No. 23-1167

In The

Supreme Court of the United States

DENNIS O'CONNOR,

Petitioner,

v.

RACHAEL EUBANKS, in her personal capacity;
TERRY STANTON, in his personal capacity;
STATE OF MICHIGAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty. Central to that mission is promoting accountability for constitutional violations by government actors. IJ pursues those goals in part through its Project on Immunity and Accountability, which argues against the imposition of qualified immunity and other doctrines that inhibit the vindication of constitutional rights. IJ recently argued before this Court regarding issues of constitutional accountability in *Brownback* v. *King* (No. 19-546), *DeVillier* v. *Texas* (No. 22-913), and *Gonzalez* v. *Trevino* (No. 22-1025).

Another central pillar of IJ's mission is protecting the right to own and enjoy property. Property rights are a tenet of personal liberty and are inextricably linked to all other civil rights. IJ litigates cases defending individuals' property rights under the Fifth Amendment's Takings Clause. See, *e.g.*, *Kelo* v. *City of New London*, 545 U.S. 469 (2005); *DeVillier* v. *Texas* (No. 22-913).

The decision below jeopardizes property rights by immunizing state officials from liability for Petitioner's takings claim. IJ files this brief to urge the Court to grant the Petition or, in the alternative,

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[1] No party or its counsel authored any of this brief, and no person other than *amicus curiae*, its members, or its counsel contributed monetarily to this brief. *Amicus curiae* notified all parties of its intent to file this brief ten days before its filing. See Sup. Ct. R. 37.6.

summarily reverse the Sixth Circuit's qualified immunity holding.

SUMMARY OF ARGUMENT

The Sixth Circuit held that Petitioner's takings claim is barred by qualified immunity because it is not "clearly established" that government officials can be sued under the Fifth Amendment's Takings Clause. This is wrong. Qualified immunity, for all its flaws, is a doctrine about whether an official has violated a clearly established *right*. It has no application to questions about whether a *cause of action* exists allowing a citizen to sue about that violation. In short, the Sixth Circuit failed to answer the legal question before it (whether Section 1983 allows suits against officials who violate the Takings Clause) because it invoked a doctrine that doesn't apply. That decision should be reversed.

The lower court's flawed analysis departs from decades of this Court's precedent. As Judge Thapar's concurrence explains, a "focus on individual liability supplies the wrong inquiry for qualified immunity." Pet. App. 11a; *O'Connor* v. *Eubanks*, 83 F.4th 1018, 1025 (6th Cir. 2023) (Thapar, J., concurring).

The Sixth Circuit's error threatens countless viable civil rights claims. Courts often decide questions about the availability of a cause of action without addressing the scope of the constitutional right at stake and without applying qualified immunity. And that makes sense: Qualified immunity is a separate inquiry that comes after a court has decided whether a plaintiff has a cause of action. The Sixth Circuit's contrary rule cannot stand.

The Petition correctly notes that each question presented warrants merits review under Rule 10, but the Court may wish to consider summarily reversing the Sixth Circuit's qualified immunity holding and remanding with instructions for the Sixth Circuit to consider whether Section 1983 provides a cause of action against government officials who violate the Takings Clause.

ARGUMENT

The Sixth Circuit's qualified immunity holding is wholly divorced from this Court's precedents and deeply dangerous to the development of the law.

I. The Sixth Circuit's qualified immunity holding is wholly divorced from this Court's precedents.

The Sixth Circuit's qualified immunity analysis looks nothing like the doctrine this Court has applied since its inception. The holding below does not protect officials who made a reasonable mistake about whether taking property without compensation was lawful. Instead, the lower court deprived Petitioner of his rights because it was unclear whether he had a cause of action. This expands qualified immunity far beyond its already controversial scope.

In *Harlow* v. *Fitzgerald*, this Court announced the doctrine of qualified immunity, holding "that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). Since then, the doctrine has

proven controversial, with its foundations and scope questioned both by Members of this Court and by lower-court judges. These criticisms are right, but the Court need not reach them in this case because the decision below does not apply qualified immunity as this Court has described it. Instead, it applies a radically expanded version of qualified immunity—changing it from a doctrine at least nominally designed to protect officials who thought they were obeying the law into a doctrine that protects officials who thought they could get away with violating the law. That expansion—which the Sixth Circuit has adopted without any reasoned explanation—is wholly at odds with this Court's qualified-immunity precedent, as Judge Thapar explained in his concurrence below. In short, the Sixth Circuit's rule takes a controversial doctrine and doubles its reach for no reason. It should be reversed.

Begin with the controversy. Members of this Court have openly questioned the doctrine's justifications and current scope.[2] And lower-court judges have raised similar questions. Some have

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[2] See *Hoggard* v. *Rhoades*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of certiorari) (asking why those "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"); see also *Baxter* v. *Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari); *Kisela* v. *Hughes*, 584 U.S. 100, 120–121 (2018) (Sotomayor, J., dissenting); *Ziglar* v. *Abbasi*, 582 U.S. 120, 159–160 (2017) (Thomas, J., concurring in part and in judgment).

questioned the doctrine's one-size-fits-all-approach, asking why they "should apply the same qualified-immunity inquiries for First Amendment cases, Fourth Amendment cases, split-second-decisionmaking cases, and deliberative-conspiracy cases." *Gonzalez* v. *Trevino*, 42 F.4th 487, 507 (5th Cir. 2022) (Oldham, J., dissenting), cert. granted, 144 S. Ct. 325 (2023). Others have noted that, as far as "the unflinching discharge of * * * duties" is concerned, *Harlow*, 457 U.S. at 814, "[t]here is a big difference between 'split-second decisions' by police officers and 'premeditated plans to arrest a person,'" *Villarreal* v. *City of Laredo*, 17 F.4th 532, 540–541 (5th Cir. 2021) (Ho, J.), withdrawn and superseded, 94 F.4th 374 (5th Cir. 2024) (en banc). Others have criticized the doctrine for permitting even egregious constitutional violations to go unpunished, equating qualified immunity with "unqualified impunity." *Zadeh* v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., dissenting). Still others have publicly argued that eliminating qualified immunity "would improve our administration of justice and promote the public's confidence and trust in the integrity of the judicial system." James A. Wynn, Jr., *As a judge, I have to follow the Supreme Court. It should fix this mistake.*, Wash. Post (June 12, 2020), available at https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/.

In short, qualified immunity is a doctrine ripe for reevaluation. But even taking the doctrine as it stands, it asks only whether a federal *right* was clearly established. In other words, it seeks to protect officials from liability unless "the unlawfulness of

their conduct was 'clearly established at the time.'" *District of Columbia* v. *Wesby*, 583 U.S. 48, 63 (2018) (quoting *Reichle* v. *Howards*, 566 U.S. 658, 664 (2012)). The point of the doctrine, as articulated by this Court, is to make sure officials must have "fair warning" that their conduct is unconstitutional before they may be held liable. *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002).

This Court has never deviated from this description of qualified immunity. It asks whether a hypothetical and reasonable officer would have known that his conduct was "constitutionally permissible." *Taylor* v. *Riojas*, 592 U.S. 7, 8 (2020) (per curiam). It stresses that the doctrine "shields officers from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights *of which a reasonable person would have known*." *City of Tahlequah* v. *Bond*, 595 U.S. 9, 12 (2021) (per curiam) (emphasis added) (internal quotation marks omitted).

This question of whether a clearly established right was violated, though, comes only after a court has determined whether there is a cause of action. As Judge Thapar explained below, courts "should first ask whether a cause of action exists against the official. Then, we should ask if that official's conduct violated clearly established law." Pet. App. 12a; *O'Connor*, 83 F.4th at 1025 (Thapar, J., concurring) (citing *District of Columbia* v. *Wesby*, 583 U.S. 48, 61 (2018) (deciding whether probable cause for arrest existed before deciding whether qualified immunity applied to arresting officers)). The Sixth Circuit erred by importing the qualified-immunity inquiry into the

first step and asking whether the existence of the plaintiff's *cause of action* was clearly established. *Ibid.*

It is unclear (and the Sixth Circuit has never explained) what would justify this expansion. Even fully crediting the idea that officials who make reasonable mistakes about the lawfulness of their actions should be protected from liability, why protect officers who knowingly violate the Constitution but reasonably believe they will get away with it? If a government official deliberately violates the law—say, by depriving a person of his property without just compensation—why should he receive a free pass because it was unclear whether his victim would have a cause of action? This Court's cases say he should not. The Sixth Circuit says he should. That erroneous ruling should be reversed.

II. The Sixth Circuit's qualified immunity holding is deeply dangerous to the development of the law.

The Sixth Circuit "has closed the federal courthouse doors on takings claims." Pet. App. 10a; *O'Connor*, 83 F.4th at 1024 (Thapar, J., concurring). "[T]his odd result" is wrong, and takings claims are not the only claims in peril if it remains good law. Pet. App. 11a; *O'Connor*, 83 F.4th at 1024 (Thapar, J., concurring). By expanding qualified immunity beyond its permissible scope, the decision below could "relegate[]" other kinds of meritorious civil rights claims to "the status of [] second-class constitutional right[s]." Pet. 24.

Courts routinely resolve disputes about the elements or existence of a cause of action without

applying qualified immunity. If those courts had used the Sixth Circuit's test, viable claims might have been wrongly extinguished.

Just this Term, the Court acknowledged that qualified immunity comes after disputes about the elements of a cause of action. In *Gonzalez* v. *Trevino*, the Court will decide the elements necessary to state a claim for retaliatory arrest under Section 1983. 42 F.4th 487, 491 (5th Cir. 2022), cert. granted, 144 S. Ct. 325 (2023) ("The question before us is whether Gonzalez has alleged a violation of her constitutional rights when probable cause existed for her allegedly retaliatory arrest."). The parties do not disagree about the scope of the plaintiff's First Amendment rights; instead, they disagree about when she can state a tort claim for violation of those rights. As the Solicitor General's office pointed out during oral argument in this Court, "qualified immunity isn't directly at issue in" *Gonzalez*, and "as a general matter, an official is not going to be entitled to qualified immunity based on a mistake about the scope of the cause of action." Justice Gorsuch was correct that a plaintiff has "to jump through this hoop," (the cause of action), "before [she] get[s] to that hoop" (qualified immunity).[3]

Similarly, *Thompson* v. *Clark* settled a question about the favorable termination requirement for malicious prosecution. 596 U.S. 36 (2022). Like in *Gonzalez*, the Court acknowledged that disputes about the elements of a cause of action are separate from qualified immunity. "[R]equiring a plaintiff to

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[3] Transcript of oral argument at 52:4–53:5, *Gonzalez* v. *Trevino*, No. 22-1025.

show that his prosecution ended with an affirmative indication of innocence is not necessary to protect officers from unwarranted civil suits—among other things, officers are still protected by the requirement that the plaintiff show the absence of probable cause and by qualified immunity." 596 U.S. at 48–49.

Other questions about the existence of a cause of action are also independent of qualified immunity. In 2019, this Court resolved a circuit split about when a Section 1983 claim about fabricated evidence accrues. *McDonough* v. *Smith*, 588 U.S. 109, 112 (2019). It was not clearly established whether certain defendants could be sued (because maybe the statute of limitations had run and maybe it had not), but there was not a question about the scope of the underlying constitutional right. It would have been an especially "odd result," Pet. App. 11a, *O'Connor*, 83 F.4th at 1024 (Thapar, J., concurring), to apply qualified immunity in a case involving the timeliness of a claim. Of course, the Court did not do so.

The Sixth Circuit's mistake implicates civil rights claims outside of Section 1983 as well. In *Tanzin* v. *Tanvir*, the Court held that plaintiffs can sue officials in their individual capacity for money damages under the Religious Freedom Restoration Act of 1993 (RFRA). 592 U.S. 43, 45 (2020). While the Court acknowledged that "government officials are entitled to assert a qualified immunity defense when sued in their individual capacities for money damages under RFRA," *id.* at 52 n.*, the Court addressed whether the cause of action existed first. The parties in *Tanzin have since litigated* the second question—whether the defendants violated a clearly established right—but

no one has suggested that qualified immunity should attach. See *Tanvir* v. *Tanzin*, No. 13-CV-6951, 2023 WL 2216256 (S.D.N.Y. Feb. 24, 2023) (correctly articulating this Court's qualified-immunity test). If the Sixth Circuit's ruling in this case is right, perhaps they should have.

Simply put, this Court has routinely needed to resolve questions about the existence or elements of a cause of action for damages. And these questions will recur. See *Landor* v. *La. Dep't of Corr. & Pub. Saf.*, No. 23-1197 (petition filed May 3, 2024) (asking "whether an individual may sue a government official in his individual capacity for damages for violations of" RFRA's "sister" statute, the Religious Land Use and Institutionalized Persons Act of 2000). If qualified immunity attaches to those questions, any number of egregious, deliberate constitutional violations will escape any kind of judicial review. But qualified immunity does *not* attach to them. The Sixth Circuit is wrong. And this Court should say so before more courts "close[] the federal courthouse doors" to viable civil rights claims like Petitioner's. Pet. App. 10a; *O'Connor*, 83 F.4th at 1024 (Thapar, J., concurring).

CONCLUSION

The Court should grant the Petition and reverse or, in the alternative, summarily reverse the Sixth Circuit's qualified immunity holding.

Respectfully submitted,

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