No. 22-438

IN THE
Supreme Court of the United States

GLOW IN ONE MINI GOLF, L.L.C.; AARON KESSLER; MYRON'S CARDS AND GIFTS, INC.; LARRY EVENSON; THE A J HULSE COMPANY; ANDREW HULSE; AND GAY BUNCH-HULSE,

Petitioners,

v.

GOVERNOR TIM WALZ, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; AND ATTORNEY GENERAL KEITH M. ELLISON, IN HIS OFFICIAL CAPACITY,

Respondents.

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

BRIEF OF THE CATO INSTITUTE AND MANHATTAN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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 Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs regarding an array of constitutional, civil rights, and criminal justice issues.

Amici are interested in this case because of their shared concern for the robust protection of civil rights under 42 U.S.C. § 1983. *Amici* have not always agreed on legal and policy questions pertaining to qualified immunity, but they share the concern that this Court's decision in *Pearson v. Callahan*, 555 U.S. 223 (2009), has inhibited the development of constitutional law and ought to be reconsidered.

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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.

SUMMARY OF ARGUMENT

Through the spring of 2020, Minnesota Governor Tim Walz issued a series of executive orders effectively shutting down privately owned small businesses like the Petitioners and causing massive revenue losses for them. At the same time, these orders permitted similarly situated businesses, such as big-box stores, to continue operating without capacity restrictions. Relying on longstanding precedent of this Court permitting just-compensation claims in similar circumstances, Petitioners sued Governor Walz under 42 U.S.C. § 1983 for violating their constitutional rights under both the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's Takings Clause. But a panel of the Eighth Circuit held that Walz was entitled to qualified immunity, without first addressing whether Walz had, in fact, violated Petitioners' constitutional rights.

For the last several years, one of the most significant legal issues put before this Court and discussed and debated by the legal community more broadly has been whether the doctrine of qualified immunity ought to be reconsidered. Members of this Court,[2]

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[2] *See Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari."); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials . . . , we have diverged to a substantial degree from the historical standards.").

lower-court judges,[3] and a diverse array of both academics[4] and public-policy organizations[5] have long noted that modern qualified immunity—in particular, the "clearly established law" standard first promulgated in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)—is difficult to reconcile with either the text and history of Section 1983 or the common-law background against which that statute was passed. Whether qualified immunity should be reconsidered is not a question before the Court in this case, however, so *amici* will not address it further.

Instead, *amici* write separately to elaborate on one particular question presented that could have a major impact on civil-rights litigation in this country,

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[3] *See, e.g.*, *Zadeh v. Robinson*, 902 F.3d 483, 499–500 (5th Cir. 2018) (Willett, J., concurring dubitante); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 391 (S.D. Miss. 2020).

[4] William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); *see also* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1337 (2021) (arguing that there *was* a freestanding immunity for executive officials in the nineteenth century, but that this history fails to justify the "clearly established law" standard because "qualified immunity at common law could be overridden by showing an officer's subjective improper purpose").

[5] *See* Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as *Amici Curiae* in Support of Petitioner, *Taylor v. Riojas*, No. 19-1261 (filed May 14, 2020).

without requiring the Court to revisit qualified immunity entirely—namely, whether the Court should revise or reconsider *Pearson v. Callahan*, 555 U.S. 223 (2009), which gave lower courts discretion to dismiss claims on the basis of qualified immunity without addressing whether the plaintiff's rights were violated in the first place. Although *amici* have differing perspectives on qualified immunity in general, they are united in their view that reversing *Pearson* would be a substantial but measured step toward more effective and uniform protection of constitutional rights under Section 1983.

The discretion given to lower courts in *Pearson* was surely well intentioned, and the *Pearson* decision explained with nuance "that it is often beneficial" for courts to decide the merits question first, even though such ordering would no longer be mandatory. 555 U.S. at 236. Nevertheless, nearly 14 years of experience have proven both the impracticality and injustice of *Pearson v. Callahan*. The ability of lower courts to avoid addressing recurring constitutional questions of major importance has severely stagnated the development of constitutional law, resulting in a state of affairs that one federal judge aptly described as "Section 1983 meets Catch 22"[6]—that is, the "clearly established law" standard requires plaintiffs to identify closely analogous precedent to overcome qualified immunity, but *Pearson* deters courts from promulgating such precedent.

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

Pearson was premised largely on the notion that discretion to avoid reaching the merits was necessary in cases involving insubstantial or poorly briefed issues, *see* 555 U.S. at 237–38, but the empirical reality is that lower courts are most likely to exercise their "*Pearson* discretion" in exactly those cases involving substantial but undecided questions of constitutional law. More troubling still, the rate at which lower courts decline to decide the merits in Section 1983 cases appears to be steadily rising over time.

Finally, *stare decisis* should not preclude the Court's reconsideration of *Pearson*. Indeed, *Pearson* itself effected a change to the judicial rule previously announced in *Saucier v. Katz*, 533 U.S. 194 (2001), and the same reasons the Court gave in *Pearson* for why it was appropriate to revise *Saucier* apply equally to reconsideration of *Pearson* itself—namely, that the doctrine at issue is a judge-made rule rather than a rule of statutory construction, that lower-court judges have criticized its workability, and that doctrinal revision would not upset established reliance interests. At the very least, this Court should offer guidance to lower courts on when and how to exercise discretion under *Pearson* and advise them that skipping the merits question is almost never warranted for important, recurring questions of constitutional law.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO RECONSIDER *PEARSON V. CALLAHAN*

Under contemporary qualified immunity doctrine, a civil rights plaintiff suing under Section 1983 must

show both that the defendant caused the deprivation of "rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983, and that such rights were "clearly established at the time an action occurred." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court held that, when faced with an assertion of qualified immunity, the court must approach these two questions in a specific sequence. The "initial inquiry" must be whether, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. Only if the allegations make out a constitutional violation does the court then proceed to "the next, sequential step," which asks "whether the right was clearly established." *Id.*

But eight years later, in *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court reconsidered *Saucier* and held that "while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory." *Id.* at 236. Lower courts are therefore authorized to "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first," *id.*, which in turn means that a claim may be dismissed because a right was not "clearly established" without deciding whether the alleged misconduct violated that right in the first place.

Pearson may have been an understandable decision when it was issued, and it was surely motivated by reasonable concerns in the abstract. But over a decade of experience with courts exercising "*Pearson*

discretion" have demonstrated the practical shortcomings of this approach, and it is time for *Pearson* itself to be reconsidered.

A. *Pearson v. Callahan* creates a "Catch-22" for civil rights plaintiffs by stagnating the development of constitutional law.

The primary motivation for the initial two-step sequence in *Saucier* was the basic need for "the law's elaboration from case to case." 533 U.S. at 201. If the court were "simply to skip ahead to the question whether the law clearly established," then "[t]he law might be deprived of this explanation." *Id.* In other words, even if a plaintiff fails to recover on the basis of qualified immunity, it is still essential that the court first examine "whether a constitutional right was violated on the premises alleged," *id.*, so as to develop the law for application in subsequent cases.

Nothing in *Pearson* undermines or rejects the importance of developing constitutional law in this manner. To the contrary, the *Pearson* Court emphasized that the "*Saucier* protocol . . . is often beneficial" precisely because it "promotes the development of constitutional precedent," and that it is "especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." 555 U.S. at 236.

The primary reason that *Pearson* eliminated the mandatory nature of the *Saucier* procedure is not disagreement with *Saucier*'s underlying rationale, but rather the belief and expectation that its rationale would not actually be achieved in certain sorts of cases. To wit, *Pearson* explained that, though "the first prong of the *Saucier* procedure is intended to

further the development of constitutional precedent, . . . there are cases in which the constitutional question is so factbound that the decision provides little guidance for future cases." *Id.* at 237 (citing *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring)). *Pearson* likewise stated that a merits decision "may have scant value when it appears that the question will soon be decided by a higher court." *Id.* at 238. *Pearson* was likewise concerned that following *Saucier* might "create a risk of bad decisionmaking," especially in cases where the briefing of the constitutional questions was "woefully inadequate." *Id.* at 239.

Thus, as a general matter, *Pearson* seemed to anticipate that the discretion to resolve a case solely on the "clearly established" prong would be valuable precisely in those cases that were *not* especially meritorious or consequential and concordantly, that the exercise of such discretion would not come at the expense of developing constitutional law. Had such predictions been borne out, there would not be nearly as urgent a need to reconsider *Pearson*. But the unfortunate reality is that *Pearson* discretion is routinely exercised today not as a tool for quickly disposing of insubstantial cases, but for refusing to address important and recurring questions of constitutional law.

One of the best examples of such stagnation is the sluggishness with which many federal courts have come to recognize the First Amendment right to record police officers in public. Although this Court has yet to issue an opinion on this exact subject, every circuit court to address this issue on the merits has found that there is, in fact, such a right under the First

Amendment.[7] But because of *Pearson*, this right has needlessly gone unprotected in many regions of the country for years.

For example, the Third Circuit confronted this issue in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), noting that the court had "not addressed directly the right to videotape police officers." *Id.* at 260. The panel therefore granted immunity on the ground that the right was not clearly established in the Third Circuit, but it declined to decide whether there actually was such a right. *Id.* at 263. Nearly a decade later, the Third Circuit faced this same police-recording question in two additional cases—*Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018), and *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017)—and *again* granted immunity to the police in both cases because the right was still not "clearly established." Similarly, the Fourth Circuit confronted the police-recording question in *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009), but granted immunity without deciding whether such a right exists. *Id.* at 853.

In *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021), the Tenth Circuit similarly granted qualified immunity to officers who threatened to arrest a man for recording them in public, notwithstanding that they had received explicit training from their police

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[7] *See Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995).

department that citizens possess this right. *Id.* at 1008–09. Like the Third and Fourth Circuit decisions discussed above, *Frasier* also declined the reach the merits question, in part because "neither party disputed that such a right exists." *Id.* at 1020, n.4. In other words, the existence of the right was sufficiently plain to the officer defendants that they did not even bother to deny its existence in this litigation. Paradoxically then, the right to record the police receives insufficient protection nationwide precisely *because* there is no real disagreement that the right exists.

It is exactly this sort of paradox that led Judge Don Willett to character repeated exercises of *Pearson* discretion as a "Catch-22" for civil rights plaintiffs, especially in conjunction with the particularity requirement of the "clearly established law" standard. As he colorfully explained:

> Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

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

B. Lower courts increasingly decline to decide the merits questions in exactly those cases where development of the law is the most necessary.

Empirical research substantiates the widespread perception that lower courts routinely exercise *Pearson* discretion in precisely those cases where it is least necessary.

Perhaps the most extensive investigation of this question was a 2015 law review article by Professors Aaron Nielson and Christopher Walker called *The New Qualified Immunity*.[8] This study identified all federal appellate cases citing *Pearson* in a three-year window, which ended up comprising 844 cases and 1460 distinct claims.[9] From this set, they then examined 1,055 claims where the court ended up granting qualified immunity, and therefore had a choice about whether or not to address the merits.[10] On a first glance, it looks as if the courts were regularly choosing to reach the merits question, even when doing so was unnecessary: out of the 1,055 claims in which the court granted immunity, they decided the merits question first 63.0% of the time (665 claims) and declined to reach the merits 37% of the time (400 claims).[11]

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[8] Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015).

[9] *Id.* at 34.

[10] *Id.*

[11] *Id.* at 34–35.

The rub, however, is that for the 665 claims where courts reached the merits, the court nearly always (92% of the time) decided that there was *not*, in fact, any constitutional violation.[12] In other words, these were the claims that were simply not meritorious to begin with, and where qualified immunity was therefore unnecessary to dismiss them. By contrast, courts "developed the law"—in the sense of holding that there was a constitutional violation, but it was *not* clearly established at the time of the violation—in only 8% of these 665 claims.[13] The 37% of cases (400 claims) where courts decided not to reach the merits (and thus, granted immunity solely because the law was not clearly established) thus appear to represent those cases in which the merits question is more difficult, and where the law is therefore more in need of development.

A recent Reuters investigation illustrates a similar pattern. In May 2020, Reuters released an investigative report analyzing qualified immunity specifically in the particular context of excessive force claims against police officers.[14] The report's authors reviewed 529 federal circuit court opinions published

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[12] *Id.* at 35. The 92% figure represents the sum of the 521 claims where the court held simply that there was no constitutional violation and the 91 claims in which they advanced the lack of an underlying violation as an alternative holding.

[13] *Id.*

[14] Andrew Chung et al., *Shielded*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/ usa-police-immunity-scotus/.

from 2005 through 2019, breaking them up into five distinct three-year periods. In the most recent period, from 2017-2019, Reuters looked at 94 appellate decisions granting qualified immunity for excessive force claims: 52 of these decisions (55%) said there was no underlying constitutional violation; only 19 of these decisions (20%) "developed the law" and said there was a constitutional violation, but that it was not "clearly established"; and 23 of these decisions (24%) granted immunity without addressing the merits.

Again, these figures illustrate that the courts are far more likely to address the merits when there is not, in fact, an underlying constitutional violation, suggesting that courts are avoiding the merits precisely when the legal claim is meritorious, or at least a close call. Thus, despite the *Pearson* Court's expectation that discretion to skip the merits would allow lower courts to quickly dispose of insubstantial claims without stagnating the law, the reality on the ground seems closer to the opposite dynamic.

II. *STARE DECISIS* SHOULD NOT PRECLUDE RECONSIDERATION OF *PEARSON V. CALLAHAN*

Stare decisis is a "vital rule of judicial self-government," but it "does not matter for its own sake." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). Rather, it is important precisely "because it 'promotes the evenhanded, predictable, and consistent development of legal principles.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). The rule therefore "allows [the Court] to revisit an earlier decision where

experience with its application reveals that it is unworkable." *Id.*

Somewhat ironically, the arguments for why this Court should feel free to reconsider *Pearson v. Callahan* are nowhere made clearer than in the *Pearson* opinion. After all, *Pearson* itself was reversing *Saucier*, and the *Pearson* Court therefore addressed in detail the *stare decisis* implications of reconsidering that eight-year-old precedent. *See* 555 U.S. at 233–35. All of those arguments, however, weigh just as heavily today in favor of reconsidering *Pearson*.

First, *Pearson* observed that reconsidering precedent is especially appropriate where "a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Id.* at 233. Of course, all of these factors apply just as strongly today. Revising or reversing *Pearson* would not upset expectations or threaten reliance interests; indeed, the very nature of *Pearson* discretion is that the way cases are resolved will be *unpredictable* to present and potential litigants. *Pearson*, no less than *Saucier*, is a recent, judge-made rule, and as discussed extensively above, experience has certainly illustrated its shortcomings.

Pearson likewise explained how reconsidering *Saucier* did not "implicate 'the general presumption that legislative changes should be left to Congress,'" *id.* at 233 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)), because "the *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations." *Pearson* itself, of course, is

no less a judge-made rule involving judicial operations. Indeed, if Congress itself attempted to mandate a return to the *Saucier* sequence, such legislation might plausibly raise separation-of-powers concerns. Thus, "[a]ny change should come from this Court, not Congress." *Pearson*, 555 U.S. at 234.

Finally, *Pearson* emphasized that lower-court judges had "not been reticent in their criticism" of *Saucier*. *Id.* In recent years, however, lower-court judges have become increasingly critical of the Catch-22 that *Pearson* itself presents. *See, e.g.*, *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (per curiam) ("This is the fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation. . . . Continuing to resolve the question at the clearly established step means the law will never get established."); *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (en banc) (Grasz, J., dissenting) ("There is a better way. We should exercise our discretion at every reasonable opportunity to address the constitutional violation prong of qualified immunity analysis, rather than defaulting to the 'not clearly established' mantra . . . .").

At the very least, even if this Court does not reconsider *Pearson* entirely, it should still offer guidance and clarification on when such discretion ought to be exercised. In particular, the Court should remind lower courts that *Pearson* was originally decided on the expectation that skipping straight to the "clearly established law" inquiry would be most appropriate in cases that were highly fact specific, inadequately briefed, or where the merits question was about to be

resolved by a higher court anyway. *See* 555 U.S. at 237–39. But when lower courts confront recurring, substantial, and well-briefed questions of constitutional law, they should presumptively decide the merits question first.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant certiorari.

Respectfully submitted,

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