No.

In the Supreme Court of the United States

KIM JACKSON,

Cross-Petitioner,

v.

CHRIS DUTRA, JASON EDMONSON & ERIC DEJESUS,

Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should reverse or recalibrate the doctrine of qualified immunity.

RELATED PROCEEDINGS

Dutra v. *Jackson*, No. 23-377 (U.S.)

Jackson v. *Dutra*, No. 22-15622
(9th Cir. Feb 17, 2023)

Jackson v. *Dutra*, No. 3:20-cv-288
(D. Nev. Mar. 29, 2022)

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Petitioner Kim Jackson respectfully conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, only in the event the Court grants certiorari in No. 23-377.

OPINIONS BELOW

The memorandum disposition of the court of appeals (Pet. App. 1a-4a)[1] is not reported, but is available at 2023 WL 2064543. The district court's order on summary judgment (Pet. App. 5a-48a) is also unreported, but is available at 2022 WL 943121.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2023; a timely petition for rehearing en banc was denied on May 10, 2023. The petition in No. 23-377 was docketed on October 11, 2023. Because thirty days from that date was Friday, November 10, 2023—Veterans Day—under Rule 30.1 this conditional cross-petition is timely filed on Monday, November 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 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,

[1] Citations to Pet. App. refer to the petition appendix filed in No. 23-377. See Rule 12.5 of the Rules of this Court.

> 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 * * *.

STATEMENT

In No. 23-377, officers who were denied qualified immunity for tearing the shoulder cartilage of a 101-pound disabled woman seek to challenge that determination. For reasons we will explain in the forthcoming brief in opposition, that petition presents no questions deserving of this Court's review, and should be denied. However, should the Court grant certiorari to review the questions presented by the officers, it should also review a logically prior question that has animated a growing number of Justices, judges, and commentators: Whether the judge-made qualified immunity doctrine be overturned or reexamined in whole.

As we explain, it should be. The text of Section 1983 does not provide for qualified immunity, and scholarship has highlighted that the traditional common-law justification for inventing qualified immunity is flawed in multiple respects—indeed, the original text of the Civil Rights Act of 1871 demonstrates Congress's intent to *abrogate* immunities, not incorporate them. Moreover, qualified immunity either fails to serve, or is unnecessary to achieve, the policy goals on which the Court expressly relied in constructing the modern version of the doctrine. The time has come to reexamine it.

A. Factual Background

Kim Jackson is a five-foot, 101-pound, Sunday school teacher. C.A. E.R. 329. She has an early childhood education certificate and worked as a teacher's assistant. D. Ct. Dkt. 50-4 at 45-46. Jackson has faced professional challenges because she has complex partial epilepsy, which triggers periodic seizures and causes "language issues." *Id.* at 7, 233.

Jackson is also a parent. She has a son and took care of her deceased cousin's three-year-old daughter, A.M., as a foster parent. She was "around A.M. since the time of her birth," "cared for her," and "attended all the classes on foster parenting." D. Ct. Dkt. 48-3 at 3. Jackson stated that "I loved A.M." and "was doing all I thought I needed to do" to comply with the requirements for temporary custody. *Id.* at 3.

On the night of November 1, 2018, Jackson was "helping [her son] with his homework." C.A. E.R. 329. She had just put A.M. to bed. Unbeknownst to her, two employees from Nevada's Child Protective Services (CPS) determined that Jackson's communications had been deficient, and that CPS should retake custody of A.M. as a result. Pet. App. 7a. They enlisted the help of law enforcement (C.A. E.R. 330 (Dutra BWC) at 03:33:25Z),[2] even though a custody transfer is a "civil matter" that does not require police to be present. C.A. E.R. 170, 205.

Officers, including Officers Chris Dutra and Eric Dejesus, respondents here, arrived at the parking lot of Jackson's apartment building. Speaking to the police officers at the scene, CPS employee Susan Thomas

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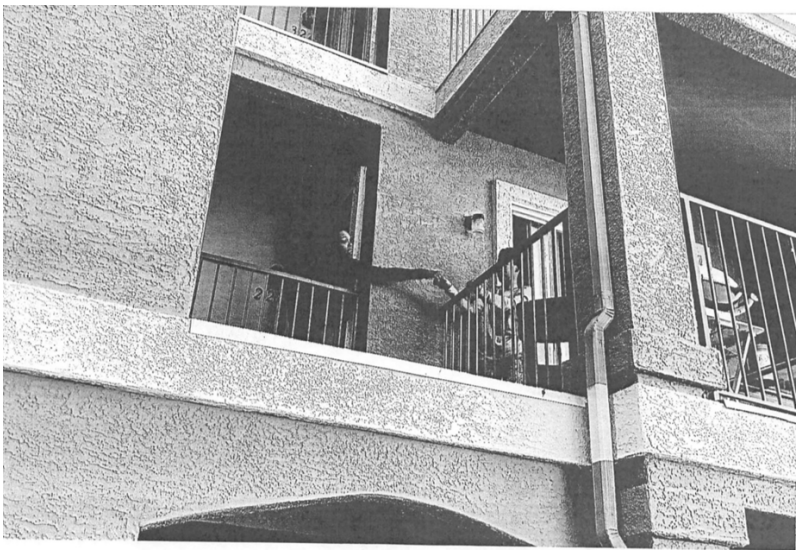
[2] The body-worn camera videos are timestamped in "Zulu time," which is seven hours ahead of the Pacific time zone; the events here thus "actually took place around 9:00pm." Pet. App. 6a.

insinuated that Jackson was "spiraling." Dutra BWC at 03:35:28Z-03:35:32Z. Officers did not clarify what Thomas meant; the "only thing" that officers were told was that CPS "couldn't get ahold of her" because "there was no return phone calls." C.A. E.R. 43-45.

Officers acknowledge that they had no warrants, no charges, and no suspicions that Jackson was engaged in criminal activity. C.A. E.R. 36-37. They testified that they had no reason to believe that she had done anything to harm or neglect A.M. C.A. E.R. 202. As a civil matter, nothing prevented social services from approaching Jackson's door and stating, "Hey, we're CPS. We're here to retake custody." C.A. E.R. 47. Nor did anything prevent the officers from knocking on the door and stating, "CPS is here with us. They have a lawful right to retrieve the foster child, A.M., and we're assisting in that." C.A. E.R. 291-292. Instead, however, officers devised a "plan" to conduct a pretextual "welfare check." C.A. E.R. 292-293.

Officer Dutra knocked on Jackson's apartment door and asked if everything was okay. As is her legal right, she declined to let officers in, later stating that "officers scare me." Dutra BWC at 03:53:14Z. She instead spoke to the officers from her outdoor balcony, directly adjacent to, and on the same level as, the outdoor entryway to her apartment. The balcony and entryway are pictured here:



C.A. Appellant Br. 8.

Believing that the officers were conducting a welfare check, Jackson responded, "[w]hy would I feel anything other than alright? I'm at the table with my son helping him with his homework." Dutra BWC at 03:38:30Z. She told Officer Dutra, "you don't have a warrant" and he responded, "you're right, I don't." *Id.* at 03:39:38Z.

A CPS official told Jackson to wake A.M. so they could "see" her. C.A. E.R. 87, 90. Jackson immediately complied, roused the three-year-old child from her sleep and brought her to the balcony to be seen. *Id.* at 89-90. Sgt. Jason Edmonson then said Jackson was "not effectively" communicating with CPS. Dutra BWC 3:41:10. Jackson returned the child to the apartment and retrieved her phone to show that she had agreed to meet with CPS the next morning. C.A. E.R. 331 (Edmonson BWC) at 03:42:48. Out of nowhere, Sgt. Edmonson stated it would be "kidnapping" if she did not give the child to CPS (Pet. App. 8a), a

statement that was "the first time anyone has said anything about [Jackson] giving [A.M.]" back to the custody of CPS. C.A. E.R. 88.

Jackson went into her apartment and returned to the balcony with A.M. in her arms. Pet. App. 8a. Then, as Officer Dutra later wrote in his police report, "Sgt. Edmonson reached over the railing which was directly in front of the front door *and tried to grab the child from Jackson*" (C.A. E.R. 284 (emphasis added)), yelling "Do not put her over the rail!" (Pet. App. 9a). Jackson maintained her hold on A.M., and—as Edmonson himself later testified—"didn't break the plane of the railing" with the child. C.A. E.R. 229. Ultimately, Jackson agreed to put A.M. outside of the door if officers would back away. Pet. App. 9a.

After CPS retrieved A.M., Jackson called 911, questioning why the officers would not leave. Pet. App. 10a. She voluntarily stepped outside her door, without being asked by officers and despite being under no legal obligation to do so. C.A. E.R. 118-119.

Officer Dutra then told her, "Now you get to stay out here and visit with me now." Pet. App. 10a. Jackson politely responded, "I came out to visit with you." *Ibid.* The officers did not tell Jackson she was "under arrest," "detained," "under investigation," or "not free to leave." C.A. E.R. 124.[3] After about a minute, with no questions asked of her, Jackson announced her intent to return to her home and took a step towards her front door. C.A. E.R. 161.

The following events then ensued:

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[3] Officer Dutra later admitted to misrepresenting this fact in his police report. C.A. E.R. 128, 166.

- Without warning, Officer Dutra grabs Jackson as she takes her first steps. C.A. E.R. 332 (Dejesus BWC) at 03:50:06Z.
- Officer Dejesus runs up and also grabs Jackson. Dejesus BWC at 03:50:09Z.
- Jackson "grab[s] a nearby rail to stabilize [her]self." C.A. E.R. 329.
- Officers Dutra and Dejesus throw Jackson to the ground as she pleads, "[p]lease don't hurt me." Dejesus BWC at 03:50:10Z.
- The officers "continue[] to pull Jackson's arms in opposite directions" causing her to scream in pain. Pet. App. 3a. Jackson later explained that her "right arm felt like it was being pulled up toward my neck" and "it hurt so bad, I thought it would break." C.A. E.R. 329.
- Jackson yells out repeatedly, "[y]ou're hurting me!" Dejesus BWC at 03:50:30Z.
- Officer Edmonson interjects and states, "[a]t this point, we don't have any charges on her. We have nothing." Edmonson BWC at 03:50:47Z.

Jackson has submitted evidence showing that, as a result of the officers' wrenching of her arms, she suffered a SLAP tear to the labrum of her shoulder joint, requiring surgery to repair. C.A. E.R. 327, 329.

B. Proceedings Below

Jackson brought this suit against Officers Dutra and Dejesus, alleging, as relevant here, unlawful seizure, false arrest, and excessive force. Jackson also sued Sgt. Edmonson, who did not directly cause Jackson's injuries, bringing a supervisory liability claim. See generally D. Ct. Dkt. 1. Defendants moved for summary judgment, asserting qualified immunity.

1. The district court held that defendants had probable cause to seize Jackson for attempted child endangerment and obstruction, and that their force was not excessive. Pet. App. 5a-6a. Despite recognizing that "Dutra * * * said that he did not witness an act of child endangerment" and that "Edmonson said there was nothing to charge against her during the arrest," the district court nevertheless found "these facts are * * * irrelevant to whether an objective officer would have probable cause." Pet. App. 21a.

The district court also determined that there was no excessive force, even though it acknowledged Jackson's testimony that, "they pulled her 'arm in a manner that feels like it's going to be broken.'" Pet. App. 27a. The court stated that "Defendants were reasonable to believe that Plaintiff was attempting to flee * * * by jumping from the second-story railing to get back in her apartment because Defendant Dutra was in front of her door." Pet. App. 27a. The court therefore granted summary judgment to the officers.

2. In an unpublished memorandum disposition, the court of appeals affirmed the dismissal of Jackson's unlawful seizure and false arrest claims, concluding that a reasonable police officer could have concluded that there was probable cause to arrest Jackson. Pet. App. 2a.

The court reversed as to Jackson's excessive force claims. It first reasoned that police officers "are permitted to use force * * * in their community caretaking capacity, to address an ongoing emergency." Pet. App. 2a. (citing *Ames* v. *King County*, 846 F.3d 340, 348-49 (9th Cir. 2017)). It therefore concluded that the officers "acted reasonably when they grabbed Jackson to prevent her from climbing over the second-floor railing," and that "[t]heir use of force remained

reasonable as Jackson resisted and they attempted to handcuff her and move her away from the railing." Pet. App. 2a.

However, the court also identified the well-established principle that "[o]fficers may not *continue* to use force once an individual is subdued and no longer resisting." Pet. App. 2a (emphasis added) (quoting multiple circuit precedents for that conclusion). Thus, because "the officers continued to pull Jackson's arms in opposite directions even after they had moved her away from the railing," a question of fact "exists as to when Jackson ceased resisting and whether the officers' use of force continued after the emergency had ended." Pet. App. 3a.

The court therefore reversed the grant of summary judgment as to this subset of Jackson's claims, explaining that "[i]f Officers Dutra and Dejesus used more force than necessary once Jackson had been subdued, then under clearly established Ninth Circuit caselaw, their use of force was excessive." Pet. App. 3a.

3. Officers Dutra and Dejesus filed a petition for certiorari, which is pending before this Court in No. 23-377. They assert two questions: (1) Whether "this Court's precedents" are "the only source of clearly established law for purposes of qualified immunity" and (2) whether the court of appeals analyzed clearly established law at a proper level of generality. Pet. i-ii.

REASONS FOR GRANTING THE CROSS-PETITION

The Court's intervention is needed to resolve the persistent critiques of qualified immunity. Even as they apply the doctrine to the cases before them, judges across the country announce that they believe qualified immunity is ungrounded in text and common law. Because this state of affairs essentially tells

litigants that courts are routinely erring by failing to redress constitutional violations, this Court needs to resolve, with finality, the grave questions that have arisen as to qualified immunity's legal status. Further, the statutory text, its original public meaning, and the incoherence of the policy justifications on which this Court has previously relied all support overturning qualified immunity. The Court should do so now.

A. It is imperative that the Court settle the debates surrounding qualified immunity.

The status of qualified immunity is an important and recurring issue, and has led to repeated calls from Justices of this Court and dozens of federal judges for reexamination of the doctrine. What is more, the status quo—in which judges deny relief for constitutional violations even while criticizing the doctrine that requires them to do so—harms the legitimacy of the judiciary in the eyes of the public.

1. Jurists lack confidence in the qualified immunity framework.

Judicial criticism of qualified immunity in recent years has been biting and sustained, both from Justices of this Court and judges throughout the federal system.

a. For example, Justice Thomas has explained that, because the qualified immunity "analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act," the Court is not "interpreting the intent of Congress in enacting the Act." *Ziglar* v. *Abassi*, 582 U.S. 120, 159 (2017) (Thomas, J., concurring in part and concurring in the judgment) (alterations incorporated). Instead, qualified immunity reflects the kind of "freewheeling policy choice[]" that the Court has "disclaimed the power to

make" in other contexts. *Id.* at 159-160. As a result, "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe." *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1862-1864 (2020) (Thomas, J., dissenting from denial of cert.).

Justice Thomas has therefore urged the Court to "reconsider [its] qualified immunity jurisprudence" "in an appropriate case." *Ziglar*, 582 U.S. at 160; see also *Baxter*, 140 S. Ct. at 1862 ("Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition."); cf. *Wyatt* v. *Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., joined by Scalia, J., concurring) (reserving the question "whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy").

Justice Sotomayor has also criticized the reaches of the doctrine. Because "[n]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials," the doctrine has transformed "into an absolute shield for law enforcement officers." *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). This "one-sided approach" "gut[s] the deterrent effect of the Fourth Amendment." *Id.*; see also *Mullenix* v. *Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) ("By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.").

b. Judges from across the country have echoed these concerns—and have renewed them after the Court's denial of certiorari in *Baxter* and its companion cases in 2020. Some, following Justice Thomas, observe that qualified immunity lacks textual and historical support. See, *e.g.*, *McKinney* v. *City of*

Middletown, 49 F.4th 730, 757 (2d Cir. 2022) (Calabresi, J., dissenting) ("[T]here was no common law background that provided a generalized immunity that was anything like qualified immunity."); *Cole* v. *Carson*, 935 F.3d 444, 470 (5th Cir. 2019) (Willett, J., dissenting) ("respectfully voic[ing] unease" with "[t]he entrenched, judge-invented qualified immunity regime"); *Horvath* v. *City of Leander*, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (explaining that neither the "common law of 1871 [n]or [] the early practice of § 1983 litigation" supports the qualified immunity defense); *Sosa* v. *Martin County*, 57 F.4th 1297, 1304 (11th Cir. 2023) (Jordan, J., joined by Wilson & Jill Pryor, JJ., concurring in the judgment) ("[T]he Supreme Court's governing (and judicially-created) qualified immunity jurisprudence is far removed from the principles existing in the early 1870s."); *Goffin* v. *Ashcraft*, 977 F.3d 687, 694 n.5 (8th Cir. 2020) (Smith, C.J., concurring) (concluding that "increased legal and historical scrutiny" on qualified immunity is "warranted").

Others focus on the doctrine's scope and policy deficiencies. See*, e.g.*, *Jefferson* v. *Lias*, 21 F.4th 74, 87 (3d Cir. 2021) (McKee, J., joined by Restrepo & Fuentes, JJ., concurring) ("[T]he deference to law enforcement that consistently results in qualified immunity in excessive force cases is inconsistent with the vast amount of research in such cases as well as the evolving national consensus of law enforcement organizations."); *Thompson* v. *Clark*, 2018 WL 3128975, at *6 (E.D.N.Y. June 26, 2018) (Weinstein, J.) ("The Court's expansion of immunity, specifically in excessive force cases, is particularly troubling.").

And still others raise difficulties with applying the "clearly established" test and the absurd outcomes

that it can generate. *Quintana* v. *Santa Fe County Bd. of Comm'rs,* 2019 WL 452755, at *37 n.33 (D.N.M. 2019) (Browning, J.) ("Factually identical or highly similar factual cases are not * * * the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way.").

Thus, a growing "chorus of jurists" has continued to explicitly call on this Court to act. *Cole*, 935 F.3d at 470 (Willett, J., dissenting) ("[Q]ualified immunity * * * ought not be immune from thoughtful reappraisal."); see also, *e.g.*, *Horvath*, 946 F.3d at 795 (Ho, J., concurring in the judgment in part and dissenting in part) ("I would welcome a principled re-evaluation of our precedents under both prongs."); *Sosa*, 57 F.4th at 1304 (Jordan, J., joined by Wilson & Jill Pryor, JJ., concurring in the judgment) ("[T]he qualified immunity doctrine we have today is regrettable. Hopefully one day soon the Supreme Court will see fit to correct it.").

2. The status quo harms the credibility of the judicial system.

Despite their open questioning of qualified immunity's legal basis and policy wisdom, judges have no choice but to faithfully apply the current doctrine. This forces judges to deny litigants relief while simultaneously challenging the grounds of that decision. See*, e.g.*, *Ziglar*, 582 U.S. at 157 (Thomas, J., concurring in part and concurring in the judgment) ("The Court correctly applies our precedents * * * . I write separately, however, to note my growing concern with our qualified immunity jurisprudence."); *Horvath*, 946 F.3d at 795 (Ho, J., concurring in the judgment in part and dissenting in part) ("But be that as it may, I am duty bound to faithfully apply established qualified

immunity precedents."); *Rogers* v. *Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023) (Willett, J.) (concurring in part) ("Today's decision upholding qualified immunity is compelled by our controlling precedent. I write separately only to highlight newly published scholarship that paints the qualified-immunity doctrine as flawed—foundationally—from its inception."); *Ventura* v. *Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete re-examination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases. However, the Supreme Court's decision in *Kisela* is, of course, binding on this court.").

This untenable result undermines the legitimacy of the judicial system. This Court has long recognized the "necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). But there is nothing reasoned about courts allowing bad deeds to go unpunished based on a doctrine that those same judges simultaneously decry as flawed and in need of reform. Cf. *Horvath*, 946 F.3d at 801 (Ho, J., concurring in the judgment in part and dissenting in part) ("Public officials who violate the law without consequence only further fuel public cynicism and distrust of our institutions of government.") (quotation marks omitted).

In other words, when courts openly fail to redress constitutional wrongs, they undermine the people's "respect for the rule of law in general and increase[] the chance that they will refuse legal directives." Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Inst. (Sept. 14, 2020), perma.cc/A98Q-WHZD. Litigants also have little reason to accept losing in court when judges openly admit

the basis for the decision was unfair or unlawful. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime and Just. 283, 283 (2003) ("Considerable evidence suggests that the key factor shaping public behavior is the fairness of the processes legal authorities use when dealing with members of the public."). Failure to resolve this issue will erode public trust in the judiciary.

3. This is an important and recurring issue.

The issue is also important and constantly recurring. Tremendous numbers of cases implicate qualified immunity. A Westlaw search for the phrase "qualified immunity" found more than 1,200 federal decisions mentioning the doctrine in the last three years. And, each year, thousands of lawsuits are filed in which defendants might invoke the qualified immunity defense. See Civil Federal Judicial Caseload Statistics, tbl. C-2 (Mar. 31, 2022) (identifying that, during the 12 months ending in March 2022, 14,960 "other civil rights" lawsuits were filed—virtually all of which could involve a qualified immunity defense). This Court should settle the qualified immunity debates for the thousands of plaintiffs and government actors who must litigate the issue each year.

Beyond the raw numbers, the continuing vitality of qualified immunity is of profound inherent importance in each individual instance where it applies. In every case where it is invoked, qualified immunity has the potential to curtail fundamental civil liberties. Apart from the obvious context of Fourth Amendment excessive-force incidents, litigants rely on Section 1983 to vindicate a wide-ranging set of constitutional rights. See, *e.g.*, *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792 (2021) (Section 1983 action against a college that

allegedly restrained students' free speech); *Horvath*, 946 F.3d 787 (Section 1983 action by firefighter alleging that the city had violated his free exercise rights by requiring him to comply with COVID-19 masking and testing policies); *Paulk* v. *Kearns*, 596 F. Supp. 3d 491 (W.D.N.Y. 2022) (Section 1983 action alleging that the county pistol permitting office had violated the plaintiff's Second and Fourteenth Amendment rights). Qualified immunity precludes the vindication of these and other rights; by definition, it makes a difference only in cases where a court has determined that there *was* a constitutional violation—or at least, has not determined that individual rights were *not* violated.

Beside the constitutional rights of individual Americans—a weighty interest in any event—qualified immunity impedes the development of constitutional law as a whole by allowing judges to stay silent on whether there was a constitutional violation in the first place. Research shows that after *Pearson* v. *Callahan*, 555 U.S. 223 (2009), increasing numbers of courts are doing just that. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37-38 (2015) (finding a post-*Pearson* decrease in the willingness of circuit courts to decide constitutional questions).

When courts "leapfrog the underlying constitutional merits" in difficult cases, they deprive the public of "matter-of-fact guidance about what the Constitution requires." *Zadeh* v. *Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part); see also *Thompson*, 2018 WL 3128975, at *8 ("The failure to address whether or not an act was constitutional prevents the creation of 'clearly established' law needed to guide law enforcement and courts on narrow issues not yet decided by

the Supreme Court."). The lack of constitutional decision-making "stunt[s] the development of constitutional rights" "[a]t a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices." Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 Mich. L. Rev. 1219, 1248, 1250 (2015).

Perversely, the post-*Pearson* approach traps Americans suffering constitutional wrongs in a "Catch-22," requiring them to "produce precedent even as fewer courts are producing precedent." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part). Constitutional violations go unpunished simply because courts have yet to address an issue. This "Escherian Stairwell" (*id.* at 480) allows "government officials and officers [to] continue to operate in clear violation of constitutional standards * * * without fear of redress" (*Thompson*, 2018 WL 3128975 at *13). For this reason, too, current doctrine is untenable, requiring the Court's intervention.

B. Qualified immunity is wrong and needs recalibration.

Qualified immunity is also wrong: It is not based in the text of Section 1983; the analogy to common-law tort defenses that gave rise to qualified immunity does not hold up under scrutiny; and the doctrine does not even serve the policy goals it was unabashedly created to address. Nor does stare decisis present a bar to reevaluating the doctrine.

1. Qualified immunity is judge-created and atextual.

a. Nothing in the plain text of Section 1983 provides for any immunities from suit whatsoever. The text 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 (emphasis added).

Thus, the Court has time and time again acknowledged that "Section 1983, on its face admits of no defense of official immunity." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993)); see *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976) ("The statute thus creates a species of tort liability that on its face admits of no immunities."); *Owen* v. *City of Independence*, 445 U.S. 622, 635 (1980) ("[Section 1983's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted").

That should be the end of the matter. As the Court has affirmed, the plain meaning of a statute governs over "extratextual considerations." *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1737 (2020); see also *id.* ("Only the written word is the law."). Because the statutory text includes no references to any immunities or defenses, the plain meaning of the text of Section 1983 is at odds with the doctrine of qualified immunity.

b. Despite the absence of any textual basis for qualified immunity, the Court initially created the doctrine by looking to the defense of good faith available in some common-law tort actions at the time of enactment. See *Pierson* v. *Ray*, 386 U.S. 547 (1967).

But as important scholarship highlights, "[t]here also may be no justification for a one-size-fits-all, subjective immunity based on good faith." *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of cert.); see William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018).

While "[n]ineteenth-century officials sometimes avoided liability because they exercised their discretion in good faith, * * * officials were not *always* immune for their good-faith conduct." *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of cert.) (collecting authorities); Baude, *supra*, at 56 (discussing the "strict rule of personal official liability" that "was a fixture of the founding era."). Indeed, there is a compelling case both that the common-law good faith defense was specific to the tort of false arrest, rather than forming a generalized immunity, and that common-law immunities were understood not to apply to constitutional violations in any event. See Baude, *supra*, at 58-60 (describing "[t]he role of good faith as an element of specific torts," rather than as a "free-standing defense"); *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of cert.) ("[T]he defense for good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. * * * An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense."); *Myers* v. *Anderson*, 238 U.S. 368, 378-379 (1915) (rejecting the defense of "nonliability in any event" and affirming liability, where the lower court had held that a state official enforcing an unconstitutional law is "made liable to an action for damages by the simple act of enforcing a void law * * * and no allegation of malice need be alleged or proved" (*Anderson* v. *Myers*, 182 F. 223, 230 (C.C.D. Md. 1910))).

Thus, even if Section 1983 was enacted against the backdrop of common-law immunities, immunity from suit for *constitutional* violations, as opposed to tort claims, was not available at common law.

c. In any event, even taking the ahistorical justification for qualified immunity at face value, that justification cannot support the current standard, which is substantially different from the good-faith defense created in *Pierson*. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987).

While *Pierson* initially applied the subjective qualified immunity standard only to Section 1983 claims for false arrest (386 U.S. at 557), qualified immunity today applies "across the board." *Anderson*, 483 U.S. at 645. And despite the fact that qualified immunity currently looks nothing like the initial formulation—much less the common-law immunities on which it was based—the Court has continued to justify expanding the doctrine with reference to common law. See *Filarsky* v. *Delia*, 566 U.S. 377, 383-384 (2012); cf. *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of cert.) ("Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this 'clearly established law' test.").

Because the plain text of the statute makes no reference to immunities, and because the common law in 1871 likely provided no immunity from constitutional tort claims, there is simply no basis to read qualified

immunity into Section 1983. And even if the subjective qualified immunity standard could be supported by common-law principles (it cannot), current qualified immunity doctrine is indefensible on those grounds. See also pages 27-30, *infra* (explaining that the current version of qualified immunity cannot be justified on policy grounds, either).

2. The original text of the Civil Rights Act further undermines qualified immunity.

Not only does the current text of Section 1983 say nothing about qualified immunity, the original text of the Civil Rights Act of 1871 specifically *abrogated* state common-law defenses, thereby *precluding* qualified immunity. Recent scholarship has reinvigorated interest in the original text as evidence that "any immunity grounded in state law has no application to the cause of action we now know as Section 1983." Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 238 (2023); see also *Price* v. *Montgomery County*, 72 F.4th 711, 727 n.1 (6th Cir. 2023) (Nalbandian, J., concurring in part) (discussing this scholarship); *Pike* v. *Budd*, 2023 WL 3997267, at *12 n.18 (D. Me. June 14, 2023) (same); *Crosland* v. *City of Philadelphia*, 2023 WL 3898855, at *4 n.8 (E.D. Pa. June 8, 2023) (same).

Judges have contended that this renewed attention to the original text should trigger a "seismic" shift in our understanding of Section 1983. *Rogers*, 63 F.4th at 980-981 (Willett, J., concurring) ("[T]he Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common law immunities absent explicit language—is faulty because the 1871 Civil Rights Act expressly included such language."); see*, e.g.*, *Erie* v. *Hunter*, 2023 WL 3736733, at *2 n.2 (M.D. La. May 31, 2023) (Jackson,

J.) (joining Judge Willett's call for this Court to grapple with the original text which "inarguably eliminates *all* . . . immunities"); *Thomas* v. *Johnson*, 2023 WL 5254689, at *7 (S.D. Tex. Aug. 15, 2023) (Rosenthal, J.) (noting that "the original text" may have resulted in "the abrogation of the common law immunities that form the basis of contemporary qualified immunity jurisprudence," but observing that "[t]his court is bound by current law and must wait for the justices to turn from their occasional criticisms of the allegedly atextual and ahistorical doctrine to its abrogation or modification").

a. As originally enacted, the Civil Rights Act of 1871 read:

> Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, ***any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding***, be liable to the party injured * * * ."

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (emphasis added).

This text plainly abrogated state common law, including the common-law immunities that formed the original basis for qualified immunity. See pages 18-20, *supra*. State common law is "any" state "law." 17 Stat. at 13. It is also state "custom, or usage" (*ibid.*)—contemporary dictionaries confirm that, in 1871, "custom" and "usage" unambiguously included "common law." See Noah Webster, *An American Dictionary of*

the English Language (1828) (defining the "unwritten or common law" as "a rule of action which derives its authority from long usage, or established custom"); Noah Webster, *Webster's Complete Dictionary of the English Language* 757 (1886) (same); accord, *e.g.*, *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 659 (1834) ("The judicial decisions, the usages and customs of the respective states" established the "common law."); *Strother* v. *Lucas*, 37 U.S. (12 Pet.) 410, 437 (1838) ("Every country has a common law of usage and custom.").

Accordingly, in 1871, an ordinary reader of the Civil Rights Act would have unambiguously understood Congress to have created liability that was not limited by state common law, including state common-law immunities. Indeed, that is precisely what the legislative debates surrounding the Civil Rights Act suggest Congress understood as well. See Reinert, *supra*, at 238-239 & nn.247-250 (collecting legislative evidence); cf., *e.g.*, *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1085 (2019) (employing "legislative history" to "confirm[]" a text-based statutory construction).[4]

b. The "notwithstanding clause," however, "was inexplicably omitted from the first compilation of

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[4] And, of course, courts shared the same understanding for nearly a century. See, *e.g.*, *Picking* v. *Pennsylvania R. Co.*, 151 F.2d 240, 250 (3d Cir. 1945) ("We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate [common-law judicial immunity] to the extent indicated by that act and in fact did so."); *Burt* v. *City of N.Y.*, 156 F.2d 791, 793 (2d Cir. 1946) (Hand., J.) ("[S]o far as we can see, any public officer of a state, or of the United States, will have to defend any action brought [under the Civil Rights Act] in which the plaintiff, however irresponsible, is willing to make the necessary allegations.").

federal law in 1874" "for reasons lost to history." *Rogers*, 63 F.4th at 980 (Willett, J., concurring).

Congress in 1866 had authorized a compilation of federal statutes, empowering a three-person commission "to revise, simplify, arrange, and consolidate" all the session laws that had accumulated to that point—but not to substantively change the law. An Act to Provide for the Revision and Consolidation of the Statute Laws of the United States, ch. 140, § 1, 14 Stat. 74, 74-75 (1866). In fact, the task was later stripped from the commission and given to a different, single reviser after the congressional committee overseeing the effort determined that the commission's proposed codification *would* significantly change the law. Ralph H. Wan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1013 (1938).

The resulting compilation was enacted into positive law, and the corresponding session laws were repealed, in the Revised Statutes of 1874. See Rev. Stat. § 5596, at 1085 (1874) ("All acts of Congress passed prior to [December 1, 1873], any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."). But it immediately became apparent that the enacted text contained literally hundreds of errors. See Wan & Feidler, *supra*, at 1014; Andrew Winston, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, Library of Congress (July 2, 2015), perma.cc/WL5N-HS3D.[5] Learning from this process, Congress would never again enact a statutory codification into positive law. See Wan & Feidler, *supra*, at 1014, 1016.

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[5] Congress itself apparently spent very little time reviewing the reviser's work. "It has been said that the revision passed the Senate in about 40 minutes." Wan & Feidler, *supra*, at 1015 n.38.

The notwithstanding clause was lost from what is now Section 1983 as a result of this haphazard revision process. See Rev. Stat. § 1979, at 347 (1874). That is, "[t]he Reviser of Federal Statutes made an unauthorized alteration to Congress's language" by dropping it. *Rogers*, 63 F.4th at 980 (Willett, J., concurring).

c. The 1871 Act's original language is nonetheless crucially relevant to the interpretation of the current statute—and demonstrates the error in the Court's adoption of qualified immunity.

The Court's foundational cases on immunity under Section 1983 recognize that, in the absence of text addressing immunities one way or the other, the interpretive task is fundamentally one of determining congressional intent. See, *e.g.*, *Pierson*, 386 U.S. at 554-555 ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. * * * [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine" of judicial immunity); *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951) ("We cannot believe that Congress * * * would impinge on a tradition so well grounded in history and reason [as legislative immunity] by covert inclusion in the general language" of Section 1983).

Even after the reformulation of qualified immunity in *Harlow*, the Court has "reemphasize[d] that [its] role is to interpret the intent of Congress in enacting § 1983, * * * and that [it is] guided in interpreting Congress' intent by the common-law tradition." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986); cf. *Anderson*, 483 U.S. at 644-645 (while "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane

rules of the common law," "our determinations as to the scope of official immunity are made in light of the common-law tradition").

In short, the Court has arrived at qualified immunity through an intent-based presumption that Congress does not, through silence, intend to depart from the common law. See, *e.g.*, *Buckley*, 509 U.S. at 268 ("Certain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume Congress would have specifically so provided had it wished to abolish' them.") (quoting *Pierson*, 386 U.S. at 555).

But such a presumption is nothing more than a "guide[] 'designed to help judges determine the Legislature's intent"—and as such, "other circumstances evidencing congressional intent can overcome their force." *Scheidler* v. *Nat'l Org. for Women, Inc.*, 547 U.S. 9, 23 (2006) (quoting *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001)). And here, there are the strongest possible "circumstances evidencing congressional intent" to the contrary: Congress's enacted language *explicitly did* abrogate state-law immunities, until what was supposed to be a non-substantive revision deleted the abrogating language from the final text. See pages 21-27, *supra*.

While such evidence of intent likely could not overcome plain language to the contrary appearing in the statutory text, qualified immunity is not based on statutory text at all. At best, it is based on statutory silence; at worst, it is policymaking by the judiciary. And when all evidence indicates that Congress intended *not* to be silent on the issue of immunities—but was thwarted by an "unauthorized alteration" of the text (*Rogers*, 63 F.4th at 980 (Willett, J.,

concurring))—the presumption that forms the entire foundation of qualified immunity is wholly unjustified.

3. Qualified immunity does not satisfy the policy goals the Court created it to serve.

As described above, qualified immunity doctrine is no longer tethered to its original legal justification based on common-law immunities. In fact, it is no longer tethered to any *legal* justification at all. Instead, the doctrine's current form reflects the Court's naked balancing of policy goals. *Harlow*, 457 U.S. at 813 ("[P]etitioners assert that public policy at least mandates an application of the qualified immunity standard. * * * We agree."); *ibid.* ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."); see *Crawford-El* v. *Britton*, 523 U.S. 574, 611-612 (1998) (Scalia, J., dissenting) ("We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities.").

Specifically, the Court in *Harlow* expressed concern that fear of personal liability in Section 1983 actions would inhibit officials from fully discharging their duties and reformulated the good-faith standard to serve that policy goal, as well as the goal of dismissing "insubstantial" lawsuits without trial. 457 U.S. at 814 ("[T]here is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"); *id.* at 808 (noting that in prior official immunity analyses, the Court "emphasized [its] expectation that insubstantial suits need not proceed to trial"). But qualified immunity does not actually serve either of those stated goals.

a. To begin, officers are not sufficiently aware of "clearly established law" to structure their exercise of discretion around qualified immunity in the first place. A recent empirical study of hundreds of use-of-force policies, trainings, and other educational materials revealed that "officers are not regularly or reliably informed about court decisions interpreting [watershed Fourth Amendment precedents] in different factual scenarios—the very types of decisions that are necessary to clearly establish the law about the constitutionality of uses of force." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 610 (2021).

This evidence therefore undermines one of qualified immunity's underpinning assumptions. See *Harlow*, 457 U.S. at 818-819 ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."). Because officers lack knowledge of the clearly established law governing their day-to-day exercises of discretion as a factual matter, the essential assumption of qualified immunity—that officials structure their conduct around existing law—cannot be supported.

Qualified immunity also is not necessary to shield government officials from the financial costs of Section 1983 suits—thus, the thinking goes, protecting "the vigorous exercise of official authority" (*Harlow*, 457 U.S. at 807)—because officers "are virtually always indemnified." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). A groundbreaking study found that law enforcement officers' financial contributions account for only 0.02% of settlements and judgments in civil rights damages actions against them. *Ibid.* Indeed, governments satisfied settlements and judgments against officers

"even when indemnification was prohibited by statute or policy" and "even when officers were disciplined or terminated by the department or criminally prosecuted for their conduct." *Ibid.*

In light of this widespread practice of police indemnification, there is no practical "risk that fear of personal monetary liability * * * will unduly inhibit officials in the discharge of their duties" (*Anderson*, 483 U.S. at 638)—again undermining the key policy justification the Court has offered for the immunity doctrine.

b. Qualified immunity also is unnecessary to prevent "insubstantial lawsuits" from reaching trial. Cf. *Harlow*, 457 U.S. at 814, 818 (stating that the "objective reasonableness" test "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment").

As Justice Kennedy has explained, however, "*Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question." *Wyatt*, 504 U.S. at 171 (Kennedy, J., joined by Scalia, J., concurring). But "subsequent clarifications to summary-judgment law have alleviated that problem." *Ibid.* (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986)). Additional defendant-friendly procedural innovations have followed, further undermining any need for immunity on top. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 680-684 (2009) (together with *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), significantly heightening the Rule 8 pleading standard, and concluding that *Bivens* plaintiffs had failed to plausibly plead a constitutional violation).

In Section 1983 cases concerning alleged Eighth Amendment violations, courts have additional tools to dispose of insubstantial cases. The Prison Litigation Reform Act of 1996 was "enacted * * *to reduce the quantity and improve the quality of prisoner suits." *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). The Act's requirement of an internal review of complaints by corrections officials before a federal lawsuit may be initiated is another procedure that may "filter out some frivolous claims." *Id.* at 525 (quoting *Booth* v. *Churner*, 532 U.S. 731, 737 (2001)).

In sum, qualified immunity is not necessary to further the policy goals it was created to serve. The ubiquity of indemnification among state, city, and local governments indicates that officers are virtually never personally liable for damages and settlements in Section 1983 actions and therefore will not be deterred from carrying out their duties by the fear of liability. Qualified immunity is also not needed to sort the meritorious from the insubstantial civil-rights claims. Courts have a number of procedural tools at their disposal to evaluate and dispose of frivolous cases, and these tools can both operate independently of and survive the reversal of qualified immunity. Public policy—the sole basis on which the current version of qualified immunity is premised—therefore cannot justify the continued existence of the doctrine.

4. Stare decisis cannot save qualified immunity.

Finally, stare decisis is no impediment to reconsideration of current qualified immunity doctrine. To the contrary, all of the factors the Court considers in evaluating whether stare decisis should apply counsel in favor of overturning qualified immunity. See *Dobbs* v. *Jackson Women's Health Organization*, 142 S. Ct.

2228, 2265 (2022) (enumerating factors that weigh "strongly in favor of overruling" precedent: "the nature of [the] error, the quality of [the] reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas," and "the absence of concrete reliance").

As we have described, qualified immunity rests on a flawed legal foundation. This Court's prior qualified-immunity decisions did not faithfully construe the text of Section 1983 either as codified or as originally enacted by Congress. Instead, early qualified immunity cases turned to flawed reasoning about the common law and functionalist considerations. See*, e.g.*, *Pierson*, 386 U.S. at 557 (applying Mississippi state common law defense); *Harlow*, 457 U.S. at 816 (relying on policy concerns). This Court has since rejected both of these modes of statutory analysis as improper. See*, e.g.*, *Rehberg* v. *Paulk*, 566 U. S. 356, 363 (2012) (rejecting Court's authority to make "freewheeling policy choice[s]"); *Van Buren* v. *United States*, 141 S. Ct. 1648, 1655 n.4 (2021) ("[C]ommon-law principles should be imported into statutory text only when Congress employs a common-law term—not when Congress has outlined an offense analogous to a common-law crime without using common-law terms.").

And as just described, even the Court's stated policy goals for qualified immunity have been negated by subsequent developments, like widespread indemnification and heightened pleading standards. See pages 27-30, *supra*. This is thus a quintessential scenario in which "doctrinal underpinnings" have "eroded over time," providing the justification needed to overcome stare decisis. See *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

Furthermore, qualified immunity has proven "unworkable" (*Dobbs*, 142 S. Ct. at 2275), and the Court has previously not hesitated to change the doctrine repeatedly to account for implementation problems. See*, e.g.*, *Pierson*, 386 U.S. at 555 (creating a subjective "good-faith" defense to Section 1983 claims); *Harlow*, 457 U.S. at 818 (finding a subjective standard to be unworkable and replacing it with the objective test used today); *Saucier* v. *Katz*, 533 U.S. 194 (2001) (announcing requirement that courts reach the merits of a plaintiff's Section 1983 claim before reaching question of qualified immunity); *Pearson*, 555 U.S. at 233-234 (overruling *Saucier*'s sequencing requirement). Moreover, that judges express concern that qualified immunity is not grounded in text or history even as they are bound to follow this Court's precedents suggests the doctrine only erodes "public faith in the judiciary." *Moragne,* 398 U.S. at 403; see pages 10-15, *supra*.

Qualified immunity has also disrupted "other areas of law" (*Dobbs*, 142 S. Ct. at 2275), particularly the orderly development, through iterative judicial interpretation, of the underlying constitutional law. Qualified immunity has created a vicious cycle in which lower courts must grant qualified immunity unless they can find a prior Supreme Court decision, binding precedent, or consensus of cases in which "an officer acting under similar circumstances" has been found to have violated the Constitution. *White* v. *Pauly*, 580 U.S. 73, 79 (2017) (per curiam). Yet the Court has also advised lower courts that they can grant qualified immunity without ruling on plaintiffs' underlying constitutional claims—reducing the frequency with which lower courts announce clearly established law. See pages 16-17, *supra*; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93

Notre Dame L. Rev. 1797, 1815-1816 (2018). Furthermore, the existence of qualified immunity discourages people whose rights have been violated from bringing cases in the first place. *Id.* at 1818.

Nor is this a case where "substantial reliance interests" (*Dobbs*, 142 S. Ct. at 2276), counsel in favor of retaining qualified immunity. As this Court has previously explained, officers can have no legitimate reliance interest in the opportunity to violate constitutional rights, or even in their ability to push the boundaries of constitutional rights without overdeterrence. See *Monell* v. *Department of Soc. Servs. of City of N.Y.,* 436 U.S. 658, 700 (1978).

Ordinarily, the case for stare decisis is most compelling when interpreting statutes, given Congress's ability to overrule this Court where it disagrees with statutory precedents. See *Kimble*, 576 U.S. at 456; Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 317 (2005) ("[T]he Supreme Court's refusal to revisit a statutory interpretation is a means of shifting policymaking responsibility back to Congress").

However, qualified immunity is not really the result of statutory interpretation at all; rather, it is a judge-made doctrine. See, *e.g.*, *Crawford-El*, 523 U.S. at 611-612 (Scalia, J., dissenting) (describing the judicial creation of qualified immunity an "essentially legislative activity"). Indeed, the Court has previously observed that the super-strong statutory form of stare decisis is not "implicat[ed]" by qualified immunity, which "is judge made and implicates an important matter involving internal Judicial Branch operations." *Pearson*, 555 U.S. at 233-234. And, of course, the relatively short history of qualified immunity demonstrates that the Court has not previously had

any qualms about adjusting or even "completely reformulat[ing]" the doctrine. *Anderson*, 483 U.S. at 645; see page 32, *supra*. The court should not hesitate to once again revisit the question of qualified immunity.

C. This case is a suitable vehicle.

The petition in No. 23-377 poses questions about what it means for the law to be clearly established for qualified immunity purposes, and whether the court of appeals properly applied this Court's precedents. Pet. i. As we will explain in our forthcoming brief in opposition, that petition presents no issues warranting the Court's consideration, and should be denied.

However, if the Court were to grant in No. 23-377, that would squarely tee up the question presented in this conditional cross-petition. The issue of what counts as "clearly established" for qualified immunity purposes—the primary question presented by the petition (Pet. i)—presupposes that qualified immunity is good law. The question presented here is therefore both logically prior to those pressed in No. 23-377, and self-evidently dispositive of the officers' claims to immunity.

CONCLUSION

If the Court grants the petition in No. 23-377, it should grant the conditional cross-petition as well.

Respectfully submitted.

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