No. _____

In The
Supreme Court of the United States

JEANINE LIBERTI and MICHAEL LIBERTI,
individually and as surviving parents
of Dylan Liberti, decedent,

Petitioners,

v.

CITY OF SCOTTSDALE; WILMER FERNANDEZ-KAFATI,
#1476; MAJORIE BAILEY, #1469; ALAN RODBELL,
in his individual and official capacity as Chief
of Scottsdale Police Department,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. For 42 U.S.C. § 1983 cases, this Court has created a qualified-immunity doctrine. It lacks support in the common law, in this Court's pre-1974 caselaw, and in the statute's text and history. Moreover, instead of shielding good-faith conduct, as originally intended, the qualified-immunity doctrine has evolved to shield police officers and other public officials from liability for bad-faith conduct. Only in the rarest of cases will they be held liable for violating Section 1983.

Should this Court abolish the qualified-immunity doctrine and return to its original practice of asking whether the common law historically provided immunity for the public officials in analogous situations?

2. Could the police officers who attacked Dylan Liberti have possibly thought that the United States Constitution, or any other legal or common-law authority, would let them attack a peaceful, cooperative, law-abiding citizen, just because they wanted him to sit on hot concrete pavement, and he wanted to stand?

3. Could a reasonable trier of fact find that the police officers' unprovoked attack on Dylan Liberti at the six-minute mark in their encounter with him contributed to causing his fatal shooting just two minutes later?

PARTIES TO THE PROCEEDING

In accordance with Supreme Court Rule 14(b), all parties to the proceeding are named in the caption.

RELATED CASES

- *Liberti v. City of Scottsdale*, No. 2:17-cv-02813-DLR, U.S. District Court for the District of Arizona. Judgment entered Sep. 11, 2019.
- *Liberti v. City of Scottsdale*, No. 18-16938, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Jun. 5, 2020.
- *Liberti v. City of Scottsdale*, No. 18-16938, U.S. Court of Appeals for the Ninth Circuit. Order entered Jul. 30, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The June 5, 2020 Memorandum Decision of the United States Court of Appeals for the Ninth Circuit (App. 1) is not officially reported.

JURISDICTION

On June 5, 2020, the United States Court of Appeals for the Ninth Circuit filed its Memorandum Decision (App. 1) affirming the Judgment in a Civil Case that the United States District Court for the District of Arizona filed on September 11, 2018 (App. 28).

On July 30, 2020, the United States Court of Appeals for the Ninth Circuit filed its Order denying the Petitioners' petition for panel rehearing and petition for rehearing en banc (App. 29).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to

the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Introduction.

Petitioners ask the Court to abolish the doctrine of qualified immunity that it has created for cases arising under 42 U.S.C. § 1983.

The qualified-immunity doctrine lacks an anchor in precedent, statutory history, constitutional text, or public policy. Without an anchor, this Court and the federal circuit and district courts have struggled to apply the doctrine consistently, rationally, and fairly. Countless meritorious cases, including this one, have died because of a doctrine this Court should have never adopted. Further, the doctrine's impact on public perception of the rule of law has been appalling.

Abolition of the qualified-immunity doctrine will let the trier of fact evaluate, under traditional common-law principles, the violent and unprovoked conduct of the police officers who started the events ending in Dylan Liberti's preventable death

In addition, Petitioners ask the Court to vacate the Ninth Circuit's memorandum decision against them because, even under the qualified-immunity doctrine, the police officers are liable for physically attacking a compliant, quiet, peaceful, law-abiding young man. That physical attack contributed to causing the fatal

shooting of the young man just two minutes later. No reasonable police officers could have ever thought that the United States Constitution, or any other sort of clearly established law, would let them physically attack that young man without provocation—a physical attack that directly resulted in his shooting death just two minutes later.

2. Factual background.

There is no good-faith dispute about the facts. Objective video evidence confirms what happened. Petitioners presented the video evidence to the district court and to the Ninth Circuit—and, in their Opening Brief, provided a complete, word-for-word, unchallenged transcript of the police encounter with Dylan Liberti, from the female police officer's arrival at the strip mall until Dylan lay dying in the dirt at the feet of the two police officers just eight minutes later. (App. 45-59)

Dylan Liberti was a young man living in Scottsdale, Arizona. Feeling "weird," he called 911 from a shopping center. (App. 49) Two Scottsdale police officers, one male and one female, arrived to check on his welfare—not to arrest him. It was just a welfare check. (App. 32-34)

Dylan told the police officers he was still feeling a "little weird, kind of" but he wanted no help from fire-department paramedics. (App. 49) He calmly and politely answered the officers' questions. He gave them his correct name, address, and date of birth. (App.

49-52) He was not hostile, menacing, or threatening. And with one exception, he cooperated fully. The one exception? He wanted to stand instead of sit. (App. 46) So he politely refused to sit. In a scorching Scottsdale summer, where the cement pavement gets surprisingly hot, no rational person could blame him for wanting to stand.

After six minutes of Dylan politely interacting with the police officers, but quietly and politely refusing to sit on summer-hot cement, the female police officer blew her top. Without warning, she suddenly grabbed Dylan to force him to sit. Her male police partner rushed to help. (App. 53-54) Terrified, upset, and confused by the violent, unprovoked attack, Dylan pushed back, squirmed loose, and ran. Screaming at him to stop, the police officers chased him with drawn service pistols—although Dylan had committed no crime under Arizona law. (App. 53-54) He had lawfully defended himself from the initial unlawful attack.

Dylan stopped, took a small pocket knife from his shorts, and scooted to the side of the parking garage. By then, Dylan was shattered and incoherent. The female police officer tasered him. Dylan collapsed. (App. 54-56)

After fighting through the paralyzing pain and struggling to get up, Dylan lurched ahead. He wanted to evade the male police officer *or* he wanted to move toward him. No one can tell for sure. On what Dylan was trying to do, the female police officer's body-camera

video, the only operating body camera and thus the only objective witness, is ambiguous. (App. 56-57)

The male police officer shot Dylan twice. (App. 57) Time of the police encounter, from start to shooting? Eight minutes. (App 45-59) After the male police officer shot Dylan, the police officers stood by for two more minutes and did nothing to help Dylan as he lay supine in the dirt, jerking in pain, helpless, moaning, and bleeding to death. (App. 57-59) The body-camera video proves all of these facts, objectively. They are undisputed.

The district court held that a reasonable jury could "only" find the police officers did nothing wrong. (App. 18) But a reasonable jury could find much wrong in a brief police encounter starting with a quiet, polite, cooperative young man wanting to stand instead of sit on the scorching pavement on a hot July day in an Arizona summer—and ending after a police officer fatally shot him just eight minutes later.

REASONS FOR GRANTING THE PETITION

1. No qualified immunity could protect the two police officers who physically attacked a peaceable, cooperative, law-abiding citizen.

This case is just the latest example of how the unanchored qualified-immunity doctrine has drifted ever further from common sense, the common law, and reality. After all, the two-judge majority at the Ninth

Circuit concluded that qualified immunity protected the two police officers who caused the death of Dylan Liberti because: "No existing precedent would have given the officers notice that Officer Bailey's grabbing of Liberti's elbow in an attempt to get him to sit down or that the officers' additional attempts to subdue him when he fled were unconstitutional." (App. 3)

That is preposterous. No rational Arizona police officers could have thought that physically attacking a quiet, compliant, law-abiding citizen was constitutional. They would have known that conduct of that sort was an unlawful seizure under the Fourth Amendment—and an unlawful assault and battery.

On top of that, the thrust of the case was a wrongful-death claim under Arizona law. Thus, there was not even a proper basis for eliminating the entire case because it happened to also allege claims under 42 U.S.C. § 1983.

In any event, at the six-minute mark in his encounter with the police, Dylan had reasonably defended himself from the initial unlawful attack on him, as was his right under Arizona law. "Under the general common law rule," which Arizona follows, "excessive force used by an officer effecting an arrest may be countered lawfully." *State v. Cadena*, 9 Ariz. App. 369, 372 (1969).

"In Arizona, a person illegally arrested can resist arrest as long as he uses such force as is reasonably necessary, short of homicide." *Id*. Reasonable Arizona jurors could find that Dylan was justified in squirming

away from the police officers assaulting and battering him and justified in fleeing the out-of-control police officers who had unjustly attacked, assaulted, and battered him for no reason and with no warning.

In his dissent, Circuit Judge Mark J. Bennett correctly concluded that:

> Dylan Liberti died tragically on a hot summer Arizona day in July 2016, shot by police officers in a Scottsdale shopping mall. Dylan was just twenty-four when he died. Many of the salient events of that tragic day are captured on police video. . . .
>
> Viewing the facts in the light most favorable to Plaintiffs, the chase, tasering, and shooting might not have occurred at all had Officer Bailey not grabbed Dylan and tried to force him to sit down against his wishes. Put another way, a reasonable trier of fact could find that that initial use of force was the proximate cause of all that followed. Thus, under Arizona's wrongful death statute, if that use of force (and the actions surrounding it) was a "wrongful act, neglect or default," then Plaintiffs could make out a case for wrongful death. . . .
>
> Dylan only attempts to flee when Officer Bailey grabs him in order to force him to do something he clearly does not want to do—sit down on hot concrete. . . .
>
> A reasonable jury could find that Dylan should not have died that hot Arizona summer day. And that jury could find that the

> proximate cause of Dylan's death were wrongful acts under Arizona law. As I believe that Dylan's parents, the Plaintiffs here, should have the opportunity to further proceed with their wrongful death claims, I respectfully dissent from that portion of the majority's disposition upholding summary judgment in favor of Defendants on those claims.

(App. 5, 9-11)

For this case, Arizona law makes the difference. In Arizona, the "policy reasons for prohibiting suspects from determining on the streets whether an arrest complies with due process do not justify the abrogation of the right of self-defense against bodily harm from the use of excessive force by a policeman, even during an arrest." *State v. Martinez*, 122 Ariz. 596, 598 (App. 1979). By statute, a person may justifiably use physical force against a police officer if "the physical force used by the police officer exceeds that allowed by law." A.R.S. § 13-404(B)(2). Arizona police officers cannot use any "unnecessary or unreasonable force" in making an arrest and cannot subject an arrested person "to any greater restraint than necessary for his detention." A.R.S. § 13-3881(B).

Under Arizona law, a "police officer has the right to use force when making an arrest," but "he simply cannot use excessive force." *State v. Mincey*, 141 Ariz. 425, 441 (1984), *cert. denied*, 469 U.S. 1040 (1984). Here, there were never any objective, specific, and articulable facts, or even suspicious behaviors, to support attacking, assaulting, and battering Dylan Liberti as

part of any arrest. *State v. Master*, 127 Ariz. 210, 211 (1980); *State v. White*, 122 Ariz. 42, 43-44 (App. 1979).

The initial unlawful physical attack on Dylan was the proximate cause of his shooting death. Remove that initial physical attack, and reasonable jurors could conclude that there would have been no shooting—and Dylan would have lived. *See Mendez v. County of Los Angeles*, 897 F.3d 1067, 1072 (9th Cir. 2018), *cert. denied*, 139 S.Ct. 1292 (2019) (Law-enforcement officers had no qualified immunity for shooting and gravely wounding two civilians, one of whom was holding a weapon, because the proximate cause of the shooting was the earlier unlawful entry of the sheriff's deputies into the victims' residence. That initial unlawful act set up everything that followed, including the shooting.).

Under substantive Arizona law, which applies in 42 U.S.C. § 1983 cases, courts "must take a *broad* view of the class of risks and victims that are foreseeable, and the particular manner in which the injury is brought about need not be foreseeable." *Rogers v. Retrum*, 170 Ariz. 399, 401 (App. 1991) (emphasis added). In Arizona, Dylan's later unfortunate decision to take a small pocket-knife from his pocket in a vain gesture of resistance would not operate as a superseding cause negating the police officers' original attack on him. Under Arizona law, a "superseding cause is one that is both unforeseeable and highly extraordinary." *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 436 (App. 1978).

It was neither highly extraordinary nor unforeseeable that Dylan, terrorized and shocked by the initial violent and unprovoked attack against him, would flee and try to defend himself, however futile that might have been. He had been, after all, attacked without any warning or provocation and then chased by two apparently berserk police officers screaming at him while they brandished high-powered pistols, often pointing them at him. Defending himself against their unhinged conduct was not the best choice. But to a young man scared senseless, it may have seemed the only choice. Whether that choice was an intervening and superseding cause would be up to Arizona jurors to decide.

In any event, under Arizona law, "for an intervening cause to supersede the original negligence, the intervening cause must be so extraordinary that the defendant could not have reasonably anticipated that the cause would intervene." *City of Phoenix v. Schroeder*, 1 Ariz. App. 510, 517 (1965).

Surely the police officers who attacked, assaulted, and battered Dylan with no provocation must have reasonably anticipated injury or even death from their lack of self-control if Dylan fought against the outrage committed against him and fled from their unlawful attack, assault, and battery. This is not a case where police officers could rationally claim that qualified immunity arising from any clearly established law protected them from their unprovoked assault and battery on a peaceable, law-abiding, compliant citizen who simply did not want to sit down.

2. The qualified-immunity doctrine is contrary to history, precedent, the common law, and public policy. This Court should abolish it.

This Court should grant the petition because history, precedent, the common law, and public policy do not support retaining the qualified-immunity doctrine this Court adopted for cases arising under 42 U.S.C. § 1983.

After the Civil War, victorious Republicans in Congress tried to protect newly freed slaves and their few White allies against abuse in the States that had unsuccessfully tried to secede from the Union. Between 1865 and 1870, Congress proposed, and the States ratified, the 13th, 14th, and 15th Amendments. These Amendments directly protected certain rights and gave Congress power to pass laws to protect those rights against state action.

Under its new constitutional powers, Congress tried to respond to "the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States." *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983). Congress passed a statute variously called the Ku Klux Klan Act of 1871, the Civil Rights Act of 1871, and the Enforcement Act of 1871. Section 1, now codified, as amended, at 42 U.S.C. § 1983, provided that—

> any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be

> subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Act of Apr. 20, 1871, § 1, 17 Stat. 13.

Section 1 gave people a right to sue state officers for damages to remedy certain violations of their constitutional rights. Significantly, no version of the statutory text from 1871 forward has ever mentioned "defenses or immunities." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1870 (2017) (Thomas, J., concurring in part). Instead, it unqualifiedly and categorically imposes liability for deprivation of constitutional rights under color of state law.

Not surprisingly, therefore, for the first century after Congress enacted what would become Section 1983, this Court recognized no immunity under that statute for challenged good-faith official conduct. Indeed, in 1915, this Court rejected an argument that plaintiffs must prove malice to recover under Section 1983. *Myers v. Anderson*, 238 U.S. 368, 378-79 (1915) (liability imposed).

But this Court eventually drifted from the statute's plain words and began to ask if the common law in 1871 would have accorded immunity to an officer for a tort analogous to a plaintiff's claim under Section 1983. *Ziglar*, 137 S.Ct. at 1871 (Thomas, J., concurring

in part). For instance, in 1951, this Court approved absolute immunity for legislators because Congress had not "impinge[d] on a tradition [of legislative immunity] so well grounded in history and reason by covert inclusion in the general language" of Section 1983. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

Then, in 1967, this Court extended a qualified defense of good faith and probable cause to police officers sued for unconstitutional arrest and detention. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). The Court derived that defense from "the background of tort liabilit[y] in the case of police officers making an arrest." *Id*. at 556-57. The Court confined that approach, however, to specific analogies to the common law.

But in 1974, this Court abandoned its traditional common-law-based approach. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), without considering the common law at all, this Court remanded for application of the qualified-immunity doctrine to state executive officials, National Guard members, and a university president. *Id*. at 234-35. *Scheuer* created a new immunity based on practical considerations about "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Id*. at 247. But *Scheuer* did that without considering whether such officers had immunity for analogous common-law torts in 1871.

This Court soon ended any context-specific and historically-based analysis. For instance, it extended

qualified immunity to a hospital superintendent sued for deprivation of the right to liberty. *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975). And it gave qualified immunity to prison officials and officers. *Procunier v. Navarette*, 434 U.S. 555, 561 (1978).

A few years later, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court eliminated from the qualified-immunity analysis any subjective analysis of good faith. The Court did that to make summary judgment easier to attain and to avoid the "substantial costs [that] attend the litigation of" subjective intent. *Id*. at 816. *Harlow* emphasized that its holding would "provide no license to lawless conduct" and that when "an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id*. at 820. Unfortunately, as contemporary weekly headlines make clear, police officers across the nation *have* treated the qualified-immunity defense as a license to lawless conduct, relying on it as their main defense in any Section 1983 lawsuit alleging excessive use of force.

Shockingly, in "the thirty-seven years since *Harlow*, the Supreme Court has only twice found that an official's conduct violated clearly established law" and has recently "also made a number of summary reversals of qualified immunity denials." *Civil Rights Litigation—Qualified Immunity—Third Circuit Holds Law Is Not Clearly Established One or Two Days after*

a Decision—Bryan v. United States, 913 F.3d 356 (3d Circuit 2019), 133 Harv. L. Rev. 1484, 1488 (2020).

But the situation is not irreversible. This Court can and should abolish the qualified-immunity doctrine and let police officers stand liable under the common law, as the framers of the original version of Section 1983 intended. *See*, *e.g.*, George F. Will, *This Doctrine Has Nullified Accountability for Police. The Supreme Court Can Rethink It*, Washington Post (May 13, 2020).

It is true that *Harlow* involved an implied constitutional cause of action against federal officials, not a Section 1983 lawsuit. Despite that, this Court extended its holding to Section 1983 without considering the statute's text because "it would be 'untenable to draw a distinction for purposes of immunity law.'" *Harlow*, 457 U.S. at 818 n. 30 (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)). Later, the Court applied that objective test to Section 1983 cases. *See*, *e.g.*, *Ziglar*, 582 U.S. at 1866-67.

Thus, it is reasonable to conclude that this Court's interpretation and application of Section 1983 "is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act." *Id*. at 1871 (Thomas, J., concurring opinion). There is no historical or common-law basis for the objective inquiry into clearly established law that this Court's contemporary cases now prescribe. As a leading researcher has explained, the qualified-immunity doctrine is now "utterly untethered from the text or history of Section

1983." Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 Notre Dame L. Rev. 2093, 2096 (2018).

The qualified-immunity doctrine represents an unfortunate rejection of precedent, history, the common law, and the original congressional intent. Notably, leading treatises from the second half of the 19th century and case law until the 1980s provide no support for the "clearly established law" test that torpedoed the Libertis' case and that has tragically sunk so many others.

Indeed, this Court adopted the clearly-established-law test not because of "general principles of tort immunities and defenses." *Malley v. Briggs*, 475 U.S. 335, 339 (1986). Instead, it adopted the clearly-established-law test based on a "balancing of competing values" about litigation costs and efficiency. *Harlow*, 457 U.S. at 816. Therefore, "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.

But this Court has imprecisely and inconsistently explained what *Harlow* described as "clearly established law" actually means. *Id*. A small sample of cases trying to define "clearly established law" shows the imprecision and inconsistency:

- Since qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law," if "officers of reasonable competence could disagree" whether the challenged conduct was improper, qualified immunity applies. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). **A reasonable-disagreement test?**

- "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 493 U.S. 635, 640 (1987). **An apparent-unlawfulness test?**

- Courts could look to "a consensus of cases of persuasive authority" to determine what was clearly established law. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). **A consensus-of-cases test?**

- Clearly established law did not mean a plaintiff must find "fundamentally similar" or even "materially similar" cases because the "salient question" was "whether the state of the law gave the officers "fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). **A fair-warning test?**

- Qualified immunity shields "an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions." *Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009). **A reasonable-belief test?**

- "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). **A beyond-debate test?**

- The official cannot be said to have violated a clearly established right "unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014). **A sufficiently-definite test?**

- Inquiring if a law was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2015). **A specific-context test?**

- Qualified immunity applied because the court of appeals "failed to identify a case where an officer acting under similar circumstances as [the police officer who shot a suspect through a window] was held to have violated the Fourth Amendment." *White v. Pauley*, 137 S.Ct. 548, 552 (2017). **A failure-to-identify-a-case test?**

- A law is not regarded as clearly established merely if a "reasonable officer might not have known for certain that the conduct was unlawful." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1867 (2017). **A might-not-have-known-for-certain test?**

- "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018). **A sufficiently-clear-foundation test?**

- When "constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018). **An inapplicable-or-too-remote test?**

- This Court has assumed "without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity," but reiterated the rule that "the clearly established right must be defined with specificity." *City of Escondido, Cal. v. Emmons*, 139 S.Ct. 500, 503 (2019). **A court-of-appeals-defined test?**

- Qualified immunity was unavailable because the facts were "particularly egregious." *Taylor v. Riojas*, No. 19-1261, 2020 WL 6365693 at *2 (U.S. Nov. 2, 2020). **A particularly-egregious-facts test?**

In the final analysis, no one can clearly say what "clearly established law" means. This Court itself has spent decades defining and explaining the indefinable and inexplicable. Diligent constitutional scholars have been unable to provide any consensus about, or coherent and consistent definition of, "clearly established law." Public officials, and especially police officers, must be even more thoroughly lost in the clearly-established-law woods.

And if that were not bad enough, under the qualified-immunity doctrine, a defendant can merely raise it as a defense, and the plaintiff then has "the burden of establishing the proof and arguments necessary to overcome it." Mark D. Standridge, *Requiem for the Sliding Scale: The Quiet Ascent—and Slow Death—of the Tenth Circuit's Peculiar Approach to Qualified Immunity*, 20 Wyo. L. Rev. 43, 44 (2020). The deterrence to official misconduct that Section 1983 was supposed to impose is weakened because "officers need not justify their actions via the qualified immunity defense, but rather, the plaintiff must justify her own case, and prove the defense wrong." Jameson M. Fisher, *Shoot at Me Once: Shame on You! Shoot at Me Twice: Qualified Immunity. Qualified Immunity Applies where Police Target Innocent Bystanders*, 71 Mercer L. Rev. 1171, 1180 (2020).

"Qualified immunity is no immunity at all," this Court has declared, "if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." *City and County of San Francisco, Cal. v. Sheehan*, 135 S.Ct. 1765, 1776 (2015).

But that ignores the plain language of 42 U.S.C. § 1983, which imposes liability on every person who, under color of state law, causes a citizen "to be subjected . . . to the deprivation of any rights . . . secured by the Constitution." One of the most important rights the Constitution protects is freedom from unreasonable searches and seizures. The "clearly established law" rubric has spun so far into the cosmos that it ignores the plain words of the statute this Court is trying to correctly interpret and implement.

"Qualified immunity was never meant to protect the idiosyncratic choices of law enforcement [officers] when they violate a person's constitutional rights." Caroline H. Reinwald, *A One-Two Punch: How Qualified Immunity's Double Dose of Reasonableness Doomed Excessive Force Claims in the Fourth Circuit*, 98 N.C. L. Rev. 665, 687 (2020). Just so, qualified immunity was never meant to protect the bizarre, idiosyncratic choice of the Scottsdale police officers to attack a peaceful, compliant, law-abiding citizen just to force him to sit on hot pavement.

This Court has created a "clearly established law" test so narrow that unless a plaintiff is fortunate enough to find an exactly on-point precedent that squarely governs in the narrow fact-specific context of the case, there is scant chance to survive summary judgment. Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1889 (2018). Indeed, the law on the "use of force and qualified immunity has evolved over the last two decades to provide a near-blanket protection for even the

most egregious, unwarranted, and racially charged police misconduct." Shawn E. Fields, *Weaponized Racial Fear*, 93 Tulane L. Rev. 931, 977 (2019).

Under the "clearly established law" test, almost all cases will die just as the Libertis' case died—with a breezy non-explanation that: "No existing precedent would have given the officers notice that Officer Bailey's grabbing of Liberti's elbow in an attempt to get him to sit down or that the officers' additional attempts to subdue him when he fled were unconstitutional." (App. 3) If the City of Scottsdale's police officers are so simple-minded, brutal, or uncaring that they think attacking a polite, cooperative, law-abiding citizen is constitutional, we, and they, have fallen very far indeed.

Part of the problem is that the qualified-immunity doctrine "operates essentially as an ignorance-of-constitutional-law defense for public officials, though that defense does not apply if the law is clearly established." Alan K. Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L. Rev. 1937, 1940 (2018). But the odds of proving that the law was clearly established are so low that, for the average plaintiff, the qualified-immunity doctrine is almost a guaranteed case-ender. In Arizona, at least, experienced plaintiffs' lawyers regularly say that federal court is where good cases against police officers go to die. The reason for that cynicism is the qualified-immunity doctrine. *See also* Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 Seattle Univ. L. Rev. 939 (2014) ("As a result of federal qualified immunity doctrine, which many states have adopted for themselves, excessive force

cases rarely get to trial, plaintiffs often cannot recover, and courts struggle to find principled distinctions from one qualified immunity case to the next.").

This Court has implemented a rule guaranteed to engender disrespect for police officers, other public officials, and the rule of law. The qualified-immunity defense has become a "powerful shield" that "protects all but the plainly incompetent or those who flout clearly established law." *District of Columbia v. Wesby*, 138 S.Ct. at 589-91. Surely our nation's people have the right to expect much more from our public officials—and especially from our police officers—than that wretched, lowest-common-denominator standard.

The elusive, ever-changing "clearly established law" approach has become an ad hoc exercise that fails to provide true guidance, lets district courts throw out cases by demanding *precisely* identical precedents, when none exist, and violates this Court's fundamental precepts of statutory interpretation.

When interpreting a statute, after all, this Court's "job is to follow the text." *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 135 (2015). The objective is to "ascertain the congressional intent and give effect to the legislative will." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). "The object of all interpretation is to ascertain the intent of the law-makers—to get at the meaning which they wished their language to convey." *Wolsey v. Chapman*, 101 U.S. 755, 769 (1879). And when it has interpreted Section 1983, this Court "has consistently taken the approach that the intent of

Congress in passing it in 1871, as the 'Ku Klux Klan Act,' is controlling." Janet C. Hoeffel, *The Warren Court and the Birth of the Reasonably Unreasonable Police Officer*, 49 Stetson L. Rev. 289, 296 (2020).

But history and intent have fallen by the wayside. Nothing in the legislative history of Section 1983, or in the congressional intent to curb the abuses of state power after a shattering Civil War, when reprisals and atrocities against newly-freed Blacks under color of state law were a daily, horrifying reality, suggests that Congress wanted state actors to escape the reach of Section 1983 by asserting qualified-immunity based on the supposed absence of some "clearly established law"—or based on anything but the traditional, common-law principles.

In addition, there is no historical, common-law, or logical justification for "a one-size-fits-all, subjective immunity based on good faith." *Baxter v. Bracey*, 140 S.Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of certiorari).

It is true that in some limited circumstances, 19th Century officials could occasionally avoid liability based on the good-faith exercise of discretion. *See*, *e.g.*, *Wilkes v. Dinsman*, 48 U.S. 89, 130-31 (1849). *See also* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1864-68 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 57 (2018); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 48-55

(1972). But that was an occasional exception based on a careful examination of the facts in each particular case.

Moreover, public officials were not always immune from liability for their good-faith conduct. *See*, *e.g.*, *Little v. Barreme*, 6 U.S. 170, 179 (1804) (John Marshall, C.J.); *Miller v. Horton*, 26 N.E. 100, 103 (Mass. 1891) (Oliver Wendell Holmes, Jr., J.). *See also* Baude at 55-58; Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396, 414-22 (1986); Engdahl at 14-21.

It appears that the defense for good-faith official conduct was restricted to authorized actions within the officer's jurisdiction. *See*, *e.g.*, *Wilkes*, 48 U.S. at 130; Thomas M. Cooley, *Law of Torts* 688-89 (1880); Joel Prentiss Bishop, *Commentaries on Non-Contract Law* § 773 at 360 (1889). An officer who acts unconstitutionally might thus fall within the exception to a common-law good-faith defense.

Regardless of what the outcome will be, this Court should return to its original search for legislative intent and to the original approach of determining whether immunity "was 'historically accorded the relevant official' in an analogous situation 'at common law.'" *Ziglar*, *supra*, 137 S.Ct. at 1870 (Thomas, J., concurring in part) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976)). The Court has continued to conduct this inquiry in absolute-immunity cases, even after the drastic change in qualified-immunity doctrine. *See*

Burns v. Reed, 500 U.S. 478, 489-92 (1991). It should do that in qualified-immunity cases as well.

3. *Stare decisis* is no reason to retain a judge-made qualified-immunity doctrine that ignores the text and the historical roots of 42 U.S.C. § 1983 and guts Fourth Amendment protections.

The doctrine of *stare decisis* "isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1405 (2020). Certainly, adherence to precedent is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014). But *stare decisis* is "not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). If it were, the degrading "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), would still be the law of the land.

This Court should do as it has done before in overruling earlier decisions, and bow "'to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.'" *Gamble v. United States*, 139 S.Ct. 1960, 2006 (2019) (Gorsuch, J., dissenting) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting). Indeed, no court should do what this Court has done for too long, which is to dispense with the actual statutory text of an important remedial statute, "to do as we think best," because "the

same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them." *Bostock v. Clayton Cty., Georgia*, 140 S.Ct. 1731, 1753 (2020).

Crafting and keeping a qualified-immunity defense in 42 U.S.C. § 1983 cases: (1) ignores the statute's historical development as a deterrent to unjust state action, (2) overlooks the statute's plain text, (3) disregards the failure of the qualified-immunity doctrine to protect the victims of police and other official misconduct, and (4) undercuts the rule of law when, in case after case, police officers injure and kill but escape any accountability because of a qualified-immunity defense based on the police officers' supposed understanding of "clearly established law"—a concept that the highest court in the land has unsuccessfully struggled to define for decades.

Notably, the qualified-immunity defense has faced significant opposition and skepticism from members of this Court:

- Qualified immunity has become "an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Kisela v. Hughes*, 138 S.Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).
- "In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1871 (2017) (Thomas, J., concurring in part).

- This Court's "treatment of qualified immunity under 42 USC § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume." *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

- "In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards." *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring).

The criticisms of qualified immunity are justified—and even understated. The continued existence of the qualified-immunity doctrine matters so much for public perception of the law "because it excuses conduct that is inexcusable." Katherine Mins Crocker, *Qualified Immunity and Constitutional Structure*, 117 Mich. L. Rev. 1405, 1407 (May 2019). Unfortunately, over time, the qualified-immunity doctrine has "metastasized into an almost absolute defense" for police officers. Diana Hassel, *Excessive Reasonableness*, 43 Ind. L. Rev. 117, 118 (2009).

"If the Court did find an appropriate case to reconsider qualified immunity," and we hope this will be the case, "and took seriously available evidence about qualified immunity's historical precedents and current operation, the Court could not justify the continued existence of the doctrine in its current form." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1799 (2018).

Justice Scalia warned over two decades ago that this Court finds itself engaged "in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote." *Crawford-El*, 523 U.S. at 611-12 (Scalia, J., dissenting).

As it did in *Plessy v. Ferguson*, when this Court approved the noxious "separate but equal" doctrine, this Court has again fallen into a deep pit of its own making. *Stare decisis* must not prevent it from climbing out.

> Again, I do not envy the task before the Supreme Court. Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of "separate but equal," so too should it eliminate the doctrine of qualified immunity.

Jamison v. McClendon, ___ F.Supp.3d ___, ___, 2020 WL 4497723 at *29 (S.D. Miss. Aug. 4, 2020).

The Libertis are not Pollyannas. They are hopeful but are aware that, during the past four decades or so, this Court "has decided many qualified immunity cases, never seriously signaling a desire to reconsider its qualified immunity precedent." Allison Weiss, *The Unqualified Mess of Qualified Immunity: A Doctrine Worth Overruling*, 76 Wash. & Lee L. Rev. Online 113, 119 (2020).

"It is time," however, "to destroy qualified immunity and replace it with something better." Hayden Carlos, *Disqualifying Immunity: How Qualified Immunity Exacerbates Police Misconduct and Why Congress Must Destroy It*, 46 So. Univ. L. Rev. 283, 324 (2019). After all, despite "past failures in America, if we recognize that the problems begin with accountability, instead of attempting to treat symptoms of those problems, then we can cure the disease—then we can eliminate injustice." *Id*.

Eliminating the qualified-immunity doctrine will not cure everything. But it will be a "step toward greater accountability and deterrence" and should "clarify the law, reduce the cost and complexity of civil rights litigation, increase the number of attorneys willing to consider taking civil rights cases, and put an end to decisions protecting officers who have clearly exceeded their constitutional authority." Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 363 (March 2020).

CONCLUSION

"Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Ramos*, 140 S.Ct. at 1408.

Petitioners ask the Court to grant their petition, to vacate the adverse Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, and to remand this case for further proceedings at the district court.

In addition, Petitioners ask that the Court, with all due speed, abolish the qualified-immunity doctrine that denied justice to the Libertis in this case, and that has denied justice for many years to so many others. Those others include Michael Brown, Tamir Rice, Elijah McClain, Eric Garner, Philandro Castile, Tony McDade, Jason Harrison, Charles Kinsey, Earl Green, Ben Brown, Phillip Gibbs, Amadou Diallo, Botham Jean, Breonna Taylor, Rayshard Brooks, Sandra Bland, Hanna Fizer, Ace Perry, Clarence Jamison, George Floyd—and their many grieving survivors. *Jamison*, 2020 WL 4497723 at fn. 1-19.

That short list is just a sample of lives taken without accountability. More will be taken without accountability if things stay as they are. That is why the "unlawfulness of qualified immunity is of particular importance now." William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 46 (2018).

"Despite its shoddy foundations," this Court has, for several decades, "been formally and informally reinforcing the doctrine." *Id*. Repeatedly, this "Court has given qualified immunity a privileged place on its agenda reserved for habeas deference and few other legal doctrines. Rather than doubling down, the Court ought to be beating a retreat." *Id*. Our nation needs

that retreat. It needs a restart in this Court's interpretation of 42 U.S.C. § 1983.

Dylan Liberti's parents are not the first to ask for change. They may not be the last. But whether in this case or in a future one, change must come. This Court caused the problem. This Court can fix it.

Respectfully submitted,

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