No. _____

IN THE

Supreme Court of the United States

N.S., ONLY CHILD OF DECEDENT, RYAN STOKES, BY AND THROUGH HER NATURAL MOTHER AND NEXT FRIEND, BRITTANY LEE; NARENE JAMES,

Petitioners,

v.

KANSAS CITY BOARD OF POLICE COMMISSIONERS; MICHAEL RADER; LELAND SHURIN; ANGELA WASSON-HUNT; ALVIN BROOKS; MAYOR SLY JAMES; DARRYL FORTE; RICHARD SMITH; WILLIAM THOMPSON; AND DAVID KENNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether qualified immunity insulates a law enforcement officer from liability under 42 U.S.C. § 1983 if there is no factually identical precedent establishing the unconstitutionality of that officer's conduct (as the Fifth, Sixth, and Eighth Circuits have held), or whether a constitutional right can be "clearly established" by precedent with some factual variation so long as the officer has fair notice that his conduct is unconstitutional (as this Court and the First, Third, Fourth, Seventh, Ninth, and Eleventh Circuits have held).

2. Whether the judge-made doctrine of qualified immunity should be narrowed or abolished.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners N.S., the only child of decedent, Ryan Stokes, by and through her natural Mother and next friend, Brittany Lee, and Narene James, the Mother of Mr. Stokes, were Plaintiffs in the District Court and Appellants in the Court of Appeals.

Respondents Kansas City, Missouri Board of Police Commissioners; Michael Rader; Leland Shurin; Angela Wasson-Hunt; Alvin Brooks; Mayor Sly James; David Kenner; Darryl Forte (former Chief of the Kansas City, Missouri Police Department); Richard Smith (the immediate past Chief of the Kansas City, Missouri Police Department); and Officer William Thompson were Defendants in the District Court and Appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners are individuals and therefore have no parent corporation and no stock.

STATEMENT OF RELATED PROCEEDINGS

N.S. v. Kansas City Board of Police Commissioners, No. 20-1526 (8th Cir.) (judgment entered on May 31, 2022)

N.S. v. Kansas City Board of Police Commissioners, No. 4:16-cv-843-BWC (W.D. Mo.) (judgment entered on February 11, 2020)

N.S. v. Kansas City Board of Police Commissioners, No. 18-1537 (8th Cir.) (judgment entered on August 12, 2019)

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INTRODUCTION

Officer William Thompson shot and killed Ryan Stokes for no legitimate reason. The record evidence, viewed in the light most favorable to Petitioners, confirms that Mr. Stokes was never a danger to officer safety. He was not armed. He was not threatening any police officers. He was not suspected of a violent crime. He was not resisting arrest. And he did not disobey any officer commands. Instead, he voluntarily raised his hands above his waist in an effort to surrender peacefully to a nearby officer. That officer correctly recognized that Mr. Stokes was not a genuine threat, so he re-holstered his gun. Officer Thompson made a different choice. Without giving any warning or announcing his presence at the scene, he immediately resorted to deadly violence and gunned down Mr. Stokes from behind. That conduct was not reasonable; it was reckless and flatly inconsistent with the Fourth Amendment's prohibition against excessive force.

Officer Thompson should be held accountable for his patently unconstitutional conduct. But the Eighth Circuit concluded that he was immune from liability under the doctrine of qualified immunity. In particular, the Court of Appeals reasoned that Officer Thompson did not violate "clearly established" law because there was no indistinguishable precedent precisely mirroring the facts of this case.

That is not the law. This Court's precedents do not demand a case directly on point to satisfy the clearly established requirement. Rather, Petitioners only had to show that existing precedent put Officer Thompson on "fair notice" that his conduct was unconstitutional. Petitioners satisfied that burden. There can be little

doubt that, at the time he killed Mr. Stokes, Officer Thompson had fair notice that police officers may not shoot (without warning) non-violent, unarmed individuals in the back who are surrendering and pose no threat to officer safety.

In holding otherwise, the Eighth Circuit imposed a far too demanding clearly established standard, faulting Petitioners for their inability to identify a prior case matching the facts of this one. By applying that mutated standard, the Court of Appeals departed from this Court's settled precedent and deepened an acknowledged split among the Circuits regarding the proper standard federal courts must use to ascertain whether the law is clearly established for purposes of qualified immunity. Left undisturbed, the decision below will sow further chaos among the Circuits. This Court should grant certiorari to resolve that confusion and ensure the fair and consistent application of qualified immunity. Alternatively, the Court should summarily reverse the Eighth Circuit's clearly erroneous decision.

Beyond exacerbating a conflict among the Circuits and misconstruing this Court's precedent, the decision below also exposes many of the flaws infecting the judge-made doctrine of qualified immunity. As a growing number of scholars and jurists have recognized, modern qualified immunity jurisprudence has gone too far. It is unmoored from the statutory text of Section 1983; it is divorced from the common law; and it does not achieve its putative policy objectives. Perhaps most troubling, it prevents individuals from obtaining redress for violations of their Constitutional rights. Justice Thomas has invited the Conference to "reconsider [its] qualified immunity jurisprudence" in

"an appropriate case." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (opinion concurring in part and concurring in the judgment). This is that case. The petition should be granted.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 35 F.4th 1111 and is reproduced at Pet.App.1-10. The District Court's order granting summary judgment is not officially reported but can be found at 2020 WL 641728 and is reproduced at Pet.App.13-32. The unpublished order of the Court of Appeals denying the petition for panel rehearing and rehearing *en banc* is available at 2022 WL 2733403 and is reproduced at Pet.App.56-57.

JURISDICTION

The Eighth Circuit entered its judgment on May 31, 2022. Pet.App.11-12. On July 14, 2022, the Eighth Circuit denied Petitioners' timely petition for panel rehearing and rehearing *en banc*. Pet.App.56-57. On October 5, 2022, Justice Kavanaugh extended the time for filing a petition for certiorari to December 11, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution 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.

U.S. Const. amend. IV.

Section 1983 provides, in relevant part:

> 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 … .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Factual Background

At summary judgment, this Court must "view the evidence … in the light most favorable to" the nonmovant (here, Petitioners) "with respect to the central facts of this case." *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam). Construing the facts in the light most favorable to Petitioners, and drawing all inferences in their favor, a jury could find that the following events occurred on the night of Mr. Stokes's death.

Around midnight on July 27, 2013, Ryan Stokes and two of his friends (Kenneth Cann and Ollie Outley) drove in separate cars to the Kansas City Power & Light entertainment district. J.A. 32-33, 303-05. Mr. Stokes rode in the passenger seat of Mr.

Outley's red Monte Carlo. J.A. 32, 305, 522. Upon their arrival at the entertainment district, Mr. Outley parked in a nearby parking lot. J.A. 523.

Mr. Outley kept a handgun that he legally owned secured in a "makeshift holster" in his car, between the center console and the driver's seat. J.A. 1494. Mr. Outley left the gun in the car, and both he and Mr. Stokes were unarmed during their night out. J.A. 1494, 1497-98.

At some point that evening, an intoxicated man falsely accused Mr. Outley of stealing his cell phone, which provoked a public disturbance. J.A. 61, 525-26, 1380-81, 1531. In response, Officer Albert Villafain sprayed a large can of pepper spray to disperse the gathering crowd. J.A. 310, 1532-33, 2064, 2157.

Incapacitated by the pepper spray, Mr. Outley handed his car keys to Mr. Stokes to "[g]o get the car." J.A. 311, 1450, 1568-69. Mr. Stokes and Mr. Cann made their way to the parking lot where Mr. Outley's car was parked. J.A. 40, 62, 2050. Neither Mr. Stokes nor Mr. Cann was involved in the alleged theft that prompted the public disturbance; neither man resembled Mr. Outley; and neither man had been accused of any threatening conduct or violent crime. J.A. 525-26, 1507-08, 1512-13. Despite this, and based solely on the drunk man's false accusation, Officer Villafain instructed fellow Officer Daniel Straub to "go stop" Mr. Stokes and Mr. Cann, and then sent a radio dispatch to other officers about the foot chase. J.A. 325, 2114, 2164. Officer Villafain's radio dispatch provided a description of the two men but did not suggest that either man was armed or dangerous. J.A. 2097, 2114, 2164-66.

Officer Straub followed Mr. Stokes into the parking lot and stopped him near Mr. Outley's car. J.A. 2050-52, 2069. Mr. Stokes walked toward the vehicle but did not enter the car or retrieve anything from inside; instead, he turned toward Officer Straub, voluntarily put his hands up above his waist, and surrendered peacefully. *See* Pet.App.4; J.A. 317, 2052-54, 2064. Realizing that Mr. Stokes posed no threat, Officer Straub re-holstered his firearm, while Mr. Stokes stood directly in front of him. *See* J.A. 251, 997, 2064.

Meanwhile, Officer Thompson—a desk officer who had not been on regular patrol duty for nearly a decade—had received Officer Villafain's dispatch that officers were pursuing two men suspected of theft. Pet.App.36; J.A. 2093-96. Seconds later, Officer Thompson saw Mr. Stokes run into the parking lot, go to the red Monte Carlo, turn toward Officer Straub, and then raise his hands past his waist. Pet.App.4, 19; J.A. 325-26, 2052, 2098, 2105. Officer Thompson failed to give a warning or announce his presence, nor did he make any attempt to deescalate the situation by giving verbal commands; he immediately resorted to deadly force, and fired three shots at Mr. Stokes from behind, hitting him twice. *See* Pet.App.16, 22; J.A. 325-27, 331, 2055-56, 2099, 2171, 2178. At the time of the shooting, Mr. Stokes was illuminated by the headlights of the red Monte Carlo, and was in plain view of Officer Thompson. J.A. 1524, 2061, 2103, 2156, 2166. Mr. Stokes did not have a gun, was surrendering to Officer Straub, and was not threatening any of the responding officers. Pet.App.4, 22; J.A. 325, 2052.

After hearing the gunshots that killed Mr. Stokes, Officer Straub re-drew his firearm and aimed it in the direction of Officer Thompson because he was

unaware of Officer Thompson's presence. J.A. 326, 2056, 2064. Officer Straub testified that it would have been "feasible under the circumstances" confronting the responding officers "to give [Mr. Stokes] verbal commands before using deadly force." J.A. 2056. But Officer Straub never heard Officer Thompson give verbal commands before killing Mr. Stokes. J.A. 325, 2055. Officer Straub further testified that he was "shocked" that Mr. Stokes "was shot." J.A. 2058.

Mr. Stokes ultimately succumbed to his gunshot wounds and died. Pet.App.16.[1]

B. Procedural History

1. Petitioners—surviving family members of Mr. Stokes—sued Respondents Officer Thompson, the Kansas City, Missouri Board of Police Commissioners, and its individual members under 42 U.S.C. § 1983 in the United States District Court for the Western District of Missouri. Petitioners alleged, among other claims, that Respondents used excessive force against Mr. Stokes in violation of the Fourth Amendment.

Respondents moved for summary judgment on the ground that they were immune from suit. Pet.App.42-55. The District Court originally denied the motion in relevant part, concluding that Officer Thompson was not entitled to qualified immunity because "a genuine issue of material fact exist[ed] as to whether [Officer Thompson's] use of force was reasonable such that a violation of a constitutional right occurred." Pet.App.49. Specifically, the District Court determined that "genuine issues of material facts exist

[1] While Mr. Stokes was dying, Officer Thompson entered Mr. Outley's car and claimed to have recovered a gun from the vehicle. J.A. 2112.

concerning whether Mr. Stokes posed an immediate threat to officers or others and whether he was resisting arrest." Pet.App.48.

2. On interlocutory appeal, the United States Court of Appeals for the Eighth Circuit vacated the District Court's judgment and remanded the case for a "second look." Pet.App.39. The Eighth Circuit instructed the District Court to "identify[] the plaintiff-friendly version of the disputed facts" and then "evaluate whether [Officer] Thompson … violated clearly established law when he shot Stokes." Pet.App.39-40.

3. On remand, the District Court concluded that Officer Thompson was entitled to qualified immunity and granted summary judgment in his favor. Pet.App.14. The court held that Officer Thompson did not violate Mr. Stokes's constitutional rights and that, even if he did, the right at issue was not clearly established. Pet.App.24-29. In doing so, the District Court incorrectly credited much of Officer Thompson's version of the facts, including his testimony that he observed Mr. Stokes with a gun, believed Mr. Stokes was armed, and thought Mr. Stokes was going to ambush other officers. *See* Pet.App.26.

4. Petitioners appealed, and the Eighth Circuit affirmed the District Court's ruling that Officer Thompson was entitled to qualified immunity. Pet.App.2. Skipping "directly to the second" prong of the qualified immunity analysis, the panel held that Eighth Circuit precedent was not clear enough to establish that Officer Thompson's conduct—shooting an unarmed, non-threatening, surrendering man in the back without warning—was unconstitutional. *See*

Pet.App.5-8. To support that conclusion, the Court of Appeals relied exclusively on its prior decision in *Thompson v. Hubbard*, 257 F.3d 896, 898 (8th Cir. 2001). Pet.App.6-7. Notably, the panel admitted that *Hubbard* was materially different from this case, including because *Hubbard* involved a "much more serious crime," and because the officer in *Hubbard*, unlike Officer Thompson, issued a command before using deadly force. *See id.* Overlooking these critical differences, the panel determined that *Hubbard* created enough uncertainty to justify qualified immunity. *Id.*

In reaching that conclusion, the panel strained to distinguish several relevant precedents from this Court and the Eighth Circuit on the ground that the facts of those cases were not similar enough to those confronting Officer Thompson. *Id.* (attempting to distinguish *Tennessee v. Garner*, 471 U.S. 1, 4 & n.2 (1985); *Nance v. Sammis*, 586 F.3d 604, 607 (8th Cir. 2009); and *Ngo v. Storlie*, 495 F.3d 597, 600-01 (8th Cir. 2007)). Because of minor factual variations in those cases, the Eighth Circuit concluded that the unconstitutionality of Officer Thompson's conduct was not sufficiently clear based on existing precedent. Pet.App.7-8.

5. The Eighth Circuit denied Petitioners' timely petition for panel rehearing and rehearing *en banc*. Pet.App.56-57.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN ACKNOWLEDGED CIRCUIT SPLIT ON THE PROPER APPLICATION OF THE QUALIFIED IMMUNITY DOCTRINE

A. The Eighth Circuit's Decision Deepens Division Among the Courts of Appeals on What Level of Factual Similarity to Prior Case Law Is Needed to Show Clearly Established Law

Qualified immunity shields law enforcement officers from civil damages liability only when their conduct "'does not violate clearly established statutory or constitutional [law].'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). But what exactly does it mean for the law to be "clearly established"?

In addressing that question, this Court has enunciated a few (sometimes competing) directives. *First*, the clearly established requirement is satisfied if it is "sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quotation marks omitted). *Second*, the principal focus of the clearly established requirement must be "on whether the officer had fair notice that [their] conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). *Third*, "general statements of the law are not inherently incapable of giving fair and clear warning to officers." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam). *Fourth*, courts must take care "not to define clearly

established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). *Lastly*, the clearly established requirement does "not require a case directly on point." *Id.* at 741; *see Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (holding that "cases involving 'fundamentally similar' facts … are not necessary" to meet clearly established requirement).

For far too long, the Courts of Appeals have struggled (and failed) to operationalize these somewhat conflicting guidelines in a consistent, uniform manner. Instead, the Circuits have adopted dramatically different approaches in determining whether the law is clearly established. As one federal appellate judge has recently recognized, "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" to satisfy the clearly established requirement. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part).

That circuit split is real and deep. Several Courts of Appeals—including the Fifth, Sixth, and Eighth Circuits—have demanded an impossibly high showing of factual similarity to satisfy the clearly established requirement. *See infra* Part I.A.1. By contrast, many other Circuits—including the First, Third, Fourth, Seventh, Ninth, and Eleventh Circuits—have held that the law can be clearly established by prior case law even if those cases have some factual differences from the case at hand. *See infra* Part I.A.2. As explained below, the decision below further entrenches this intractable conflict among the Circuits.

1. The Fifth, Sixth, and Eighth Circuits Require Plaintiffs to Identify a Prior Case Involving the Same Factual Scenario to Satisfy the Clearly Established Prong

In the decision below, the Eighth Circuit held that the law was not clearly established by prior case law because those cases arose in slightly different factual circumstances. Pet.App.6-7. For instance, the Eighth Circuit distinguished this Court's decision in *Garner*, solely because it involved an officer who shot a "minor suspect … climbing a fence." Pet.App.7. The Eighth Circuit also dismissed as inapposite its earlier decisions in *Nance* and *Ngo*—the former because *Nance* concerned a confrontation with "two *children* after dark who were *walking*" and the latter because *Ngo* "involved an officer-on-officer shooting, not an officer who fired at a fleeing suspect." Pet.App.7. In the very same breath, however, the panel rested its ruling on a single Eighth Circuit case (*Hubbard*)—even though the panel admitted that there were "some differences" between *Hubbard* and this case. Pet.App.6. In conducting this lopsided analysis, the Eighth Circuit imposed a heightened burden on Petitioners by effectively requiring them to identify existing precedent involving the same factual scenario at issue in this case. Pet.App.7-8.

This case is not the first time the Eighth Circuit has applied this supercharged clearly established standard. In *Goffin v. Ashcraft*, the Eighth Circuit granted qualified immunity to an officer who shot a fleeing arrestee even though another officer had searched the arrestee and found no weapons. 977 F.3d

687, 691-92 (8th Cir. 2020). The Eighth Circuit reasoned that the officer did not violate clearly established law because the plaintiff could point to no prior case where "a pat down that recovered nothing eliminated [an officer's] objectively reasonable belief that [an arrestee] was armed and dangerous." *Id.* at 692. As Judge Kelly noted in dissent, the majority "relie[d] on the precise scenario of a suspect fleeing after a pat down that revealed no weapons to conclude that Ashcraft violated no clearly established law"—even though the "novel fact" of a pat down "d[id] not render inapplicable the clearly established law that officers may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officers or others." *Id.* at 696 (Kelly, J., dissenting).

The Eighth Circuit does not stand alone in its draconian application of the clearly established requirement. The Fifth and Sixth Circuits, too, mistakenly demand prior case law with identical (or nearly identical) facts to overcome qualified immunity.

For instance, in *Morrow v. Meachum*, the Fifth Circuit held that a plaintiff "must make an extraordinary showing" to satisfy the clearly established requirement. 917 F.3d 870, 876 (5th Cir. 2019). That "extraordinary showing" requires the plaintiff to identify clearly established law with a heightened degree of "specificity and granularity." *Id.* at 874-75. Thus, in the Fifth Circuit, a plaintiff "loses [if] no previous panel has ever held th[e] exact sort of [conduct at issue] unconstitutional." *Zadeh*, 928 F.3d at 479 (op. of Willett, J.); *see Cope v. Cogdill*, 3 F.4th 198, 218 (5th Cir. 2021) (Dennis, J., dissenting) (faulting majority for "defin[ing] the clearly

established right in an overly narrow manner" and requiring plaintiffs to "point to a case with virtually identical facts").

The Sixth Circuit follows the same rigid approach. In *Gordon v. Bierenga*, the Sixth Circuit held that a law is not clearly established unless the plaintiff can point to prior case law meeting a heightened "level of 'specificity.'" 20 F.4th 1077, 1085 (6th Cir. 2021). Although the court in *Gordon* acknowledged that existing precedent was "similar in some ways," it found that the case law was not "similar enough to the facts of this case to pass muster under the controlling standards for defining 'clearly established' law." *Id.* at 1079; *see Kenjoh Outdoor, LLC v. Marchbanks*, 23 F.4th 686, 695 (6th Cir. 2022) (granting qualified immunity "because not a single judicial opinion ha[s] held the official's action unconstitutional" (quotation marks omitted)).

At bottom, the Fifth, Sixth, and Eighth Circuits have erected an impossibly high barrier for plaintiffs seeking to vindicate their constitutional rights in the face of qualified immunity. Under that unforgiving standard, Petitioners were obligated to identify prior case law involving the same facts at issue in this case: a desk officer recklessly gunned down an unarmed man from behind without any warning, even though that man posed no threat, was illuminated by car headlights (in the officer's plain view), and raised his hands above his waist to peacefully surrender.

2. The First, Third, Fourth, Seventh, Ninth, and Eleventh Circuits Do Not Require Plaintiffs to Identify a Prior Case Involving the Same Factual Scenario

On the other side of the split, at least six other Circuits have held that the law can be clearly established even if prior case law is not an exact match. In those jurisdictions, a constitutional right is clearly established without factually indistinguishable precedent so long as prior case law puts the officer on fair notice that his conduct is unconstitutional. *See, e.g.*, *Dennis v. City of Phila.*, 19 F.4th 279, 288 (3d Cir. 2021) ("[W]e do not require that prior precedent have indistinguishable facts.").

The Seventh Circuit's decision in *Strand v. Minchuk* is illustrative. 910 F.3d 909 (7th Cir. 2018). There, the Seventh Circuit explained that, although courts must define the constitutional right at issue with some "specificity," the "demand for specificity is not unyielding or bereft of balance." *Id.* at 915. As the Seventh Circuit put it, "assessing whether the law is clearly established does not require locating 'a case directly on point'" since police officers "can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* Applying those principles, the Seventh Circuit held that an officer—who used deadly force against a subdued suspect who had surrendered, stood with his hands in the air, and posed no threat to the officer—was not entitled to qualified immunity. *Id.* at 917-18. In support of that conclusion, the court reasoned that it was clearly established "for decades" that a surrendering suspect "has the right not to be seized by deadly or significant

force." *Id.* at 918. Like the officer in *Strand*, Officer Thompson violated clearly established law when, without warning, he unleashed deadly force against an unarmed man who was trying to surrender in Officer Thompson's line of sight, stood with his hands above his waist, and posed no objective threat to any of the officers at the scene. Given these similarities, Petitioners would have prevailed in the Seventh Circuit.

The same would hold true in many other Circuits. For example, like the Seventh Circuit, the Fourth Circuit has held that an officer is "not absolved of liability solely because the court has not adjudicated the exact circumstances of his case." *Dean ex rel. Harkness v. McKinney*, 976 F.3d 407, 419 (4th Cir. 2020). Even though "there [was] no case directly on point factually to inform [the court's] analysis" in that case, the court nonetheless concluded that the "core constitutional principles set forth in numerous cases lead … to the conclusion that [the plaintiff's] right was clearly established." *Id.* at 418-19. Because the officer in *Dean* had sufficient notice that his conduct was unconstitutional, the Fourth Circuit held that he did not deserve qualified immunity. *Id.* at 419; *see Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019) (noting that courts "need not—and should not—assume that government officials are incapable of drawing logical inferences" in determining clearly established law).

Likewise, in the Third Circuit, a plaintiff need not identify "a case directly mirror[ing] the facts at hand, so long as there are sufficiently analogous cases that should have placed a reasonable official … on notice that his actions were unlawful." *Kane v. Barger*, 902

F.3d 185, 195 (3d Cir. 2018) (quotation marks omitted). As the Third Circuit explained, "'it need not be the case that the exact conduct has previously been held unlawful so long as the contours of the right are sufficiently clear'" to the officer. *Id.* at 194-95 (quoting *Kedra v. Schroeter*, 876 F.3d 424, 450 (3d Cir. 2017)). Applying that standard, the Third Circuit held that the officer had fair notice based on case law from the Third Circuit and other Courts of Appeals establishing that his alleged misconduct was unconstitutional. *Id.*; *see Dennis*, 19 F.4th at 288-89.

The First, Ninth, and Eleventh Circuits apply the same rule in determining whether the law is clearly established. *See Irish v. Fowler*, 979 F.3d 65, 76-77 (1st Cir. 2020) (noting that this Court "has established that cases involving materially similar facts are not necessary to a finding that the law was clearly established"); *Orn v. City of Tacoma*, 949 F.3d 1167, 1178 (9th Cir. 2020) (holding that a plaintiff need not "identify prior cases that are 'directly on point'"); *Torres v. City of Madera*, 648 F.3d 1119, 1128-29 (9th Cir. 2011). (holding that "the test of whether a right is 'clearly established'" must not "be so narrow that the immunity is transformed from one 'qualified' in nature to one absolute" and that "[w]ere [the court] to require such granular specificity … [it] would effectively wrench of all meaning the Supreme Court's admonition that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances'"); *Young v. Brady*, 793 F. App'x 905, 908 (11th Cir. 2019) (per curiam) (holding that "[e]xact factual identity with a previously decided case is not required" and affirming denial of qualified

immunity (quoting *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011)).

The upshot of this wall of circuit authority is simple: the clearly established prong does not require plaintiffs to embark upon a wild goose chase in search of a prior case involving virtually identical facts (as the Fifth, Sixth, and Eighth Circuits have held). To the contrary, a plaintiff need only demonstrate that prior case law gave the officer fair notice that his conduct fell outside the bounds of the Constitution.

As the foregoing discussion reveals, "determining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010). It is therefore unsurprising that "[t]he circuits vary widely in approach" in defining the level of specificity needed to show that the law is clearly established. *Id.* Indeed, the disarray among the Circuits shows that "the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh*, 928 F.3d at 479 (op. of Willett, J.). Absent further guidance from this Court, the Circuits will remain "hopelessly conflicted" on that question. Karen Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015).

B. The Eighth Circuit's Decision Is Incorrect

In addition to further entrenching an acknowledged circuit split, the Eighth Circuit's decision is also wrong on the merits. As explained above, the Eighth Circuit applied a heightened clearly established standard by requiring Petitioners to

identify a case arising from the same factual circumstances as this one. *See supra* Part I.A.1.

That approach flies in the face of this Court's precedent. Time and again, this Court has made clear that it does "not require a case directly on point" to find that the law was clearly established. *E.g.*, *al-Kidd*, 563 U.S. at 741. To be sure, this Court has instructed courts to frame the right "in light of the specific context of the case," *Brosseau*, 543 U.S. at 198, but that does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Rather, to be clearly established, a constitutional right need only supply officers with "fair warning that their alleged [conduct] … was unconstitutional." *Hope*, 536 U.S. at 741. Thus, officers "can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*

The Eighth Circuit's heightened standard collides with these settled principles and reflects the "rigid, overreliance on factual similarity" that this Court has rejected. *Id.* at 742. Under this Court's precedent, Petitioners had no obligation to identify an apples-to-apple match in prior case law to satisfy the clearly established requirement. All that Petitioners had to do was show that existing precedent put Officer Thompson on sufficient notice that his conduct was unconstitutional.

Petitioners met that burden. Contrary to the Eighth Circuit's determination, any reasonable officer in Officer Thompson's shoes was on fair notice that it was unconstitutional to repeatedly shoot—from

behind and without giving a warning—an unarmed man who raised his hands above his waist to surrender, was illuminated by the headlights of a car, and posed no objective threat or danger to responding officers. Notably, Officer Straub accurately recognized that Mr. Stokes did not present a threat and re-holstered his firearm. In fact, Officer Straub testified that it would have been feasible to give Mr. Stokes verbal commands before deploying deadly force; that he did not hear Officer Thompson give any commands; and that he was "shocked" that Mr. Stokes had been shot. Existing precedent from this Court, the Eighth Circuit, and other Circuits firmly establishes that Officer Thompson's "shoot first, think later" behavior was objectively unreasonable under these circumstances.

This Court's decision in *Garner* is particularly instructive. In *Garner*, a police officer confronted an unarmed, non-threatening young man who was fleeing the scene of a crime. 471 U.S. at 3-4, 10-11. After the police officer announced himself and instructed the felony suspect to "halt," the suspect started to climb over a fence. *Id.* at 3-4. Fearing that the young man would escape, the officer shot the suspect in the back of the head and killed him. *Id.* at 4. Concluding that the officer's conduct was objectively unreasonable, the Court handed down a straightforward rule: an officer "may not seize an unarmed, non-dangerous suspect by shooting him dead." *Id.* at 11.

Garner should have put Officer Thompson on notice that his actions were unconstitutional. In fact, this case is an easier call than *Garner*. In *Garner*, the police officer announced himself, told the felony suspect to stop, and shot him only after he disobeyed

that order. Here, no one heard Officer Thompson announce his presence or give any orders or warnings, and Mr. Stokes was trying to surrender peacefully—not flee the scene. If the officer in *Garner* acted unreasonably when he shot and killed a non-threatening, unarmed felony suspect who disobeyed officer commands and tried to flee the scene, then it follows *a fortiori* that Officer Thompson's conduct was objectively unreasonable when, without giving any verbal commands, he repeatedly shot in the back a non-threatening, unarmed individual who was compliant and was trying to surrender to another responding officer.

The Eighth Circuit gave short shrift to *Garner*. Because that case involved a "minor suspect" who was "busy climbing a fence," the panel believed it "did not involve the same level of potential danger." Pet.App.7. But that reasoning does not withstand scrutiny. The Eighth Circuit's suggestion that "minor suspects" categorically pose less of a threat to officers finds zero support in *Garner*. Nothing in *Garner* hinged on the suspect's minor status. That is for good reason: the officer in *Garner* actually believed the suspect "was 17 or 18 years old." 471 U.S. at 3-4. At any rate, the Court in *Garner* focused on whether the suspect "posed [an] immediate threat to the officer" or "to others"—not on how old he was. *Id.* at 11.

Nor does it matter that the suspect in *Garner* attempted to flee by climbing a fence. If anything, that fact cuts strongly in Petitioners' favor. Unlike the fleeing suspect in *Garner*, who disobeyed the officer's instruction to "halt," Mr. Stokes attempted to surrender to Officer Straub with his hands raised. There can be little doubt that a compliant,

surrendering, unarmed man presents a far lower risk of danger to public and officer safety than a fleeing felony suspect who disregards an officer's command and attempts to scale a fence. Based on *Garner*, Officer Thompson should have known that his conduct exceeded the bounds of the Fourth Amendment.

But even if *Garner* alone did not clearly establish the unconstitutionality of Officer Thompson's conduct, several Eighth Circuit cases confirm that his immediate resort to deadly force was objectively unreasonable. *See, e.g.*, *Ngo*, 495 F.3d at 601-03; *Nance*, 586 F.3d at 610-11; *Rahn v. Hawkins*, 73 F. App'x 898, 900-01 (8th Cir. 2003) (per curiam); *Craighead v. Lee*, 399 F.3d 954, 961-62 (8th Cir. 2005).

Take *Ngo*, for starters. In that case, a plainclothes officer (Ngo) was shot by another officer (Storlie) who responded to the scene. 495 F.3d at 600-01. After being shot by a criminal suspect, Ngo radioed for help, fell to his knees under a streetlight, and then tried to flag down Storlie's squad car by waving his arms over his head with a gun in his hand. *Id.* Eventually, Storlie saw Ngo, exited his squad car, and fired a machine gun at Ngo "a split-second later" without providing a warning or giving Ngo a chance to speak. *Id.* at 601. The Eighth Circuit held that "a reasonable officer arriving at the scene would have recognized that Ngo did not pose an immediate threat to the officers' safety or the safety of others," since Ngo had dropped his gun, was not pointing it at the officers, was not reaching for one, and was not actively resisting arrest. *Id.* at 603. The Eighth Circuit further explained that Storlie's failure to give Ngo any warnings or take "an extra moment to assess the situation add[ed] to the unreasonableness" of his conduct. *Id.*

Ngo bears a striking resemblance to this case. Just like Ngo, Mr. Stokes had no gun, was not reaching for one, and was not actively resisting arrest. And just like Storlie, Officer Thompson failed to provide any warnings or take an extra few seconds to assess the situation before repeatedly shooting Mr. Stokes in the back.

Ignoring these similarities, the Court of Appeals dismissed *Ngo* as a case about "an officer-on-officer shooting, not an officer who fired at a fleeing suspect." Pet.App.7. But that sparse reasoning is doubly flawed. For one thing, Mr. Stokes was not a "fleeing suspect" at the time of the shooting—he was turning toward Officer Straub with his empty hands raised above his waist as he tried to voluntarily surrender. For another thing, there is no reason to believe *Ngo* should be confined solely to cases involving officer-on-officer shootings; in fact, the Eighth Circuit recently applied *Ngo* outside that context in affirming the denial of qualified immunity in an excessive force case. *See Cole Estate of Richards v. Hutchins*, 959 F.3d 1127, 1131-33 (8th Cir. 2020). The panel's effort to distinguish *Ngo* is thus unavailing.

Nance provided Officer Thompson with further notice that his conduct exceeded the bounds of the Fourth Amendment. In *Nance*, the Eighth Circuit held that it was unreasonable for officers, without identifying themselves as police or giving a warning, to shoot a young boy who had a toy gun tucked in his waistband and was raising his hands while trying to comply with officer commands. 586 F.3d at 610-11. In reaching that conclusion, the Eighth Circuit acknowledged that officers were "in the area to watch for armed suspects and knew they might encounter a

dangerous situation," but found that insufficient to permit the use of deadly force under the circumstances. *Id.* at 611.

As *Nance* shows, Officer Thompson employed excessive force in this case when, without giving a warning, he fired multiple shots at an unarmed, surrendering man who had his hands above his waist. And yet, the panel here wrote off *Nance* as a case about "children" who were "walking" during the police encounter. Those distinctions make no difference. The reasoning in *Nance* did not depend upon whether the victims were children or adults, nor did the result turn on whether those victims were "walking." *See id.* at 609-12. If anything, the victims in *Nance* (one of whom carried a toy gun) presented more of a perceived threat to officer safety than Mr. Stokes, who was unarmed and trying to surrender to Officer Straub.

Other Eighth Circuit cases reinforce the lessons of *Ngo* and *Nance*. In *Rahn v. Hawkins*, for instance, the Court held that officers violated clearly established Fourth Amendment law when they shot a suspect who raised his arms in surrender, complied with officer commands to approach, and did not actively resist arrest. 73 F. App'x at 900-01. Similarly, in *Craighead v. Lee*, the Eighth Circuit said it was unreasonable under clearly established law for an officer to shoot without warning at two individuals who were struggling with one another while one held a gun overhead, pointing upward. 399 F.3d at 961-62 (citing and collecting cases denying qualified immunity "in which the plaintiff presented evidence to show that the officer used deadly force under circumstances in which the officer should have known that the person did not present an immediate threat of serious physical injury

or death"). And in *Moore v. Indehar*, an officer violated clearly established Fourth Amendment law when he responded to a scene where shots had been fired and shot an unarmed, fleeing suspect. 514 F.3d 756, 762-63 (8th Cir. 2008). As in those cases, so too here. Like the officers in *Rahn*, *Craighead*, and *Moore*, Officer Thompson violated the Fourth Amendment when he rushed to violence, failed to give any warnings, and killed an unarmed, surrendering man.

If that were not enough, authority from other Circuits further confirms that Officer Thompson's actions were unconstitutional. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (noting that courts may look to persuasive authority in conducting clearly established inquiry). For example, the Ninth Circuit denied qualified immunity to an officer who shot at a man who "had committed no serious offense," "posed no immediate threat" to officer or public safety, and was not "'attempting to evade arrest by flight.'" *Torres*, 648 F.3d at 1127-28 (relying on *Garner*); *see Adams v. Speers*, 473 F.3d 989, 993-94 (9th Cir. 2007) (relying on *Garner* to deny qualified immunity to officer who, without warning or need to defend himself or others, shot and killed a man).

Other circuits are in accord. *See, e.g.*, *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 7-8 (1st Cir. 2005) (officers violated clearly established law when they shot unarmed, fleeing suspect from behind); *Henry v. Purnell*, 652 F.3d 524, 533-36 (4th Cir. 2011) (en banc) (denying qualified immunity to officer who shot fleeing non-felony misdemeanant who was not armed, threatening, or dangerous); *Bouggess v. Mattingly*, 482 F.3d 886, 888-89, 892-95 (6th Cir. 2007) (officer should have known his actions violated clearly established rights

when, without warning, he shot from behind an arrestee who struggled with the officer to flee, but never drew weapon or uttered threatening remarks); *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) (officer violated clearly established law when he continued shooting at suspect who presented no danger to public); *Morton v. Kirkwood*, 707 F.3d 1276, 1282-84 (11th Cir. 2013) (officer violated clearly established law when he shot at unarmed man who, while in a stationary car, raised his hands when he heard officer shout at him). Taken together, this robust consensus of authority places the constitutionality of Officer Thompson's actions beyond debate.

Against this mountain of precedent, the Eighth Circuit offered just a single case in support of its ruling: *Hubbard v. Thompson*. Pet.App.6-7. Relying on that decision, the panel held that Officer Thompson faced a "similar choice here: use deadly force or face the possibility that Stokes might shoot a fellow officer." *Id.* But that is wrong, for at least two reasons.

First, the evidentiary record—viewed in the light most favorable to Petitioners—provides scant support for the panel's unexplained assertion that Officer Thompson had to weigh the risk that Mr. Stokes "might shoot a fellow officer." Pet.App.6. As this Court has repeatedly admonished, on summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan*, 572 U.S. at 651. Properly crediting Petitioners' evidence, the record confirms that Mr. Stokes had no gun, was not accused or suspected of a violent crime, was not making any threatening moves or comments toward any officer, was visible to Officer Thompson in the headlights of the red Monte Carlo, and was

voluntarily surrendering to Officer Straub by raising his hands above his waist. In these circumstances, no reasonable officer would believe that Mr. Stokes posed a threat.

In reaching a contrary conclusion, the Eighth Circuit declared that Mr. Stokes "opened and shut the driver's side door." Pet.App.4, 7. But the Eighth Circuit's reliance on that defendant-friendly fact was misplaced. Petitioners squarely disputed that fact in the District Court, J.A. 317 (averring that "Ryan did not open the car door"), and, as the District Court readily acknowledged, Respondents never stated "as an uncontroverted material fact, that the door … was opened or closed at any point," Pet.App.26 n.3. In any event, qualified immunity cannot be denied on this basis since Officer Thompson never expressly based his use of deadly force on the alleged "opening and closing" of the car door. J.A. 95-97, 2096.

Moreover, even if Officer Thompson held the (objectively unreasonable) belief that Mr. Stokes presented a danger, he made no effort to give Mr. Stokes a warning or utilize non-deadly actions to deescalate the situation, which further reinforces the unreasonableness of his conduct. *See, e.g.*, *Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010) (noting that "police are required to consider [w]hat other tactics if any were available" (quotation marks omitted)). For instance, as Officer Straub's testimony confirms, a reasonable officer should have resorted to verbal commands (e.g., "Police! Stop! Get on the ground!") before opening fire on Mr. Stokes. J.A. 2056.

At a minimum, the material facts and the reasonableness of Officer Thompson's conduct should have

been resolved by a jury—not the court. That procedural misstep alone warrants summary reversal of the Eighth Circuit's judgment. *See Tolan*, 572 U.S. at 657-60 (vacating Fifth Circuit's judgment because it "improperly weigh[ed] the evidence and resolved disputed issues in favor of the moving party" (quotation marks omitted)).

Second, even setting aside the Eighth Circuit's distortion of the facts, *Hubbard* is nothing like this case. In *Hubbard*, the officer responded to the scene of an armed robbery where shots had been fired. 257 F.3d at 898. Upon his arrival, the officer approached the suspect, who appeared to surrender but then turned to flee. *Id.* After a foot chase through the city, the suspect eventually jumped a fence and then moved his arms toward his waist as though reaching for a weapon; after the officer yelled "stop," the suspect's arms continued to move, so the officer shot him. *See id.*

Nothing like that happened here, as even the panel below acknowledged. Pet.App.6. Officer Thompson was not responding to the scene of an armed robbery where shots were fired; he did not have to chase Mr. Stokes through city streets; and he did not tell Mr. Stokes to "stop" or give him a warning. Mr. Stokes, for his part, was not disobeying officer commands or visibly reaching for a weapon. Given these material differences, no reasonable officer would believe that *Hubbard* justified Officer Thompson's reckless conduct.

* * *

Ultimately, the Eighth Circuit's flawed application of the clearly established test led it down the wrong path. Instead of asking whether Officer Thompson had fair notice that his conduct went too far (as required

by this Court's case law), it faulted Petitioners for failing to identify a prior case arising in the same factual circumstances. Had it applied the correct standard, the Eighth Circuit would have reached the only result supported by the facts and the law: Officer Thompson violated clearly established law when he shot and killed Mr. Stokes.

Given the Eighth Circuit's clear departure from this Court's settled law (and the decisions of its sister Circuits), this Court should either grant plenary review on this question presented or summarily reverse the Eighth Circuit's clearly erroneous decision. *See Brosseau,* 543 U.S. at 197-98.[2]

II. THE COURT SHOULD GRANT CERTIORARI TO ABOLISH OR NARROW THE DOCTRINE OF QUALIFIED IMMUNITY

Even if the Court does not grant review to clarify the clearly established standard, it should seize on this case as an opportunity to reconsider the scope and ongoing viability of modern qualified immunity doctrine. Judge Calabresi recently said it best: "As scholars have made clear, and more and more judges have come to recognize, qualified immunity cannot

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[2] Even assuming, *arguendo*, that prior case law did not clearly establish the constitutional violation here, Officer Thompson's reckless actions make this the "'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590; *see Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020). No reasonable officer would believe it was lawful to fire multiple shots in the back of an unarmed suspect who was trying to surrender, without first announcing his presence, giving a warning, trying to gather more information about the situation, or trying to resort to non-deadly tactics.

withstand scrutiny." *McKinney v. City of Middletown*, 49 F.4th 730, 756-57 (2d Cir. 2022) (Calabresi, J., dissenting) (appendix collecting cases and scholarship critiquing qualified immunity). These scholars and judges have offered numerous reasons why the Court's qualified immunity jurisprudence should be recalibrated or jettisoned altogether. *Id.* Below, we focus on three such reasons.

First, modern qualified immunity doctrine is a judge-made invention that lacks any basis in the text of Section 1983 or the common law. *Second*, as a practical matter, the doctrine fails to achieve its putative policy objectives. *Third*, qualified immunity grants government officials a free pass to trample on the Constitutional rights of individuals with impunity. This case presents an ideal vehicle to address those weighty concerns and reexamine the proper scope and ongoing validity of qualified immunity.

A. Modern Qualified Immunity Doctrine Is a Creature of Judicial Innovation That Is Divorced from the Statutory Text and Common Law

In 1871, Congress enacted Section 1983, which empowers "any citizen of the United States or other person within [its] jurisdiction" to sue a government official who, while acting "under color of" state law, violates their "rights, privileges, or immunities" under federal law. 42 U.S.C. § 1983.

By its text, Section 1983 does not limit monetary recovery only to those plaintiffs who can show a violation of clearly established rights. In fact, as Justice Thomas and other federal judges have repeatedly and convincingly explained, the statute

"'ma[kes] no mention of defenses or immunities,'" and instead "applies categorically to the deprivation of constitutional rights under color of state law." *Baxter v. Bracey*, 140 S. Ct. 1862, 1862-63 (2020) (Thomas, J., dissenting from denial of certiorari) (quoting *Ziglar*, 137 S. Ct. at 1870 (op. of Thomas, J.)); *accord Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part) (noting that "the judge-made doctrine of qualified immunity … is found nowhere in the text of § 1983"); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 404 (S.D. Miss. 2020) (similar).

Because the text supplies no basis for qualified immunity, the Court has sometimes tried to ground the doctrine in the common law. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (noting that, "[a]lthough the statute on its face admits of no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them'").

But the common law of 1871 provides no foundation for the modern doctrine of qualified immunity—or its central pillar, the clearly established requirement. *See Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting) (noting that qualified immunity doctrine "is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act"); *City of Middletown*, 49 F.4th at 757 (Calabresi, J., dissenting) (noting that "scholars have demonstrated that there was no common law background that provided a generalized immunity that was anything like qualified immunity"). In fact, this Court itself has acknowledged that, when it

decided *Harlow v. Fitzgerald*, it "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson*, 483 U.S. at 645. So, even if qualified immunity had common law roots at some point, this Court has since left them in the rearview mirror.

B. Qualified Immunity Fails to Achieve Its Asserted Policy Objectives

Unable to convincingly anchor qualified immunity in the statutory text or the common law, this Court and proponents of qualified immunity have often justified the doctrine as good policy. This Court has invoked two principal policy justifications for modern qualified immunity doctrine: (1) protecting individual officers from crushing financial liability, *see Pierson v. Ray*, 386 U.S. 547, 555 (1967), and (2) relieving officers and the courts of the heavy burdens and costs of litigation, *Harlow*, 457 U.S. at 816-17. But, as leading scholars have explained, those justifications (and many others offered in defense of qualified immunity) do not hold water. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1803-14 (2018) (debunking policy justifications for qualified immunity).

First, qualified immunity is unnecessary to protect individual officers from financial liability. *See City of Middletown*, 49 F.4th at 757-58 (Calabresi, J., dissenting) (noting that "qualified immunity is largely irrelevant to officers' individual financial liability"). As Professor Joanna Schwartz has persuasively shown, officers almost never pay for their own legal defense or for the damages awarded against them. *See also* Joanna C. Schwartz, *Police Indemnification*, 89

N.Y.U. L. REV. 885, 902-37 (2014). That is so because, in most jurisdictions, officials are indemnified by their government employers, "even when they were disciplined, terminated, or prosecuted for their misconduct." *Id.* at 937. Thus, the reality is that "officers virtually never pay." Schwartz, *The Case Against Qualified Immunity*, *supra* at 1806.

Second, qualified immunity does not protect officers or courts from the burdens of litigation. In this case, the parties participated in extensive motion practice, discovery (including more than 40 depositions), and two rounds of appeals because of Respondents' qualified immunity defense. Moreover, empirical studies show that "qualified immunity actually increases the time, cost, and complexity of civil rights cases in which the defense is raised." Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 338 (2020). Why? Because modern qualified immunity doctrine generates costly motion practice and interlocutory appeals. *Id.* This is a case in point: since its filing, the issue of qualified immunity has been the subject of two District Court decisions, two Eighth Circuit opinions, and multiple motions, oppositions, appellate briefs, and a petition for rehearing. If qualified immunity was meant to reduce the burdens of litigation, it has done an especially poor job in this case and many others. In reality, eliminating qualified immunity would not overwhelm officers and courts with burdensome litigation; rather, doing so "would likely decrease the average cost and time spent litigating and adjudicating civil rights cases." *Id.*

C. Modern Qualified Immunity Doctrine Prevents Courts from Remedying Constitutional Violations by Erecting an "Absolute Shield" against Liability

As explained above, modern qualified immunity jurisprudence cannot be justified by text, history, or policy. That is reason enough to reexamine its continued scope and validity. But there is more: Qualified immunity is dangerous. It is corrosive to the rule of law and renders the protections of the Constitution "hollow." *See Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

Section 1983 was designed "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). But courts are often powerless to perform that role because qualified immunity stands in their way. *See Sampson*, 974 F.3d at 1025 (op. of Hurwitz, J.) (noting that qualified immunity "doctrine requires—in this case and many others—the dismissal of facially plausible claims of constitutional violations because the right at stake was not 'clearly established'").

That is especially true in the Fourth Amendment excessive-force context. As Justice Sotomayor and other jurists have persuasively noted, this Court has in recent years "transform[ed] the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"; it "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting); *see Jefferson v. Lias*, 21

F.4th 74, 94 (3d Cir. 2021) (McKee, J., concurring) (describing qualified immunity as a "practically impenetrable wall").

To make bad matters worse, modern qualified immunity jurisprudence grants courts discretion to skip to the clearly established prong without first determining whether the relevant conduct violates the Constitution. *See Pearson*, 555 U.S. at 236-37. The "inexorable result" of that discretion is a disturbing "Catch-22": "Plaintiffs must produce precedent even as fewer courts are producing precedent." *Zadeh*, 928 F.3d at 479-80 (op. of Willett, J.); *see* Schwartz, *After Qualified Immunity*, *supra*, at 318. And, in the Eighth Circuit, plaintiffs must complete this task by finding an indistinguishable needle in a haystack of prior of cases. *See supra* Part I.A.

As this case demonstrates, modern qualified immunity doctrine thwarts efforts to hold government officials accountable under the law and must be reconsidered. Mr. Stokes was not supposed to die in 2013. He was killed because a desk cop failed to announce his presence, gave zero warnings, made no effort to use non-deadly force, and repeatedly shot an unarmed, non-threatening man in the back while that man was trying to peacefully surrender. Because of that officer's irresponsible acts, Mr. Stokes's family is missing a father, a partner, and a son. And because of qualified immunity, Mr. Stokes's family cannot secure even a modicum of justice or redress in the federal courts. There is "nothing right or just under the law about this." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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