPD officers for wellness check alluded to a breach of a policy, it was not the only claim as Petitioner alleged other violations of his civil rights that could be tried on circumstantial evidence and not documentary evidence.

e. The court erred in law by failing to recognize the Pro Se status of Petitioner who was entitled to the most liberal interpretation of the

Even after proving that the harassment was based on custom and practice by mentioning several other examples, it was still adjudged and decreed that the judgment of the district court is affirmed. Rather than addressing whether Respondents acted unlawfully, the panel majority proceeded directly to considering whether Respondents violated clearly established law. This was clearly against the Eighth Circuit decision in the case of *Kelsay v. Ernst*, 905 F.3d 1081 (2018) generally establish that, when a "nonviolent misdemeanant poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully." Instead, the appeals court affirmed the district court's decision citing (among others), that Petitioner failed to prove that the violation of his constitutional rights was caused by an official custom, practice, or policy.

This petition followed.

XI. REASONS FOR GRANTING THE WRIT

The Second Circuit's decision shows a clear departure from the positions held by four other circuits when it comes to the limits of qualified immunity. The question of whether an officer violates clearly established law by using substantial force against a non-threatening suspected misdemeanant who is neither fleeing nor resisting arrest has previously been answered by the First, Fifth, Sixth, and Tenth Circuits. All these circuits have held that as a matter of law, such use of force violates clearly established law even where the victim of that force does not comply entirely with an officer's demands—and even if the plaintiff does not identify a prior case with virtually identifiable facts. *Westfall*, 903 F.3d 534, 549 (5th Cir. 2018); *Ciolino*, 861 F.3d 296, 306 (1st Cir. 2017); *Kent*, 810 F.3d 384, 397 (6th Cir. 2016); *Casey*, 509 F.3d 1278, 1286 (10th Cir. 2007).

The Second Circuit in the Petitioner's case, however, reached the opposite conclusion. It held that Respondents did not violate clearly established law when they broke into the Petitioner's house, beat the plaintiff, and even drugged him after asserting to the respondent that there was no danger. The court reached this conclusion because Petitioner did not show that the violation of his constitutional rights was caused by an official custom, policy, or practice as seen in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691. Even though Petitioner gave similar operations the NYPD had done in the past, the Second Circuit concluded that the evidence was too insufficient to serve as a custom, policy, or practice.

This split—on its own—warrants the Court's intervention to clarify the

that "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); see also *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015). But, on the other hand, it has repeatedly explained, that the application of certain factors identified in *Graham v. Connor*, 490 U.S. 386 (1989)— "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight," id. at 396—may defeat a qualified immunity defense "in an obvious case * * * even without a body of relevant case law," *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); see also *Kisela*, 138 S. Ct. at 1153; *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

The Second Circuit's departure underscores that this Court should intervene to explain exactly when that is so. After all, if the obviousness principle means anything, it should mean that, with none of the factors identified in *Graham* supporting the use of force, Respondent's beating and drugging of a non-violent person was an obvious violation of the law. Regardless of the circuit split, the Court should also grant certiorari because the question presented is exceptionally important. If the Court does not take this case and establish some bounds for when the law is clearly established in excessive force cases, courts—and police officers—will "effectively treat qualified immunity as an absolute shield." *Kisela*, 138 S. Ct. at 1155 (Sotomayor, J., dissenting). That outcome would eviscerate Section 1983, which should not be understood to grant immunity to officers unless they would have had a defense in "an analogous situation at common law." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (internal quotation omitted); see also *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring). When Congress enacted Section 1983, the background common law of assault and battery would not have provided Respondent a defense against Petitioner's suit. The Court should grant certiorari to resolve the circuit split, clarify the contours of the qualified immunity doctrine, and restore some semblance of the historical order, at least in obvious excessive force cases like this one.

The Court Should Grant Review to Decide the Question Presented

A. *The Circuits Are Split on this Question*

1. Even if Petitioner had ignored Respondent's instruction to open the door (he opened it to inform the police officers that he was not in any danger) or resisted arrest—which he did not—the result of this case would have been

that the case law is sufficiently clear to warn a reasonable officer that the use of substantial force against a non- threatening misdemeanant who is not fleeing, resisting arrest, or posing any risk to the safety of others violates the right to be free from excessive force, even if the individual disobeys an officer's commands.

In *Westfall v. Luna*, the Fifth Circuit reversed the grant of qualified immunity to a police officer who took the plaintiff to the ground for disobeying an order. 903 F.3d 534, 549 (5th Cir. 2018). There, the defendant officer instructed the plaintiff, a woman who was five-feet-five inches and of a "small build," not to follow her son into her home. *Id.* at 540–41. When the plaintiff disobeyed the instruction not to enter and instead reached for her doorknob, the officer took the plaintiff to the ground. *Id.* at 540.

Although the plaintiff disobeyed police instructions, the Fifth Circuit held that the police officer was not entitled to qualified immunity for using excessive force based on similar circumstances present here. Like Petitioner, the plaintiff was arrested not for a serious crime but for "interference with public duties—a minor offense." *Id.* at 547 (citing Tex. Penal Code § 38.15(b) ("An offense under this section is a Class B misdemeanor.")). Like Petitioner, the plaintiff also did not pose a threat to the officers or anyone else. *Id.* at 548. And, like in this case, "it [was] clear that [the plaintiff] was not trying to flee" the scene. *Id.* at 548. Had this case been decided in the Fifth Circuit rather than the Second Circuit, therefore, it is apparent that it would have been decided otherwise.

The same is true with respect to the Sixth Circuit. In *Kent v. Oakland County*, the Sixth Circuit held that a police officer who tased a plaintiff who disobeyed several commands was not entitled to 12 qualified immunity as a matter of law. 810 F.3d 384, 397 (6th Cir. 2016). In the case, the plaintiff was yelling and flailing his arms at police officers and emergency medical technicians. *Id.* at 388. The defendant officer commanded the plaintiff to calm down and to put his arms down and asked the plaintiff to go to the downstairs area of the home. *Id.* Although the plaintiff "refused to comply with an officer's command," the Sixth Circuit concluded that the officer violated clearly established law because the plaintiff was not suspected of a serious crime, did not pose an "immediate safety threat," and did not attempt to flee the scene. *Id.* at 391–93. Accordingly, the outcome of this case would have turned out differently had it been decided in the Sixth Circuit.

In fact, precedent shows that the result would also have been different if Petitioner had taken his claim to the Tenth Circuit. In *Casey v. City of Federal Heights*, the Tenth Circuit reversed the grant of qualified immunity to a police officer who took a plaintiff to the ground for not following instructions and

to take the court file for his traffic case out of the courthouse. *Id.* at 1279. The plaintiff removed the file from the building anyway, walking out of the courthouse and toward his truck to retrieve money to pay the traffic ticket fine. *Id.* at 1279–80. The clerk alerted a police officer, who intercepted the plaintiff as he was heading back toward the courthouse. *Id.* at 1280. The officer "accosted" the plaintiff and ordered "him to return to his truck." *Id.* After the plaintiff explained that he needed to return the file to the courthouse, the officer asked the plaintiff for the file. *Id.* Rather than complying with the officer's instruction, the plaintiff held out his briefcase to the officer with the file clearly visible. *Id.* with the officer unable to take the file, the plaintiff walked around him and toward the courthouse. *Id.* The officer put the plaintiff in an arm lock, but the plaintiff continued walking toward the courthouse, at which point the officer grabbed and tackled him. *Id.* The Tenth Circuit concluded that "a reasonable jury could find [the officer's] use of force to be excessive and therefore unconstitutional," and proceeded to determine that he violated clearly established law. *Id.* at 1283. In this case, Petitioner did not even resist arrest, nor did he pose "'an immediate threat to the safety of anybody present." *Id.* at 1282 (quoting *Graham*, 490 U.S. at 396)). He only refused to remove the door security chain because he didn't know why the police had come to his house. Consequently, the very angry nine police officers proceeded to break Petitioner's door and beat Petitioner with their fists, feet, police batons on the knees and elbows, and then drugged Petitioner with potentially multiple drugs until Petitioner completely lost consciousness and woke up in a hospital without any knowledge of where he was.

Also, Petitioner would have survived summary judgment had he been able to appeal his case in the First Circuit. In *Ciolino v. Gikas*, the First Circuit denied qualified immunity to a police officer who took a plaintiff to the ground for disobeying instructions. 861 F.3d 296, 306 (1st Cir. 2017). In the case, police officers ordered attendees of a street festival to disperse. *Id.* at 299. Rather than complying with the officers' instructions, the plaintiff paused in front of the officers and their police dogs, taunted the police dogs, and turned his back on the officers. *Id.* The defendant officer then grabbed the plaintiff from behind and took him to the ground. *Id.* at 300. Although the plaintiff disobeyed police instructions, the First Circuit concluded that "a reasonable officer in [the defendant]'s position would have understood" his actions violated the plaintiff's Fourth Amendment right. *Id.* at 303 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotation omitted)). As with Petitioner, the Petitioner just disobeyed an order to open a door. And the plaintiff, like Petitioner, "presented no indications of dangerousness." *Id.* (alterations and internal quotation omitted). * * * None of these decisions can be reconciled with the decision in this

should not be dependent on the state the Petitioner sued in as this is a matter under federal law.

2. The clear split on the question presented underscores even deeper tension among the circuits over how to determine when the law is clearly established for qualified-immunity purposes in excessive force cases. "[C]ourts of appeals are divided—intractably—over precisely what degree of factual similarity must exist * * * In day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in 15 part). For the Second Circuit majority, none of the decisions cited by the district court or Petitioner sufficed to clearly establish the unreasonableness of using substantial force here because none of those decisions involved the same fact pattern. In contrast, other circuits reject the notion that they need to "find qualified immunity wherever [they] have a new fact pattern." *Casey*, 509 F.3d at 1284; see also, e.g., *Kent*, 810 F.3d at 395 (declining to limit consideration of cases capable of clearly establishing law to those involving the particular context at issue); *Ciolino*, 861 F.3d at 304 (considering "analogous" cases that "illustrate the application of *Graham's* general excessive force principles"); *Westfall*, 903 F.3d at 549 (holding that it is "clearly established that the permissible degree of force depends on the *Graham* factors"); *Edrei v. Maguire,* 892 F.3d 525, 540–544 (2d Cir. 2018) (denying qualified immunity as a matter of law to officers even though there was no case with the exact same facts), cert. denied, 139 S. Ct. 2614 (2019); *Yates v. Terry*, 817 F.3d 877, 887 (4th Cir. 2016) (same); *Alicea v. Thomas*, 815 F.3d 283, 291–92 (7th Cir. 2016) (same).

The Court should grant certiorari, reject the Second Circuit's approach, and affirm that of the majority of circuit courts instead. The infinite factual differences inherent in each police incident and the nature of excessive force jurisprudence— "an all-things-considered inquiry with 'careful attention to the facts and circumstances of each particular case'"— means that "there will almost never be a previously published opinion involving exactly the same circumstances." *Casey*, 509 F.3d at 1284 (quoting 16 *Graham*, 490 U.S. at 396). The Second Circuit's approach sounds the death knell for holding police officers accountable because the court will almost always be able to find some minor factual difference between a case presently before the court and a prior case. See John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*?, 62 Fla. L. Rev. 851, 858 (2010) ("When precisely applicable precedent cannot be found, qualified immunity expands beyond all sensible bounds.").

B. This Case is the Ideal Vehicle for Deciding the Question Presented

This case provides a uniquely clean vehicle to decide the question presented as a pure issue of law. It is the Petitioner's contention that his constitutional rights have been violated. Should innocent civilian's constitutional rights be sacrificed on the altar of police guaranteed immunity?

a. The severity of the crime that could have been committed in Petitioner's case

This petition should be granted because it is unrealistic and very much ironic that a "wellness check" made Petitioner end up in a hospital. There is no gainsaying that Petitioner was well off prior to the violation of his constitutional rights. More so, the extent of crime that would have been committed but for the intervention of the police inflicting the harm on Petitioner is minuscule and should not warrant the violation of his constitutional rights.

b. Whether Petitioner posed an immediate threat to the safety of the officers or others

It is obvious that Petitioner "posed no danger to anyone" when Respondents broke Petitioner's door and beat Petitioner with their fists, feet, police batons on the knees and elbows, and then drugged Petitioner with potentially multiple drugs as proven in the evidence brought forward by Petitioner until Petitioner completely lost consciousness and woke up in a hospital not knowing where he was.

c. Whether Petitioner was actively resisting arrest or attempting to evade arrest by flight.

It was also be proven that Petitioner did not resist arrest nor attempted to evade arrest in this case and refusing to open his door to the police cannot be misconstrued to mean that Petitioner was resisting arrest as he was not informed of what he had done to warrant his arrest.

C. Resolving the Question Presented is Exceptionally Important

This Court has consistently reaffirmed that "in an obvious case", the standards of *Graham* can clearly establish the law, "even without a body of relevant case law." *Brosseau*, 543 U.S. at 199; see also *Pauly*, 137 S. Ct at 552; *Kisela*, 138 S. Ct. at 1153. But the Court's precedents do not explain what makes the use of force obviously excessive. The Court should clarify the issue in this case by holding that use of substantial force is obviously excessive when every one of the *Graham* factors cuts against the police officer using that force, i.e., when force is used against a non-threatening suspected misdemeanant, who is

If the obviousness principle means anything, it must mean that a violation is obvious when all of the factors identified in this Court's jurisprudence cut against the use of substantial force but the officer uses such force anyway. The *Graham* factors would become all but meaningless—and establish no outer bound to immunity in excessive force cases—if officers could avoid liability regardless of whether some, all, or none of the factors support the use of substantial force. If there is ever an obvious case of excessive force, it is this case.

The opportunity to clarify when the Fourth Amendment's excessive force law is clearly established warrants special attention because the Court's recent cases uniformly address where the law in this area is not clearly established. Over the past five years, the Court has decided five qualified-immunity cases involving an excessive force claim. In all these cases, the Court vacated or reversed courts of appeals' decisions ruling that the law was clearly established. *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019); *Kisela v. Huges*, 138 S. Ct. 1148 (2018); *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullenix v. Luna*, 136 S. Ct. 305 (2015); *San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015).

The Court has not been nearly as active in clarifying the circumstances in which the use of force goes beyond the pale and loses the protection of qualified immunity, which has led to the circuit split. The lack of a precedent setting forth circumstances in which the use of force violates clearly established Fourth Amendment law has serious and negative effects. Without such decisions, the law remains perennially unsettled, in effect transforming qualified immunity into "an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

This case exemplifies this problem by illustrating how law enforcement can weaponize minor distinctions to defeat qualified immunity. A state of affairs that borders on de-facto absolute immunity raises especially grave concerns in the excessive-force context because the analogous common law torts of assault and battery did not recognize any good-faith immunity for such claims. The current state of the law represents a radical departure from the common law rules that prevailed when Congress enacted Section 1983. If the Court does not wish to reconsider its qualified immunity jurisprudence at this time, as members of this Court have urged, it should at least take steps within the confines of current law to rein in the most extreme departures from the original meaning of Section 1983.

Section 1983 "on its face does not provide for any immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Instead, qualified immunity jurisprudence is built on the proposition that good-faith immunity for government officers would

need to write it down in the text of Section 1983. See *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967) (holding that Section 1983 should be read against the background of nineteenth-century tort law, which included "the defense of good faith"). Pierson's creation of a subjective good faith defense later evolved into a purely objective inquiry into clearly established law. See *Harlow*, 457 U.S. 800, 815–16, 818 (1982).

But the foundation stone of these decisions turns out to be a fiction: qualified immunity is a modern innovation and finds no true ancestor in the common law. The doctrine "substitute[s]" the Court's "policy preferences for the mandates of Congress" and lacks grounding in the text and history of Section 1983. *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring). The current qualified immunity jurisprudence consists of "devising limitations to a remedial statute, enacted by the Congress, which 'on its face does not provide for any immunities.'" *Wyatt v. Cole*, 504 U.S. 158, 171–72 (1992) (Kennedy, J., concurring) (citing Malley, 475 U.S. at 432). This exercise "transform[s] what existed at common law based on [the Court's] notions of policy or efficiency," id. at 171–72, entangling the Court in "essentially legislative activity," *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting).[1]

From the early years of the Republic and through the end of the Nineteenth Century, American law rejected a generalized good faith defense for government officers.[2] For example, in *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 124 (1804)., a U.S. captain held "a conviction that he acted upon correct motives, from a sense of duty," when he unlawfully seized another ship. But that was no defense to liability. *Id.* at 125. Similarly, in 1851, the Court held that a U.S. Army colonel who had seized a citizen's property was liable for damages, whether or not he was following orders. *Mitchell v. Harmony*, 54 U.S. 115, 137 (1851). The court reasoned that if an officer "trespassed on private rights," he was liable for damages. *Id.* at 135. His subjective good faith was beside the point:

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[1] In recent years, an ever-growing chorus of federal judges has expressed concern about the rift between qualified immunity doctrine and the text and history of Section 1983. See Morrow v. Meachum, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.); Jackson v. City of Cleveland, 925 F.3d 793, 822–23 (6th Cir. 2019) (Bush, J.); Dyal v. Adames, No. 16-CV-2133, 2018 WL 2103202, at *4 (E.D.N.Y. May 7, 2018) (Weinstein, J.); Thompson v. Cope, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.); Rodriguez v. Swartz, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.); Sok Kong Tr. for Map Kong v. City of Burnsville, No. 16-CV-03634, 2018 WL 6591229, at *17 n.17 (D. Minn. Dec. 14, 2018) (Nelson, J).

[2] See William Baude, Is Qualified Immunity Unlawful?, 106 CAL. L. REV. 45, 55 (2018); 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, 1914 (2010); Joanna Schwartz, The Case Against Qualified Immunity, 93 NOTRE DAME L. REV. 1797, 1801 (2018);

it did not matter if he acted out of "zeal for the honor and interest of his country, and in the excitement of military operations." *Id.*

In 1915, this Court rejected good-faith immunity to liability in a Fifteenth Amendment voting rights suit against state officers—a case brought under Section 1983 itself. See *Myers v. Anderson*, 238 U.S. 368, 379 (1915). In *Myers*, the lower court had denied the state officers' attempt to read a bad faith element into the statute, holding that the state officers were "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) (emphasis added); see also *Baude*, supra, at 58.

Good faith could spare an officer from liability in certain contexts in the Nineteenth Century—but not because of some generalized immunity. Rather, as is the case today, certain state common law torts required bad faith as an element or recognized good faith as a defense. *Baude*, supra, at 55. But when it came to assault and battery by an officer, bad faith was not an element, nor good faith a defense. Thus, if one inquires "whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983," see *Ziglar*, 137 S. Ct. at 1871 (Thomas J., concurring), the answer, in this case, is clearly in the negative. In fact, the Court said as much in *Beckwith v. Bean*, 98 U.S. 266, 275 (1878), a case decided just seven years after the enactment of Section 1983. In *Beckwith*, government officials had imprisoned the plaintiffs because the officials believed the plaintiffs were aiding Civil War deserters. *Id.* at 268. The plaintiffs sued the officials for assault, battery, and false imprisonment. *Id.* at 266. Good faith was not available as a defense: "A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act[.]" *Id.* at 277 (citation omitted). Nor could the defendants' good faith reduce the plaintiffs' compensatory damages: "[C]ompensation cannot be diminished by reason of good motives upon the part of the wrong-doer." *Id.* at 276. Evidence of good faith was relevant only to the jury's consideration of punitive damages, i.e., "whether punishment by exemplary damages should be inflicted." *Id.* at 275.

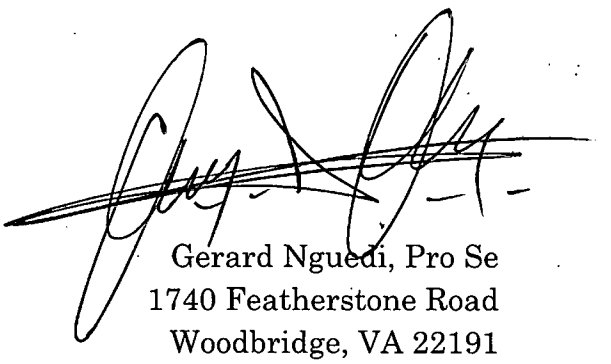
In 1871, an officer would not argue good faith immunity, or even a good faith defense, to preclude an assault or battery claim against him. But absent this Court's intervention, officers like this will escape a trial 150 years later based on judge-made immunity policy in the most obvious type of case, one where none of the relevant factors supporting the use of force are present.

doctrine and the original meaning of Section 1983— all within the boundaries of stare decisis and current law. The Court should grant certiorari to do just that.

XII. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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