No. 22-293

IN THE

Supreme Court of the United States

ANTHONY NOVAK,

PETITIONER,

v.

CITY OF PARMA, OHIO; KEVIN RILEY and THOMAS CONNOR, individually and in their official capacities as employees of the City of Parma, Ohio,

RESPONDENTS.

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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

The Rutherford Institute files this brief to address an unwarranted expansion of the doctrine of qualified immunity which threatens to significantly expand the ability of public officials to retaliate with impunity against citizens for the exercise of their constitutional rights, at a time when qualified immunity has already expanded far beyond any constitutional, rational or policy-related reason for its existence.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly affirmed that a civil rights plaintiff may pursue a claim for retaliatory arrest if he or she shows that the arrest lacked probable

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice of the intent to file this *amicus* brief was provided to all parties, and all parties have consented to such filing.

cause. An absence of probable cause, the Court has explained, is weighty evidence that the true reason for the arrest was unlawful retaliation.

The Court of Appeals for the Sixth Circuit (the "Sixth Circuit"), by its Opinion, improperly extended this doctrine. It held that not only must a plaintiff prove the absence of probable cause, but go one step further -- that the absence of probable cause was so obvious as to be "clearly established."

Further, the Sixth Circuit improperly required a hyper-specific level of factual similarity between this case and a previous one for the constitutional principles involved to be "clearly established."

These misstatements of the law, by themselves, require correction. However, the fact that such errors keep happening, no matter how hard courts strive to untangle the "mare's nest" of qualified immunity, suggest that as much fault may lie in what the doctrine has become as with courts who struggle to get it right. It is increasingly clear that qualified immunity has done harm to citizens' enjoyment of their constitutional rights, to respect for the law and public institutions, and to the good functioning of the judicial system which is disproportionate to the benefits the doctrine was judicially invented to deliver.

This case -- which does not involve police officers making split-second judgment calls in tense circumstances -- provides an ideal vehicle to reconsider or modify qualified immunity, in a context that presents minimal risk of the policy concerns that led the majority in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ("*Harlow*") to venture beyond the doctrine's legitimate roots in statute and the common law.

ARGUMENT

I. A Plaintiff In A Retaliatory Arrest Case Must Prove Only The Absence Of Probable Cause, Not That The Absence Of Probable Cause Was "Clearly Established."

It is clearly established that government officials may not take adverse action against a person in retaliation for the exercise of First Amendment rights. *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *Crawford-El v. Britton*, 523 U.S. 574, 588, 593, n.10 (1998); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283-284 (1977); *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1013 (6th Cir. 1999).

In the particular circumstance of a retaliatory arrest, this Court has noted the existence of "causal complexity," (*see Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019)), and therefore has emphasized the importance of the rule that the defendant's "retaliatory animus" be the actual, "but-for" cause of the plaintiff's subsequent injury. *Hartman*, 547 U.S. at 259, 260 (recognizing that although it "may be dishonorable to act with an unconstitutional motive," an official's "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway").

Accordingly, this Court has held that in retaliatory arrest cases, plaintiffs must generally "prove as a threshold matter that the [arrest] was objectively unreasonable because it was not supported by probable cause." *Nieves*, 139 S. Ct. at 1728; *see also Reichle v. Howards*, 566 U.S. 658, 663 (2012). In *Nieves*, the Court succinctly explained the reason for this require-

ment: "[B]ecause probable cause speaks to the objective reasonableness of an arrest [citation], its absence will…generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite."

Without citing to authority, the Sixth Circuit's opinion ("Opinion") now takes that rule one giant step further:

> "[T]o prevail on his claim, Novak must show that it was **clearly established** that the officers lacked probable cause to arrest him."

Opinion, p. 3 (emphasis added).

That is not a correct reading of this Court's retaliatory arrest and qualified immunity precedents. Specifically, the insertion of a "clearly established" requirement -- compelling a plaintiff not only to establish the absence of probable cause, but that it was clearly absent -- is unsupported, unwarranted and improper.

The Opinion cited no authority, and *amicus* has located none, for the proposition that a retaliatory arrest is permissible, in the absence of probable cause, simply because officers might possibly have subjectively believed probable cause was present. This Court's precedents, on the other hand, apply a purely objective test: **Was probable cause present, or not?** *See Nieves*, 139 S. Ct. at 1724-1725; *Ashcroft v. al-Kidd*, 563 U.S., 731, 737 (2011). "[I]f the plaintiff establishes the absence of probable cause, 'then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor

behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." *Nieves*, 139 S. Ct. at 1725 (citing *Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018)).

Here, however, the Sixth Circuit never actually got around to determining the existence of probable cause. The closest it came was stating that it "may have" been present. Opinion, p. 13, second paragraph. The Opinion treats this fundamental question as dispensable: "[E]ven if [the officers] 'mistakenly' (but reasonably) concluded that probable cause existed" -- even if it objectively and actually did not -- "[t]hat's enough to shield Riley and Connor from liability." Opinion, p. 5.

To summarize: This Court has held that if a plaintiff in a retaliatory arrest case establishes the absence of probable cause -- "weighty evidence that the officer's animus caused the arrest" -- the defendant must then try and prove the arrest was not retaliatory. The Sixth Circuit, in contrast, now declares that it is good enough simply to hold that probable cause **might** have existed. This Court is right, and the Sixth Circuit is wrong. The presence of probable cause must be decided one way or the other; it cannot simply be "punted" on the theory that a "close call" goes to the government official. That is not what is required to be "clearly established" to overcome qualified immunity in a retaliatory arrest case.

"[E]vidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case." *Reichle*, 566 U. S., at 668. By inventing a requirement that the absence of probable cause be "clearly established," the Sixth Circuit has

effectively given would-be retaliators a "fig leaf" capable of covering even the most shameless retaliatory animus: They need only peruse the statute books for a charge that might possibly, conceivably, theoretically not be 100% frivolous -- and, according to the Sixth Circuit, that would be enough to immunize them.

Justices of this Court have lamented that qualified immunity's "clearly established" analysis is becoming steadily more "onerous." *See Kisela v. Hughes*, 138 S. Ct. 1148, 1158 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).) The Sixth Circuit's Opinion represents yet another turn of the ratchet. It should be reversed.

II. ALL OF THE ACTS PROMPTING NOVAK'S ARREST, INCLUDING DELETING COMMENTS EXPOSING THE PARODY, CONSTITUTED CLEARLY ESTABLISHED PROTECTED SPEECH.

In its first opinion considering this case, the Sixth Circuit found that "the sole basis for probable cause [here] was speech. Besides posting to his Facebook page, Novak committed no other act that could have created probable cause." *Novak v. City of Parma*, 923 F.3d 421, 431 (6th Cir. 2019). The Opinion sought to "walk back" or qualify that finding with a footnote: "And though Novak's Facebook activity and its consequences form the sole basis for probable cause (since he didn't do anything else, like hack into the Department's page) it's possible that not all of his Facebook activity was protected speech." Opinion, p. 17 n.1.

The Sixth Circuit attempted to distinguish "Novak's satirical posts" by stating that Novak "modeled

his page after the Department's, using the same profile picture. He deleted comments that let on his page wasn't the official one. And when the Department tried to clarify that Novak's page was imitating its own, he copied the official page's clarification post word for word."

These are distinctions without a difference. The first and last acts, above, were themselves also acts of protected parodic speech by Novak, whereas the second -- the deletion of posts -- constituted the exercise of Novak's editorial judgment over what third-party speech to allow on his page, which the First Amendment also protects. *See Miami Herald Pub Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1 (1986); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568 (1995) ("[T]he presentation of an edited compilation of speech generated by others…fall[s] squarely within the core of First Amendment security").

Novak was not required to allow the essential element of his parody's effectiveness -- the brief moment of credulity before a reasonable reader recognizes the parody and laughs at himself -- to be spoiled, by featuring third parties' "THIS IS FAKE!" comments prominently on his page. "Parody needs to mimic an original to make its point." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994). "[T]here is no reason to require parody to state the obvious (or even the reasonably perceived)." *Id.* at 582 n.17; *see also*, *e.g.*, *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc.*, 886 F.2d 490, 496 (2d Cir. 1989) ("There is no requirement that the cover of a parody

carry a disclaimer that it is not produced by the subject of the parody, and we ought not to find such a requirement.").

Because all of the acts that were or could possibly have been used to support arresting Novak -- including his editorial moderation of the Facebook page -- were clearly established as enjoying First Amendment protection, it was clearly established that there was no probable cause to arrest Novak. And it is clearly established that a retaliatory arrest, lacking in probable cause, violates the First Amendment.

III. THE SIXTH CIRCUIT IMPROPERLY DEMANDED A "CASE DIRECTLY ON POINT"

Following a trend which has unfortunately become widespread, the Sixth Circuit's application of qualified immunity demanded an unduly "extreme level of factual specificity" between this case and a previous one to find that the applicable law was "clearly established." *See United States v. Lanier*, 520 U.S. 259, 267 (1997). It held that "Novak has not identified a case that clearly establishes deleting comments or copying the official warning is protected speech," and therefore "the officers could reasonably believe that some of Novak's Facebook activity was not parody, not protected, and fair grounds for probable cause." Opinion, p. 5.

But as this Court has repeatedly admonished courts who keep making this same error, "clearly established law" does "not require a case directly on point." *al-Kidd*, 563 U.S. at 741; *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). This Court has held that "officials can still be on notice that their con-

duct violates established law even in novel factual circumstances," and that the outward attributes of a case do not have to be "fundamentally similar" or "materially similar" to those in previous precedents. *Hope v. Pelzer*, 536 U.S. 730, 739, 741 (2002). Although the right in question must be "clearly established" in a "particularized" sense (*Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), even "notable factual distinctions" can be present (*Lanier*, 520 U.S. 259 at 270), so long as the "*statutory or constitutional question* be beyond debate" *al-Kidd*, 563 U.S. at 741 (emphasis added).

Although the qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition" (*Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)), a "rigid overreliance on factual similarity" is improper. *Hope*, 536 U.S. at 742. Qualified immunity does not apply when "courts have agreed that certain conduct is a constitutional violation under facts not distinguishable *in a fair way* from the facts presented in the case at hand." *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *see also Hyland v. Wonder,* 117 F.3d 405, 411-12 (9th Cir. 1997) (rejecting the argument that the district court should have granted qualified immunity because no previous case involved a comparable plaintiff; the "Supreme Court and our case law do not require that degree of specificity"). Not just "distinguishable" – virtually any case will have at least some incidental differences from precedent – but "distinguishable in a fair way"; that is, in a way that has genuine, substantial implications for the parties' constitutional rights.

This Court's recent decision in *Taylor v. Riojas*, 141 S. Ct. 52 (2020) was a reminder that *Lanier* and

Hope (which *Taylor* cited) are still good law, and that there does not have to be case authority "directly on point" for a civil rights plaintiff to prevail. Yet courts of appeal continue to ignore them. For instance, the Ninth Circuit recently held, in another First Amendment retaliation case, that qualified immunity would apply unless the details of a previous case aligned almost identically with the current one. *See Riley's Am. Heritage Farms v. Elsasser*, 29 F.4th 484, 505 (2022) (holding that it was not "clearly established that a school district could not cease patronizing a company providing historical reenactments and other events for students because the company's principal shareholder had posted controversial tweets that led to parental complaints"). This kind of hyper-specificity has come to slice the salami almost comically fine.

Such fixations on the external *factual* incidents, and not on a properly particularized identification of the applicable legal and constitutional *rules*, make it hard to see how courts are doing anything other than requiring that "the very action in question be previously…held unlawful." *See Anderson*, 483 U.S. at 640. They are, in effect, demanding precedents directly on point in all but name. The Sixth Circuit's error is only the latest incident in a persistent and baleful trend.

IV. QUALIFIED IMMUNITY CREATES CONFUSION, ALLOWS INJUSTICE, FAILS TO ACCOMPLISH ITS STATED PURPOSES, AND SHOULD BE REVISITED.

In *Lanier*, this Court rejected a proposed rule that only "fundamentally similar" precedent could "clearly establish" a constitutional right, on the ground that it would "lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling." *Lanier*, 520 U.S. at 270. "Much

wrangling" is an understatement of what has followed since then.

Why do courts increasingly demand such a "rigid overreliance on factual similarity"? It may be that the courts have overreacted to this Court's gentle chiding of "courts…not to define clearly established law at a high level of generality." *See al-Kidd*, 563 U.S. at 742 (cleaned up). There may be a parallel with the eager-to-redeem-himself, trigger-happy deputy in *Mullenix* ("How's that for proactive?" he said to a previously critical supervisor after unloading his rifle into a suspect's windshield. 136 S. Ct. at 316 (Sotomayor, J., dissenting).) Rebuked for defining rights "at [too] high [a] level of generality," *al-Kidd,* 563 U.S. at 742, they now demand "[too] extreme [a] level of factual specificity." *Lanier*, 520 U.S at 267. For all practical purposes, many courts now require a case "directly on point." They steer so wide of Scylla they crash into Charybdis.[2]

This increasing insistence that Appellants identify a previous case with so close a factual resemblance to this one—a virtual identical twin—presents citizens abused by officials with a nearly insuperable burden. It cannot be gainsaid that a case with facts so microscopically precise would necessarily need to be a case of first impression in order to qualify as precedent and that the odds of such a precedent so factually granulated are unlikely ever to be repeated. Plaintiffs are thus faced with a Catch-22. In order for a case of first impression to become precedent, it must itself go

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[2] *See* HOMER, THE ODYSSEY, BOOK XII (Robert Fagles trans., Penguin Classics 2d ed. (1999).)

beyond existing precedents to become established law. As one commentator has observed:

> The narrower the category of cases that count, the harder it is to find a clearly established right. Thus, a restrictive approach to relevant precedent beefs up qualified immunity and makes its protections more difficult to penetrate…. When a narrow view of relevant precedent is added to the demand for extreme factual specificity in the guidance those precedents must provide, the search for "clearly established" law becomes increasingly unlikely to succeed, and "qualified" immunity becomes nearly absolute.

John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*?, 62 Fla. L. Rev. 851, 859 ("Jeffries") (citations omitted).

Moreover, qualified immunity often becomes a matter of "panel roulette." Circuit courts, and even individual panels within circuit courts, may vary wildly in the level of specificity they demand for a principle to be "clearly established." Amicus respectfully submits that this is not simply a matter of circuit court justices not being up to a simple task. "Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. Ann. Surv. Am. L. 445, 447 (2000) ("Wilson"). Far from being an easy matter, determining whether a government official violated "clearly established" law "has proved to be a mare's nest of complexity and confusion." Jeffries at 852. The "conflicting signals"

sent by this Court's decisions over the years have yielded widely varying approaches among the circuits. *Id.*

In particular, the "clearly established" standard has been called "unworkable, unduly burdensome, and out of step with reality," Bailey D. Barnes, *A Reasonable Person Standard for Qualified Immunity*, 55 Creighton L. Rev. 33, 35 (2021), and a "moving target and insufficiently defined," Natalie T. Frandsen, *Bulletproof Vests & Lawsuit Threats: The Need for Renovation of Law Enforcement Qualified Immunity*, 48 Ohio N.U. L. Rev. 341, 356 (2022). "The choice…to identify (but not really address) the proper level of generality at which a clearly established right is stated [has] had serious effects on the doctrine's administrability." Alan K. Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L. Rev. 1937, 1942 ("Chen"). The result has been, "as Winston Churchill once famously said of Russia, 'a riddle wrapped in a mystery inside an enigma." *Id.*

Courts' wildly inconsistent responses to this Court's guidance, over the years, as to what "clearly established" means, recalls a child's game of "hot and cold. Judges grope haplessly around the legal landscape to shouts of 'Colder! More particularity!' and 'Hotter! Less extreme specificity!' 'The instability has been so persistent and so pronounced that one expert describes qualified immunity as existing "in a perpetual state of crisis."'" Jeffries at 852 (quoting Wilson at 447).

Harlow justified its substantial departures from qualified immunity's common law roots (including the requirement of good faith) largely on policy grounds, chiefly the costs of litigation that would supposedly be

avoided by adopting an objective "clearly established" standard, and a desire to avoid the "burdens of broad-reaching discovery. *Harlow*, 457 U.S. at 814, 816-817; see also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The results of the forty-year experiment are in, and it has been persuasively argued that the doctrine fails to achieve those policy goals. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1799-1800, (2018) ("Schwartz").

"Justices have been raising concerns about qualified immunity for decades." Schwartz, at 1798-99. Justice Kennedy criticized the doctrine's departure from the common law in his concurrence in *Wyatt v. Cole*, 504 U.S. 158 (1992). "Our immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in 'freewheeling policy choices…In the context of qualified immunity, however, we have diverged to a substantial degree from the historical standards." *Id.* at 171 (Kennedy, J., concurring in judgment).

More recently, in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), Justice Thomas "[wrote] separately…to note [his] growing concern with [the Court's] qualified immunity jurisprudence." *Id.* at 1870 (Thomas, J., concurring in part and concurring in the judgment.) "[W]e are no longer engaged in 'interpret[ing] the intent of Congress in enacting" Section 1983." *Id.* at 1871. "Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." *Id.* "The Constitution assigns this kind of balancing to Congress, not the Courts." *Id.* at 1872. Accordingly, Justice Thomas asserted that "[i]n an appropriate

case, [the Court] should reconsider [its] qualified immunity jurisprudence." *Id.*; see also *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas J., dissenting from the denial of certiorari) ("clearly established" text cannot be located in Section 1983's text and may have little basis in history).

Justice Sotomayor has lamented that her colleagues were making the "clearly established" analysis ever more "onerous." *See Kisela*, 138 S. Ct. at 1158 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *Mullenix,* 136 S. Ct. at 316 (Sotomayor, J., dissenting). In Justice Sotomayor's view, an increasingly restrictive qualified immunity doctrine "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Id*. at 1162. "Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Id*.

Appellate and district court judges increasingly share these Justices' concerns. "To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly…. Even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration." *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). "[T]here is increasing consensus that qualified immunity poses a major problem to our system of justice." *Jamison v. McClendon*, 2020 U.S. Dist. LEXIS 139327 at *59 (S.D. Miss. 2020).

If modern qualified immunity doctrine stands on shaky legal and historical foundations, fails to accomplish the policy goals advanced to justify its judicial invention, leaves citizens oppressed by unremedied violations of their constitutional rights, and creates a tangled "nightmare for litigators and judges," Chen at 1951 -- why is it still here?

V. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING, AND THIS CASE PRESENTS A GOLDEN OPPORTUNITY TO ADDRESS THEM.

This matter is "an appropriate case [for the Court to] reconsider [its] qualified immunity jurisprudence."

Dissenting from the denial of certiorari in *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021), Justice Thomas asked:

> But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? We have never offered a satisfactory explanation to this question.

Id. at 2422 (Thomas, J., dissenting from the denial of certiorari).

Because no satisfactory answer to that question readily appears, the long-overdue reappraisal of the qualified immunity experiment should begin with a case like this, where the responsible officials had time to reflect on their options in calm air-conditioned of-

fices, consulting legal counsel with ample time to consider the constitutional protection of parodic expression -- and still managed to get it wrong.[3]

This is not the kind of case where a police officer "must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *See Anderson*, 483 U.S. at 664. Respondents had no "duty" to retaliate against Petitioners. Indeed, as the Opinion itself acknowledged, "any one of the officials involved could have allowed 'the entire story to turn out differently, simply by saying 'No'…Unfortunately, no one did." Opinion, p. 16. The Opinion further questioned whether the officers acted "reasonably," and warned against any conclusion that their "actions were justified or should be condoned." Opinion, p. 15.

Officials who rashly risk violating the Constitution in circumstances like this neither need nor deserve the extraordinary measures of extra-statutory, judicially created immunities.

This case, therefore, presents an ideal vehicle for this Court to address the incoherence, policy failings, and constitutional and legal shakiness of qualified immunity without risking the policy dangers that launched this failed legal experiment down its path in the beginning. It should do so.

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[3] The Opinion asserts that "the officers had good reason to believe they had probable cause" because "three other officials" agreed with them. Opinion, p. 6. *Amicus* has located no authority for this "herd immunity" theory, where the simple fact that multiple officials all join in an error automatically makes the error reasonable and shields them all from liability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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