No. 21-778

IN THE
Supreme Court of the United States

SELINA MARIE RAMIREZ, Individually and as Independent Administrator of, and on behalf of, THE ESTATE OF GABRIEL EDUARDO OLIVAS, and as Parent, Guardian, And Next Friend of and for Female Minor SMO; GABRIEL ANTHONY OLIVAS, Individually,
Petitioners,

v.

JEREMIAS GUADARRAMA; EBONY N. JEFFERSON,
Respondents.

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

BRIEF OF THE CATO INSTITUTE, LAW ENFORCEMENT ACTION PARTNERSHIP, AND RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Daniel M. Greenfield
Rosalind Dillon
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8538

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

Counsel for Amici Curiae

(additional counsel on inside cover)

December 23, 2021

David F. Oyer*
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H. Street NE
Suite 275
Washington, DC 20002

Admitted only in California; practicing under supervision of the MacArthur Justice Center.

Captain Leigh Maddox (Ret.)
THE LAW ENFORCEMENT ACTION PARTNERSHIP
121 Mystic Avenue, Suite 9
Medford, MA 02155

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STATEMENT OF INTEREST[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The Law Enforcement Action Partnership (LEAP) is a nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal-justice professionals who seek to improve public safety, promote alternatives to arrest and incarceration, address the root causes of crime, and heal police-community relations through sensible changes to our criminal-justice system.

The Roderick & Solange MacArthur Justice Center (MJC) is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for civil rights and a fair and humane criminal justice system. MJC has represented clients facing a myriad of civil rights injustices and frequently litigates on behalf of

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[1] All parties received timely notice and have consented to the filing of this brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

individuals who have experienced violence at the hands of law enforcement. MJC has an interest in ensuring accountability for civil rights violations by preventing the unwarranted expansion of qualified immunity.

The above-named *amici* reflect the growing cross-ideological consensus that application of this Court's qualified immunity doctrine under 42 U.S.C. § 1983 misunderstands that statute and its common-law backdrop, denies justice to victims of obvious constitutional violations, and fails to provide accountability for official wrongdoing.

SUMMARY OF ARGUMENT

Over the last half-century, the doctrine of qualified immunity has sharply diverged from the statutory and historical framework on which it is supposed to be based. The text of 42 U.S.C. § 1983 ("Section 1983") makes no mention of immunity, and the common law of 1871 did not include the sort of across-the-board defense for all public officials that characterizes qualified immunity today. Though recent scholarship reflects some disagreement over the scope of certain good-faith immunities at common law, there is no dispute that the "clearly established law" standard in particular is without any historical basis.

This petition, of course, does not expressly call for the reconsideration of qualified immunity itself, but the doctrine's dubious legal foundations should make this Court especially wary about unwarranted expansions of the doctrine. And the lower court's formulation of the "clearly established law" inquiry in this

case highlights an especially troubling trend, especially in the Fifth Circuit. Though this Court has long held that in "obvious" cases, general principles of constitutional law provide government officials with all the notice necessary to override the defense of qualified immunity, *see, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002), the Fifth Circuit routinely flouts that settled rule. Last October Term alone, this Court twice rebuked the Fifth Circuit for ignoring the requirement to deny qualified immunity in cases of obvious constitutional violations. *See Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021).

The Fifth Circuit is not entitled to disregard this Court's qualified immunity case law. The most obvious constitutional violations often entail facts so flagrant that there is no precedent directly on point. Thus, declining to apply the teaching of *Taylor* and *McCoy* in such cases leads to the perverse result that the most egregious bad actors can rely on qualified immunity as a matter of course. As Justice Gorsuch once explained, "it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015) (Gorsuch, J.).

Like handcuffing an incarcerated person to a hitching post in the blazing Alabama sun, *Hope*, 536 U.S. at 737-38, forcing a prisoner to lie naked atop human excrement for days on end, *Taylor*, 141 S. Ct. at 53-54, and attacking an incarcerated person with pepper spray "for no reason at all," *McCoy*, 141 S. Ct.

1364, tasing Mr. Ramirez—who had just doused himself in gasoline—even though he presented no danger to others and knowing that it would light him on fire is so obviously unlawful that a police officer need not have opened a casebook to understand that their conduct was prohibited under the Constitution.

Nonetheless, the Fifth Circuit granted qualified immunity to the officers anyway because the precedents purportedly differed in some inconsequential way from the case at hand. In addition, the court effectively adopted a heightened pleading standard for excessive-force claims, by requiring allegations that the officers had an alternative that would have avoided the harm, thereby making the Fifth Circuit an outlier with respect to both qualified immunity *and* Fourth Amendment jurisprudence.

Correcting these errors is especially urgent today, at a time when public trust in our government institutions has fallen to record lows. A rash of high-profile incidents of police misconduct has sent Americans to the streets in protest. Law-enforcement officers, in turn, report serious concerns about their ability to safely and effectively discharge their duties without the confidence of those they must protect. By telling the public, in essence, that even obvious instances of police misconduct can go unremedied, the Fifth Circuit is not only misapplying this Court's precedent—it is fueling a crisis of confidence in our nation's law-enforcement officers. For these reasons, the Court should summarily reverse the decision below.

ARGUMENT

I. MODERN QUALIFIED IMMUNIITY DOCTRINE IS UNTETHERED FROM ANY STATUTORY OR HISTORICAL JUSTIFICATION.

Notwithstanding that the petition does not explicitly call upon the Court to revisit qualified immunity entirely, the Court should still consider the question presented with an eye toward the doctrine's fundamentally shaky legal foundations. In particular, the Court should not permit lower courts to engage in persistent misapplication of the doctrine that effectively expands qualified immunity beyond the bounds of existing precedent, thereby compounding a pre-existing legal error.

A. Neither the text nor history of Section 1983 provide for qualified immunity.

This Court has recognized that "[Section 1983] on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language simply says that any person acting under state authority who causes the violation of a protected right "shall be liable to the party injured." 42 U.S.C. § 1983.

This unqualified textual command makes sense in light of the statute's historical context. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, itself part of a "suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[2] This statutory purpose would have been undone by

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[2] William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 49 (2018).

modern qualified immunity jurisprudence, as the Fourteenth Amendment itself had only been adopted three years earlier, in 1868. If Section 1983 had been understood to incorporate qualified immunity, Congress's attempt to address rampant civil rights violations in the post-war South would have been toothless.

Nor is qualified immunity consistent with the background common-law principles against which Section 1983 was originally passed. These historical arguments have been addressed at length both in recent academic scholarship and by members of this Court, and *amici* will not retread the issue in detail here. *See e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 55-60 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute."). The central principle is simply that, from the founding through the nineteenth century, courts did not generally recognize the concept of "good faith" as a freestanding defense to civil liability for public officials. *See* Baude, *supra*, at 55-60.

Most importantly, this Court originally rejected the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Court considered a suit against election officers that had refused to register black voters under a "grandfather clause" statute, in violation of the Fifteenth Amendment. *Id.* at 380. The defendants argued that they could not be liable for money damages under Section 1983, because they acted on a good-faith belief that the statute was constitutional. The *Myers* Court

noted that "[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in argument," but it ultimately rejected these arguments, noting that they were "disposed of . . . by the very terms of [Section 1983]." *Id.* at 378. In other words, the defendants were violating the plaintiffs' constitutional rights, so they were liable—period.

B. The "clearly established law" standard is plainly at odds with any plausible reading of nineteenth-century common law.

The Court's primary rationale for qualified immunity is the purported existence of similar immunities that were well-established in the common law of 1871. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). But while there is some disagreement regarding the extent to which "good faith" was relevant in common-law suits, no possible reading of that common law justifies the central doctrinal feature of modern qualified immunity today—i.e., the rule that the defense turns solely on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law," rather than the actual beliefs or intentions of the defendant. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

A recent article by Scott Keller does argue, in contrast to what he calls "the modern prevailing view among commentators," that executive officers in the mid-nineteenth century enjoyed a more generalized immunity for discretionary acts, unless they acted

with malice or bad faith.[3] But whether or not Keller is correct about the general state of the common law,[4] he acknowledges that the contemporary "clearly established law" standard is at odds even with his historical interpretation because "qualified immunity at common law could be overridden by showing an officer's subjective improper purpose."[5]

In other words, even the foremost academic *defenders* of qualified immunity recognize that the key doctrinal feature of the modern doctrine is historically unsupported. *See also* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1868 (2018) ("We agree

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[3] Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1334 (2021).

[4] Will Baude has posted an article responding to Scott Keller's piece, in which he argues that Keller's sources at most establish a common-law basis for "quasi-judicial immunity," which only protected quasi-judicial acts like election administration and tax assessment, not ordinary acts of law enforcement, and which was only a legal defense, not an immunity from suit. Therefore, the historical "immunity" Keller identifies has very little in common with modern qualified immunity. William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (2021 Forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3746068.

Moreover, the defendants in *Myers v. Anderson* made exactly the sort of good-faith, lack-of-malice argument Keller says was well established at common law—but the Court refused to apply any such defense to Section 1983. *Myers*, 238 U.S. at 378.

[5] Keller, *supra*, at 1337.

that, as a historical matter, the objective standard is harder to defend than a good-faith standard.").

The Court's qualified immunity jurisprudence has therefore diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support, and the relevant history establishes a baseline of strict liability for constitutional violations, where "good faith" was a defense only to some common-law torts. Yet qualified immunity functions today as an across-the-board defense, based on a "clearly established law" standard that was unheard of before the late twentieth century. In short, the doctrine has become exactly what the Court assiduously sought to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

II. GOVERNMENT OFFICIALS MAY VIOLATE "CLEARLY ESTABLISHED LAW" IN CASES OF OBVIOUS VIOLATIONS, WITHOUT PRIOR FACTUALLY ANALOGOUS DECISIONS.

Although the petition does not call for the reconsideration of qualified immunity entirely, it does present the Court with a valuable opportunity to clarify its case law and to rein in the most problematic excesses of the doctrine. Specifically, the Court should make clear to lower courts that overcoming qualified immunity does not require plaintiffs to first find a case with a virtually identical factual scenario.

The Fifth Circuit held below that Respondents could not be liable for setting Mr. Ramirez on fire in part because the Fifth Circuit's existing case law on the issue was "not apropos." Pet. App. 12a. This cramped view of the qualified immunity inquiry cannot be

squared with this Court's repeated admonitions that obviousness alone can provide fair warning to officials that their acts are unlawful. *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020); *Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002). After all, the clearly-established inquiry boils down to notice, not whether a court has held that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Thus, a "general constitutional rule" identified in prior cases provides fair warning when it applies with "obvious clarity to the specific conduct in question." *Taylor*, 141 S. Ct. at 53-54 (citation omitted).

Just last term, this Court twice considered it necessary to remind the Fifth Circuit that the clearly-established inquiry is not a choose-your-own-adventure endeavor—the "obvious violation" doctrine is a component of the analysis that courts cannot simply choose to disregard.

First, in *Taylor*, this Court summarily reversed the Fifth Circuit for its unduly narrow view of the clearly-established inquiry in a prison conditions case. 141 S. Ct. at 53-54. There, prison officials had confined the plaintiff in a cell covered with feces for four days, followed by two days without clothing in a frigid cell that had a clogged drain overflowing with human waste, forcing the plaintiff to sleep naked on the floor in raw sewage. *Taylor v. Stevens*, 946 F.3d 211, 218-19 (5th Cir. 2019). But, because the Fifth Circuit had not previously held that prisoners could not be "housed in cells teeming with human waste" for "only six days," it concluded that the law was not clearly established. *Id.* at 222.

This Court, on the other hand, was untroubled by the absence of a prior case establishing that the specific duration of time plaintiff was held in the conditions at issue in *Taylor* was unconstitutional. *Taylor*, 141 S. Ct. at 53-54. Instead, the "obviousness of [the plaintiff's] right" to be free from "such deplorably unsanitary conditions for such an extended period of time" was apparent from the "general constitutional rule" barring deliberate indifference under the Eighth Amendment. *Id*. at 53-54 & n.2 (quoting *Hope*, 536 U.S. at 741).

Then, several months later, this Court granted, vacated, and remanded in another qualified immunity case, *McCoy v. Alamu*, 141 S. Ct. 1364 (2021). In *McCoy*, the Fifth Circuit had rejected the plaintiff's argument that being pepper sprayed by a prison guard "for no reason" was an "obvious" violation of the general rule that prison officials cannot act "maliciously and sadistically to cause harm." *See McCoy v. Alamu*, 950 F.3d 226, 229, 234 (5th Cir. 2020). Notwithstanding Fifth Circuit caselaw clearly establishing that punching an inmate in the face for no reason, *Cowart v. Erwin*, 837 F.3d 444, 449, 454-55 (5th Cir. 2016), or tasing an inmate without provocation, *Newman v. Guedry*, 703 F.3d 757, 763-64 (5th Cir. 2012), violates the Constitution, the majority granted the guard qualified immunity because it had never held that a guard could not *pepper spray* an inmate for no reason. *McCoy*, 950 F.3d at 232-33. The dissent had centered on obviousness, vigorously contending that the fact that the "weapon of choice was pepper spray" instead of a fist or a taser did not matter, and that the majority erred in not applying the "obviousness

exception." *Id*. at 235, 236 (Costa, J., dissenting). This Court apparently agreed, and instructed the Fifth Circuit to reconsider in light of *Taylor*. 141 S. Ct. at 1364.

McCoy and *Taylor* emphasized to the Fifth Circuit what this Court has repeatedly articulated—where conduct is obviously unlawful, factually similar precedent is not necessary to defeat qualified immunity. Notwithstanding those pointed reminders, the Fifth Circuit has yet again refused to recognize the obviousness exception to qualified immunity. As Judge Willett, dissenting from denial of *en banc* rehearing, pointed out, the Fifth Circuit has ignored a message delivered by this Court "in back-to-back cases, both from [the Fifth Circuit] and both involving obvious conscience-shocking constitutional violations." Pet. App. 42a. In doing so, Judge Willett predicted, the Fifth Circuit has "provided [this] Court yet another message-sending opportunity." *Id.*

It is critical that this Court take that opportunity. As Justice Gorsuch once astutely pointed out, "the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015). Without the obviousness doctrine, the more "flagrantly unlawful" the action, the more likely an official is to escape liability. *See id*; *see also Bellotte v. Edwards*, 629 F.3d 415, 424 (4th Cir. 2011) (Wilkinson, J.) ("The absence of 'a prior case directly on all fours' here speaks not to the unsettledness of the law, but to the brashness of the conduct.").

Indeed, one city attorney whose job consists of *defending* officers against Section 1983 claims recently

urged that "courts should more frequently withhold qualified immunity from officers who commit *obvious* constitutional violations" to "ensure that reckless and incompetent officers are held accountable, thereby increasing the public's trust in the justice system and ensuring that constitutional rights are meaningfully enforced." Alexander J. Lindvall, *Qualified Immunity and Obvious Constitutional Violations*, 28 GEO. MASON L. REV. 1047, 1049 (2021); *see also* Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi: *The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 437 (2018) ("[T]he question of whether there is fair warning is often ignored in practice, but nonetheless appears to be the question lower courts ought to ask.").

Otherwise, conduct so unnecessarily cruel and shocking that it is unlikely to ever be repeated by more than one police officer, let alone in any given circuit—like tasing a mentally-ill man covered in gasoline, knowing it would light him on fire—would enjoy immunity, while only the most common and mundane violations would be punished. *See* Lindvall, *supra*, at 1065-76 (collecting "jaw-dropping" cases); Joanna Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L. J. 305, 350-51 (2020) (observing that robust application of the obvious violation doctrine would "limit[] one of the most troublesome aspects of the Court's qualified immunity jurisprudence"). That would be perverse.

Time and again, this Court has broadcast that lower courts *must*—not *may*—consider whether "general statements of the law" apply with "obvious clarity" in egregious cases, even in the absence of a prior

factually similar case. Yet, despite having been twice "rebuke[d]," Pet. App. 37a-38a (Oldham, J., concurring in denial of rehearing *en banc*), last October term, the Fifth Circuit has not received the message.

The decision below is especially problematic because it not only misapplies this Court's precedent on obvious constitutional violations, but also distorts basic rules of civil procedure to dismiss the complaint. As the petition explains in detail, the panel effectively created a heightened pleading standard for excessive-force claims by requiring that plaintiffs specifically allege alternative actions the officers could have taken to avoid the harm. *See* Pet. at 12-22. That decision was flatly at odds with this Court's precedent and also created a circuit split with the First, Third, Fourth, Ninth, and Eleventh Circuits. *Id* at 23-27. These errors once again call for summary reversal.

III. PERSISTENT MISAPPLICATION OF QUALIFIED IMMUNITY HARMS PUBLIC OFFICIALS BY ERODING PUBLIC TRUST AND UNDERMINING THE RULE OF LAW.

Granting qualified immunity to police officers who commit obvious constitutional violations not only misapplies this Court's case law and works an unlawful injustice to the victims of police misconduct—it also hurts the law enforcement community itself, by reinforcing the public's perception that police are held to a far lower standard of accountability than ordinary citizens.

In the aftermath of many high-profile police killings—most obviously, the murder of George Floyd at the hands of Minnesota police officers in May 2020—

Gallup reported that trust in police officers had reached a twenty-seven-year low. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020)[6] (Source: GALLUP). For the first time ever, fewer than half of Americans place confidence in their police force. *Id.*

This drop in confidence has been driven in large part by videos of high-profile police killings of unarmed suspects, but also the public perception that officers who commit such misconduct are rarely held accountable for their actions.[7] Indeed, according to a recent survey of more than 8,000 police officers themselves, 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable." Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017).[8]

Policing is dangerous, difficult work. Without the trust of their communities, officers cannot safely and effectively carry out their responsibilities. "Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness." Inst. on Race and Justice, Northeastern

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[6] *Available at* https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html.

[7] *See* Mike Baker, et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html.

[8] *Available at* https://pewrsr.ch/2z2gGSn.

Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20-21 (2008).[9]

In other words, "when a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness." Fred O. Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018); *accord* U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 80 (Mar. 4, 2015) (A "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.").[10]

When properly trained and supervised, the vast majority of officers follow their constitutional obligations, and they will benefit if the legal system reliably holds rogue officers accountable for their misconduct. Indeed, "[g]iven the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated." Inst. on Race and Justice, *supra*, at 21. Aggressive application of qualified immunity prevents law-enforcement officers from overcoming those negative perceptions about policing. It instead protects the minority of police who routinely break the law and thereby

[9] *Available at* https://www.ojp.gov/ncjrs/virtual-library/abstracts/promoting-cooperative-strategies-reduce-racial-profiling.

[10] *Available at* https://perma.cc/XYQ8-7TB4.

erodes relationships between communities and law enforcement.

In a recent survey, a staggering nine in ten law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings. Pew Research Ctr., *supra*, at 65. Eighty-six percent agreed that their jobs have become more difficult as a result. *Id.* at 80. Many looked to improved community relations for a solution, and more than half agreed "that today in policing it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public." *Id.* at 72. Responding officers also showed strong support for increased transparency and accountability, for example, by using body cameras, *id.* at 68, and—most importantly for these purposes—by holding wrongdoing officers more accountable for their actions, *id.* at 40.

To be sure, the extent to which qualified immunity has undermined public trust in law enforcement might counsel in favor of reconsidering the doctrine entirely. But even if the Court declines to take that step, it should at least ensure that lower courts do not *mis*apply qualified immunity in a manner that exacerbates exactly such problems. By reversing the Fifth Circuit and clarifying that defendants who commit obvious constitutional violations may be held accountable, the Court can take a significant step toward restoring public confidence in police officers.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should summarily reverse the lower court.

Respectfully submitted,

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

Daniel M. Greenfield
Rosalind Dillon
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8538

Captain Leigh Maddox (Ret.)
THE LAW ENFORCEMENT ACTION PARTNERSHIP
121 Mystic Avenue, Suite 9
Medford, MA 02155

David F. Oyer*
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H. Street NE
Suite 275
Washington, DC 20002

**Admitted only in California; practicing under supervision of the MacArthur Justice Center.*

Counsel for Amici Curiae

December 23, 2021