No. 23-514

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

BRIEF FOR THE CROSS-RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the text, history, or common law background of the Fourth Amendment, Section 1983, and Section 1988 support the qualified immunity doctrine?

2. Has Congress reenacted, or acquiesced in, the qualified immunity doctrine under Section 1983?

3. Does statutory stare decisis warrant maintaining the qualified immunity doctrine under Section 1983?

PARTIES TO THE PROCEEDING

Cross-Respondents are Chris Dutra, Jason Edmonson, and Eric Dejesus. They were the defendants in the district court and appellees in the Ninth Circuit. Cross-Respondents Dutra and Dejesus are the petitioners in No. 23-377. As a prevailing party in the Ninth Circuit, Jason Edmonson neither sought an extension nor joined the petition in No. 23-377. *See* Rules 13.4; 13.5.

Cross-Petitioner is Kim Jackson. She was the plaintiff in the district court and appellant in the Ninth Circuit. Cross-Petitioner is the respondent in No. 23-377.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, there are no parent or publicly held companies involved in this proceeding.

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INTRODUCTION

Cross-Petitioner/Respondent Kim Jackson tries to inject a new antecedent question to overrule qualified immunity because she cannot defend the Ninth Circuit's abstract characterization of its own inapplicable precedents as "clearly established law."

Jackson urges review based on a perceived pop culture controversy surrounding qualified immunity and some jurists' alleged lack of confidence in it. Yet the supposed public uproar and judicial insecurity have not translated, in practice, to this Court. True, Justices have sometimes meditated about the doctrine's foundations. But judicial self-reflection is not the same as doctrinal self-loathing. Despite some contemplative statements, this Court continues applying qualified immunity to Section 1983 claims without qualification—including through summary reversals. Qualified immunity and its "clearly established law" requirement remain clearly established in this Court's precedents.

On the merits, Jackson's attack on qualified immunity misfires. She contends the doctrine lacks any textual or historical basis and is without justification in policy or stare decisis.

But, as Judge Andrew S. Oldham has recently written, qualified immunity traces its roots to the immunities inherent in the Fourth Amendment itself. English common law had robust official immunities that jumped the Atlantic at the Founding and became engrained in the Fourth Amendment's concept of

"unreasonableness." The Fourth Amendment therefore contains background principles with an eerie resemblance to qualified immunity.

Those inherent immunities still flourished when Section 1983's precursor, the 1871 Ku Klux Klan Act, was enacted. Its text expressly incorporated the 1866 Civil Rights Act's Section 3—the predecessor of Section 1988. And Section 1988 explicitly instructs courts to apply pre-*Erie federal* general common law. Through Section 1988, Section 1983 transplants the old soil of the Fourth Amendment and the then-existing federal common law background immunities. *Federal* common law applies notwithstanding the so-called *state* "notwithstanding clause." Thus, qualified immunity is well grounded in text, history, and tradition. Its modern formulation bears a striking similarity to its historic analogues. So, whether intentionally or fortuitously, the doctrine today is close to where it started.

Section 1988 also vests this Court with the common law authority to develop and define the contours of Section 1983 actions. In this way, Section 1983 is a common law statute apiece with the Sherman Act. This Court has treated Section 1983 in this mode many times. Therefore, even though the Fourth Amendment's original public meaning and Section 1983's common law history set the stage, they may not be the final act.

Congress's actions and inactions in the decades since *Harlow* confirm that the legislature has granted this Court the prerogative to define the parameters of

Section 1983 actions. Congress has amended Section 1983 but it has never abolished qualified immunity or the objective "clearly established law" component. The amendments to Section 1983, while leaving qualified immunity untouched, constitute congressional reenactment or acquiescence in this Court's statutory interpretation.

Congress maintains the power to modify Section 1983 should it ever disagree with this Court's interpretation. Until Congress acts, every State, city, police department, and law enforcement officer will continue to rely heavily on the doctrine's availability. Qualified immunity looms large over all levels of government—everything from federal-state relations to local hiring, training, insurance, daily citizen interactions, and yes, litigation. It is hard to conceive of a doctrine that is more consequential to the thousands and thousands of Americans serving as everyday public safety officers. Stare decisis is at its apex when there are far reaching statutory reliance interests of this magnitude.

The Court should not lightly consider overruling the doctrine, especially because Jackson does not describe what a post-qualified immunity world looks like. And even if Jackson's crusade succeeds, this Court's review will not change the ultimate result here. The body camera footage shows that Cross-Respondents had a constitutional basis to arrest and seize Jackson. The force used was not "unreasonable" or "excessive" under any measure.

Much of the popular din attending qualified immunity will be quieted if the Court clarifies the sources that may supply clearly established law as presented in No. 23-377. The answer is not to overrule or "recalibrate" qualified immunity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and 42 U.S.C. §1983 are reproduced at App.50.[1] 42 U.S.C. §1988(a) is reproduced at Resp.App.1.

STATEMENT OF THE CASE

The factual background is described more fully in the petition in No. 23-377. This description provides additional context for the conditional questions presented and addresses the misstatements of fact in the conditional cross-petition. Rule 15.2.

A. Jackson is Arrested.

Jackson portrays herself as an innocent Sunday school teacher dutifully caring for a young family member when, out of nowhere, she was randomly abused by the police. Cross-Pet.3-7. But Jackson has

[1] "App." refers to the petition appendix in No. 23-377.

an extensive criminal history, which she omitted from her caretaker application. D.Ct. Dkt. 44-27-30. Because of this omitted history, Washoe County (Nevada) Human Services Agency's Child Protective Services ("CPS") denied Jackson's request for "Relative Care Placement" for the child, A.M. *Id*. at 44-27 ¶21; 44-29-30. On October 19, 2018, CPS determined it was best to "move A.M. sooner rather than later." *Id*. at 44-30.

Just a couple weeks later, CPS called Cross-Respondent Officers to Jackson's apartment. App.6. CPS told the officers that Jackson was refusing access to A.M. App.6-7. Officers were told more than Jackson was not responding to phone calls. They were told Jackson was "spiraling," not cooperating, and refusing to go to meetings. App.7; Cross-Pet.4. CPS relayed its conclusion that Jackson's conduct constituted kidnapping. App.7. This conclusion did not come "out of nowhere." Cross-Pet.5.

On scene, Officer Dutra knocked on Jackson's door, but she refused to let officers and CPS inside. App.7. Instead, Jackson stepped onto her second-story balcony to speak with them. *Id*.

CPS asked Jackson to bring A.M. out onto the balcony, and Jackson complied. App.8. CPS told Jackson that A.M. was in its custody and asked Jackson to open the door. *Id*. Jackson refused and went back inside. *Id*.

Less than a minute later, Jackson returned to the balcony alone and began arguing with CPS. *Id*. As things escalated, Officer Edmonson said that Jackson's

refusal to release A.M. was kidnapping. *Id*. Jackson replied, "Oh you want her?" *Id*.

Jackson went back inside and quickly returned to the second-story balcony holding A.M. in her hands. *Id*. Again, Jackson asked, "You want her?" and started moving toward the railing with A.M. outstretched across to Officer Edmonson who was on the landing outside the front door. *Id*.

Jackson suggests that Edmonson reached over the railing and tried to grab A.M. from Jackson. Cross-Pet.6. This version is belied by the body-cam footage which shows Jackson stating, "As you can see, your hand is right here. You can grab her." App.9. Officers and CPS urged Jackson that it was not safe for them to get A.M. by passing her over the railing. *Id*. Officer Edmonson yelled "Do not put her over the rail!" *Id*. When asked later about when she "tried to hand a baby over the fence," Jackson admitted "Now again, I said I was wrong for that." App.11-12.

Eventually, Jackson opened the door and CPS hurried A.M. away. App.9.

Officers Dutra and Dejesus returned to Jackson's door. App.9-10. Eventually, Jackson came outside. App.10. Officer Dutra positioned himself in front of the door and told Jackson "Now you get to stay out here and visit with me now." *Id*. Jackson responded, "No problem sir, I came out to visit with you." *Id*. Jackson also said, "Let me sit down so you guys know that I'm not trying to get away from you." *Id*. Jackson sat on the stairs leading up to the third floor. *Id*.

A short time later, Jackson suddenly stood and rushed to the hallway railing outside her door. App.11. Jackson lifted her right leg on top of the railing and tried to climb over the railing as if to jump from there to her apartment's balcony. *Id*. Shouting, Officer Dutra immediately grabbed Jackson's upper body and Officer Dejesus grabbed her right leg. *Id*. Dutra said, "Put her in handcuffs." *Id*.

Jackson started screaming and struggling. *Id*. Multiple times, Dejesus told her to stop and tried to put Jackson's right arm behind her back. *Id*. Jackson continued to struggle until she finally sat on the ground. *Id*. Jackson was not "thrown" down or struck. Cross-Pet.7.

B. Jackson Sues.

Jackson sued, advancing claims for unlawful seizure, false arrest, and excessive force. App.17. She also asserted a supervisory liability claim against Officer Edmonson. *Id*.

On cross-summary judgment motions, the district court found that "review of the body camera footage conclusively shows that Defendants had probable cause and their force was not excessive." App.5-6. The Officers had probable cause for Jackson's attempted child endangerment and obstruction. App.19-25. The district court determined no juror could construe as excessive the force shown on film. App. 27. "In light of the [body-worn camera] footage," the district court granted summary judgment on all claims. App.17-18.

While Jackson asserts her shoulder was injured during the encounter, Cross-Pet.2, the district court found she had presented no admissible evidence "to consider such a diagnosis." *Id.* at 28. There was evidence the alleged injury was pre-existing. D.Ct. Dkt. 44-15 ¶14.

Jackson appealed. The Ninth Circuit affirmed on the unlawful seizure, false arrest, and vicarious liability claims but reversed on the excessive force claim. App.2-4.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

A. Qualified Immunity is Well-Founded.

1. Qualified Immunity is inherent in the Fourth Amendment.

Jackson starts on the wrong foot. Her attempt to tear down qualified immunity begins in 1871 with Section 1983's enactment and the claim that "the common law in 1871 likely provided no immunity from constitutional tort claims." Cross-Pet.17-20.

But, as Judge Andrew S. Oldham has explained, "the originalist inquiry should focus (at least in the first instance) on whether officers enjoyed constitutional immunities in 1791. And the historical pleading practices embraced in English common law and by our first Congresses suggest the answer is 'yes.'" Hon.

Andrew S. Oldham, *Official Immunity at the Founding*, 46 HARV. J.L. & PUB. POL'Y 105 (2023).

Officer immunities were "robust" at common law before the Founding. *Id*. at 112. English officers possessed many pleading and procedural protections that were unavailable to private parties. *Id*. at 112-22. For example, officers of the Crown received the privilege to plead both a "special matter" and "general" issue nearly a century before anyone else. *Id*. at 114-15. Officers received a defense to liability and a right to avoid the "burdens of litigation" that looks a lot like today's qualified immunity. *Id*. at 114.

An illustration is found in a 1609 English statute appropriately named "An act for ease in pleading troublesome and contentious suits prosecuted against justices of the peace, mayors, constables, and certain other [royal] officers, for the lawful execution of their office." *Id*. at 114-15 (quotations omitted). The Fraud Act of 1662 is another example. *Id*. at 116 (quotations omitted).

These statutes, and the practices under them, share similarities with qualified immunity. *Id*. at 115. They provided defenses to officers that ordinary citizens lacked. *Id*. They increased a plaintiff's "burden of proof by forcing them to prove a prima facie case and then go a step further." *Id*. In the case of the Fraud Act of 1662, for instance, "[o]nce an official demonstrated he had been sued for anything 'done in the due and necessary performance' of his office, he could submit the Fraud Act in evidence and automatically avoid

liability." *Id*. at 116-17. And these privileges were predicated "on concerns about officers being unable to perform their duties." *Id*. at 115. Historians note that Parliament had " 'shield[ed] the officers of the crown[ ] as far as possible[ ] from their responsibility for illegal actions.' " *Id*. at 118 (quotations omitted).

English officer immunities crossed the Pond with the Framers. Immunities played a central role in search-and-seizure litigation in America well into the eighteen-century, including in foundational cases like *Wilkes v. Wood* and *Entick v. Carrington*. *Id*. at 118-22.

Look at the Fourth Amendment's text. "In 1791, the word 'unreasonable' meant 'against the reason of the common law.' " *Id*. at 105 (citing Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1270 (2016)). The word "unreasonable" therefore connoted a specific meaning at the Founding: "namely, against reason, or against the reason of the common law." *Id*. at 112. " 'That which was consistent with the common law was reasonable and, therefore, legal. That which was inconsistent was unreasonable and illegal.' " *Id*.

John Locke, William Blackstone, the Founders, and the public shared this understanding of "unreasonable." *Id*. The eighteenth-century original public meaning of "unreasonable" was much more formalistic than today's meaning. Donohue, *supra*, at 1274-75. Back then " 'unreasonable' meant 'illogical,' or 'inconsistent with the common law'—making the action illegal." *Id*. at 1275. " 'Unreasonable' thus carried a quality

that meant actually *going outside the boundaries of a settled rule* . . . It was not a matter of degree. It was a matter of whether it met the standards or not." *Id*. at 1275 (emphasis in original). It was an objective inquiry. *See id*.

The term "unreasonable" therefore incorporated the common law. And because the common law recognized officer immunities, those immunities became imbedded into the concept of "unreasonableness" in the Fourth Amendment. "The common law that existed at the Founding," Judge Oldham says, "brought with it a series of protections for officers who were charged with executing searches and seizures. It was only when the officers' searches and seizures transgressed the reason of the common law—including the common-law immunities discussed above—that those searches became unreasonable." Oldham, *supra*, at 124.

Three early congressional statutes confirm this approach in the Nation's formative years: The Collection Act of 1789, the Collection Act of February 1815, and the Collection Act of March 1815. *Id*. at 125-26. These statutes closely mirrored the earlier English immunity statutes. *Id*. at 126. Indeed, the Collection Act of 1789 was materially identical to Parliament's 1609 act. *Id*. at 127.

From all this, the Framers understood that officers enjoyed a qualified immunity at common law. *Id*. at 127. The Framers did not object to the official immunities and, instead, they affirmatively enacted them. *Id*. at 131-32. Thus, the concept of "unreasonable"—

through its incorporation of the common law—imported the preexisting official immunities into the Fourth Amendment. *Id*. at 127-29. The official immunities traveled with the original public understanding of "unreasonable." *Id.* at 109. "[H]ence it appears the Fourth Amendment prohibited searches and seizures that ran against that common law—taking account of the officers' preexisting immunities." *Id.* at 127-28.

According to Judge Oldham, the Founding approach to official immunities under the Fourth Amendment "bears an eerie resemblance to modern doctrine" and its protection of all but the plainly incompetent or those who violate the law knowingly. *Id*. at 124 n.131 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). At the Founding, a plaintiff needed to show that an officer acted egregiously enough that he lost the various common law protections, or the officer was "*so* wrong that he lost the qualified immunity afforded to him by the common law." *Id*. at 124. Officer actions patently inconsistent with the settled common-law rule—another way of saying the clearly established law—were considered "unreasonable."

Jackson provides no reason to think that the original public meaning of the Fourth Amendment somehow changed—or the inherent official immunities were lost—between 1791 and 1871.

2. Section 1983 Expressly Incorporates Common Law Immunities through Section 1988.

Jackson skips the Fourth Amendment itself and declares that "the absence of any textual basis for qualified immunity" in Section 1983 "should be the end of the matter." Cross-Pet.18. Jackson also contends that Section 1983's so-called "lost" "notwithstanding clause" shows congressional intent to abrogate any state common law immunities. Cross-Pet.21-26.

But, while claiming fidelity to the original text, Jackson ignores that Section 1983's ancestor—the Ku Klux Klan Act of 1871 ("the 1871 Act")—incorporated the Civil Rights Act of 1866's ("the 1866 Act") mechanics for litigating federal civil rights actions. The 1866 Act included an *express* directive to apply *federal* common law to fill statutory gaps for remedies and defenses.

a. Following the so-called "notwithstanding clause," the 1871 Act's Section 1 explicitly cross-referenced and adopted the 1866 Act's process. 17 Stat. 13, 13 ("such proceeding to be prosecuted . . . under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication' ").

In turn, the 1866 Act's Section 3 provided:

> The jurisdiction in civil and criminal matters . . . shall be exercised and enforced in conformity *with the laws of the United States*, so

> far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, *the common law*, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

14 Stat. 27 §3 (emphases added).

After reshuffling, the 1866 Act's Section 3 became Section 1988. *Moor v. Alameda Cnty.*, 411 U.S. 693, 706 n.19 (1973).

b. Importantly, Section 1988's precursor was enacted in the generation of *Swift v. Tyson*, 41 U.S. 1 (1842) before the Court repudiated the federal courts' common law prerogatives in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). "[A]t the time § 1988(a) was enacted, references to the 'common law' were generally understood to refer to the type of federal common law that the federal courts employed when hearing cases between citizens of different states under their diversity jurisdiction over lawsuits between citizens of different states." Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 570 (2020) (citing Seth F. Kreimer, *The Source of Law in*

Civil Rights Actions: Some Old Light on Section 1988, 133 U. PA. L. REV. 601, 618-19 (1985)); *see also Robertson v. Wegmann*, 436 U.S. 584, 590 n.5 (1978) (citing *Swift* and stating that there is judicial and scholarly support for interpreting "common law" as referring to "general common law that was an established part of our federal jurisprudence by the time of § 1988's passage in 1866").

Accordingly, today's Section 1988 was enacted on the "assumption that there is 'a transcendental body of law outside of any particular State'" and "federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law.'" *Erie R. Co.*, 304 U.S. at 79 (quoting Justice Holmes's description of *Swift*).

Thus, contrary to Jackson's assertions, Section 1983 is not totally silent about the applicability of *federal* common law defenses and immunities. Section 1988 provides an express textual hook. Jackson admits that her arguments could not "overcome plain language . . . in the statutory text" incorporating common law qualified immunity. Cross-Pet.26. As a result, Section 1988 is fatal to Jackson's arguments.

c. The early cross-reference to the Section 1988's forerunner shows Congress understood that Section 1983 could not directly cover every possible issue that may arise in a civil rights action. *Moor*, 411 U.S. at 702. Section 1988 tells courts what law to apply when filling any gaps about remedies *and* defenses. *Id*. at 702-03.

Consider monetary damages. Section 1983's text does not detail how a person shall be liable or specify *monetary damages*. Under Jackson's view, Section 1983's silence about monetary damages means none are allowed. Yet, citing or applying Section 1988, this Court has held that "both federal and state rules on damages may be utilized." *Sullivan v. Little Hunting Park, Inc*., 396 U.S. 229, 240 (1969).

This Court has also used Section 1988 to define the unmentioned deployable defenses. *See Moor*, 411 U.S. at 706 (municipal vicarious liability); *Robertson*, 436 U.S. at 591-94 (state survivorship); *Bd. of Regents of Univ. of State of N. Y. v. Tomanio*, 446 U.S. 478, 488-90 (1980) (state statute of limitations and tolling rules).

Consequently, Section 1988 is an express incorporation of federal general common law defenses and immunities into Section 1983. *Robertson*, 436 U.S. at 596-97 (Blackmun, J., dissenting) (discussing Section 1988 and stating "[I]n constructing immunities under § 1983, the Court has consistently relied on federal common-law rules.").

d. All of this comes full circle to Jackson's claim that the "notwithstanding clause" abrogated qualified immunity. Cross-Pet.21-26. At most, the "notwithstanding clause" may prohibit *state* statutory or *state* common law immunities. 17 Stat. 13, 13 ("any such law, statute, ordinance, regulation, custom, or usage of the *State*, to the contrary notwithstanding") (emphasis added).

But the clause does not foreclose the availability of any *federal* general common law immunities through Section 1988. The scholar who purportedly "rediscovered" the "notwithstanding clause" nods to the possibility that federal or general common law immunities might be available "because common law immunities could exist independent of whatever state law was abrogated by the Civil Rights Act of 1871." Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 242 (2023).[2]

So, notwithstanding the "notwithstanding clause," the relevant inquiry is whether the "laws of the United States" or federal general common law recognize something akin to qualified immunity. If so, Section 1983's incorporation of Section 1988's express references to the "laws of the United States" and the federal "common law" supplies a textual basis.

As shown, an eerily similar qualified immunity is inherent in the Fourth Amendment's "reasonableness" at the time of the Founding. An analogous qualified immunity also remained available in 1871. *See infra* §(A)(4).

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[2] However, Reinert dismisses the possibility on a misreading of *Erie*. *See* 304 U.S. at 75-76 (stating general law was not limited to commercial relations or interstate torts).

3. Section 1983 Did Not Silently Abrogate Common Law Immunities.

Setting aside the text of the Fourth Amendment, Section 1983, and Section 1988, Jackson contends the Court went astray when it "arrived at qualified immunity through an intent-based presumption that Congress does not, through silence, intend to depart from the common law." Cross-Pet.26.

But there is a blackletter presumption against silently displacing the common law. "A statute will be construed to alter the common law only when that disposition is clear." A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012). Thus, the Court has correctly presumed that Congress would have been more explicit if it intended to abolish the well-established immunities that existed in 1871. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993).

A critic, Professor William Baude, agrees statutes are often subject to common law defenses "[s]o perhaps Section 1983 permits such an unwritten immunity defense despite its seemingly categorical provisions for liability." William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 50 (2018). While Professor Baude is correct on this point, he and Jackson misinterpret the historical record to conclude modern qualified immunity conflicts with the common law. *Id.*; Cross-Pet.20.

4. Qualified Immunity is Rooted in the Common Law.

Jackson contends that "qualified immunity currently looks nothing like the initial formulation—much less the common-law immunities on which it was based." Cross-Pet.20. But, as Judge Oldham shows, qualified immunity and its clearly established law requirement are hardly modern inventions. Rather, together with the Fourth Amendment's inherent qualified immunity, the common law around the 1871 Act's enactment reflected a similar immunity. Indeed, the introduction of a subjective component in *Pierson* can be seen as common law deviation. The return to an objective standard is more properly considered a course correction despite this Court's contrary statements that the objective standard departed from the common law.

a. Since the early Republic, this Court has long recognized a type of objective "immunity from civil suits for damages" that applies unless the officer's actions are "manifestly or palpably beyond his authority" or there is a "*clear* absence" of any legal authority. *See*, *e.g.*, *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); *Bradley v. Fisher*, 80 U.S. 335, 351-52 (1871).

Immunity attached for "action having more or less connection with the general matters committed by law to his control or supervision." *Spalding*, 161 U.S. at 498. Mere mistakes or errors interpreting laws did not dissolve the immunity. "Sometimes erroneous constructions of law may lead to [errors] [b]ut a public

officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion." *Kendall v. Stokes*, 44 U.S. 87, 98 (1845) (post-master general had "undoubtedly the right to examine" an account but he erroneously thought "he had a right to set aside allowances").

On the other hand, when the action was so clearly unlawful that it would be "known" to the officer, then "no excuse is permissible." *Bradley*, 80 U.S. at 351-52; *Myers v. Anderson*, 238 U.S. 368, 382 (1915) (holding there was no immunity for enforcing a law clearly violating the Fifteenth Amendment).

There was no subjective inquiry into motives. *Bradley*, 80 U.S. at 347. A subjective investigation "would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government." *Spalding*, 161 U.S. at 498.

b. Start in 1804 with Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. 170, 176 (1804). There, a nonintercourse statute unambiguously authorized the President to seize ships that appeared to be sailing *to* a French port. *Id*. at 177. When passing along orders to his officers, the President instructed the navy to seize ships apparently bound *to or from* French ports. *Id.* at 178. Under the President's expanded directive, Captain Little captured a vessel sailing *from* a French outpost. *Id.* at 176. The vessel's

owner sued Little for damages, but the district court denied the request because it found "probable cause" to suspect that the vessel was covered by the statute. *Id.*

On appeal, this Court considered whether the President's instructions "excused" the officer "from damages." *Id.* at 178-79. The Court said no. It found no "excuse" for the seizure despite his "pure intentions." *Id.* at 179. Reminiscent of contemporary qualified immunity, Little's subjective beliefs were immaterial and there was no need to reach the probable cause question because his actions violated the clearly established law set by the nonintercourse act. *See id.* ("the instructions cannot change the nature of the transaction, or legalize an act which without those instructions *would have been a plain trespass*") (emphasis added). "[P]erhaps that was because Little's mistake was not a *reasonable* one." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1865 (2018).

Chief Justice Marshall considered a similar question in *United States v. Riddle*, 9 U.S. 311 (1809). *Riddle* involved a customs officer who seized goods for violating a customs law where the English shipper undervalued the goods even though the American consignee declared their true worth. *Heien v. North Carolina*, 574 U.S. 54, 62, (2014) (describing *Riddle*). Customs statutes authorized courts to issue certificates of probable cause to indemnify customs officers against damage suits for unlawful seizures. *Id.*

"[A] certificate of probable cause functioned much like a modern-day finding of qualified immunity, which depends on an inquiry distinct from whether an officer has committed a constitutional violation." *Id.* at 63 (citing *Carroll v. Carman*, 574 U.S. 13, 20 (2014)).

The Court affirmed the certificate of probable cause because "the construction of the law was liable to some question" and "[a] doubt as to the true construction of the *law* is as reasonable a cause for seizure as a doubt respecting the fact." *Riddle*, 9 U.S. at 313. *Riddle* therefore applied an early qualified immunity lookalike that immunized the officer from liability when he did not violate clearly established law.

Tracy v. Swartwout, 35 U.S. 80, 81 (1836) is another example. In *Tracy*, this Court considered whether a customs officer was liable for charging more than the permissible amount of duty under the Secretary of Treasury's instructions. The law distinctly imposed a 15% ad valorem duty on sugar imports, but the officer demanded a three cent per pound duty. *Id.* The plaintiff admitted that the officer acted in good faith at the Secretary's direction. *Id.* at 94. The district court told the jury that they "ought not to subject the collector to the payment of more than nominal damages [because] the collector was pursuing what he believed to be the true construction of the law." *Id.* The jury awarded six cents in damages and six cents in costs. *Id.*

This Court reversed. It explained "[w]here a ministerial officer acts in good faith, for an injury done, he

is not liable to exemplary damages; ***but he can claim no further exemption, where his acts are clearly against law***." *Id.* at 95 (emphasis added). The Court apparently did not believe that the officer could be "pursuing" a reasonable construction of such an unequivocal law. *Id.* at 94-95. Thus, like today's qualified immunity standard, the Court held, without a subjective inquiry, that the officer was not "exempt" because his actions unquestionably violated clearly established law in the form of an unambiguous provision.

By "1896, the Supreme Court arguably recognized something akin to *Harlow*'s objective standard." Nielson & Walker, *supra*, at 1867 (citing *Spalding*, 161 U.S. at 498). The case, *Spalding v. Vilas*, surveyed authorities dating back to the English common law and held that officers were immune from civil damage suits when discharging the legal duties imposed on them provided the officers' actions were not "manifestly or palpably beyond" authority—another way of saying in violation of clearly established law. 161 U.S. at 498. Immunity applied if the action had a "more or less connection with the general matters committed by law to his control or supervision." *Id.*

The *Spalding* Court reasoned that the officer "may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested." *Id.* at 498-99. The Court continued, "[b]ut if he acts, *having authority*, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is

not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals." *Id.* at 499 (emphasis added).

Back then, the Court foresaw the same societal costs that this Court articulates today associated with a subjective inquiry into officer motivations. The Court worried that discovery into mental states would have a "crippling" effect on the executive branch's ability to function. *Id.* at 498-99. Officers "should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages." *Id.* at 498.

Thus, since the Founding, this Court has recognized and applied a federal common law immunity that mirrors the contemporary, objective qualified immunity standard. "It is noteworthy that something at least akin to an objective standard had some purchase in the nineteenth century." Nielson &. Walker, *supra*, at 1868; *see also* Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 972 (2014) (noting there were "few" excessive force cases around the 1871 Act's enactment but stating "[t]he common law had a very different approach to excessive force cases. The test was objective rather than subjective, like modern doctrine, but it was emphatically the province of the jury to decide the reasonableness of the action.").

c. But in the latter part of the nineteenth century, this Court began veering off the path and adopted the approach of multiple *state court* precedents holding

that an officer's discretionary acts were covered by a good-faith defense even if the officer's authority was later ruled unconstitutional. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1353-54 (2021) (citing *Pierson v. Ray*, 386 U.S. 547, 555 (1967)).

Enter *Pierson v. Ray*. *Pierson* purported to apply the common law, but it relied on *state law* immunities and newer treatises (like the Restatement (Second) of Torts) to announce that a subjective "defense of good faith" is available under Section 1983. 386 U.S. at 554-57. The Court characterized this standard as "the prevailing view in this country" because "[t]he common law has never granted police officers an absolute and unqualified immunity." *Id.* at 555.[3]

Pierson did not consider federal common or general law. And it may have even reformulated the proper Section 1983 analysis under state law. *See* Keller, *supra*, at 1389.

d. After *Pierson*, the Court's jurisprudence slowly began to heal itself. In *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975), the Court reintroduced an objective prong to *Pierson*'s subjective test. The Court reiterated that an official's immunity could be dissolved if he acted in "disregard of settled, indisputable law" or "unquestioned constitutional rights." *Id.* at 321.

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[3] *Pierson* was a false arrest case and Jackson does not assert that Cross-Respondents would be liable under the *Pierson* standard for her unlawful seizure/false arrest (or any other) claim.

Three years later, *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) elaborated that qualified immunity was unavailable "if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm." Precedent must "clearly establish" the constitutional right. *Id.* at 564-65.

Everything came full circle in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Since *Harlow* was a *Bivens* action, the Court returned to *federal* common law rather than *state* common law. *See id.* at 805-06 ("As recognized at common law. . . ."). The Court abandoned *Pierson*'s state-law induced subjective standard and held "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." *Id.* at 818.

Harlow called back to the "crippling" societal costs that *Spalding* worried about almost ninety years before, including dissuading willing public servants, litigation, distraction, and underenforcement of laws. *Id.* at 814. Much like Chief Justice Marshall and this Court's early days, *Harlow* concluded that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and

permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818.

The Court later (re)confirmed that *Harlow*'s objective standard applies to Section 1983 claims. *Davis v. Scherer*, 468 U.S. 183, 190-91 (1984).

Viewing this arc of history, *Pierson*—rather than *Harlow*—appears to be out of step with federal common law through 1871. *See* Keller, *supra*, at 1393-94 ("So if *Harlow* had limited its modification of the qualified immunity doctrine to high-ranking executive officials . . . the doctrine would have approximated the common law."). While the doctrine has followed a circuitous road, qualified immunity today resembles the common-law rules prevailing at the Founding and in 1871 even if "it is mere fortuity." *See Ziglar v. Abbasi*, 582 U.S. 120, 160 (2017) (Thomas, J., concurring in part).

5. Section 1983 is a Common Law Statute.

a. Section 1988 provides textual support for qualified immunity under Section 1983 for another reason. "Perhaps the best defense of qualified immunity in the scholarly literature is that §1983 should be regarded as a kind of 'common law statute' that effectively delegates authority to the judiciary to promulgate doctrine, much like the Sherman Act gave birth to a complex law of antitrust hardly evident from the terms of that statute." Rosenthal, *supra*, at 559.

In the era of *Swift*, the 1871 Act's incorporation of the 1866 Act's Section 3 is a clear statement that Congress intended Section 1983 to be a common law statute. The 1866 Act expressly instructed courts to use the "laws of the United States" and federal "common law." *See supra* §(A)(2). "Note that section 1988 does not say 'the common law of the state' in question but 'the common law.'" Kreimer, *supra*, at 619. Thus, Section 1988 is explicit statutory authorization to expound a federal common law of civil rights. *Id.*

In this way, Section 1983 is like the Sherman Act where this Court has said the statute "invokes the common law *itself*, and not merely the static content that the common law" as it existed at enactment. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (Scalia, J.). Jackson admits Section 1983 could be a common law statute if it "employs a common-law term." Cross-Pet.31 (citing *Van Buren v. United States*, 141 S. Ct. 1648 (2021)). Through Section 1988, Section 1983 literally invokes the "common law."

This Court has also treated Section 1983 as a common law statute. Applying contemporary Restatements of Law, Justice Scalia observed the Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (Scalia, J.) (applying Restatement (Second) of Torts); *Smith v. Wade*, 461 U.S. 30, 34 (1983) ("look[ing] first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out

the purpose and policy of the statute . . . especially the recurring problem of common-law immunities.").

b. Scholars agree that Section 1988 "direct[s] courts to continue fill[ing] in the gaps in civil rights legislation by applying and continuing to develop the corpus of federal common law, with modifications and within limitations imposed by state statutes and constitutions." Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CAL. L. REV. ONLINE 40, 53 (2018) (citing Kreimer, *supra*, at 628-33); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CAL. L. REV. 933, 993 (2019). Even opponents concede that the current form of the doctrine could be justifiable if Section 1983 is conceived as a common law statute. *See* Baude, *supra*, at 78.

On its face, Section 1988 empowers the Court to develop a federal common law of civil rights under Section 1983—including qualified immunity. "As an example of federal common law . . . *Harlow's* formulation of qualified immunity fits comfortably within § 1988(a). . . . Thus, under § 1988(a), the Court properly imported the common law judgment it made in *Harlow* into § 1983 immunity jurisprudence." Rosenthal, *supra*, at 570.

B. Congress Has Reenacted, and Acquiesced in, Qualified Immunity.

Congress is presumed to be aware of this Court's prior statutory interpretations and to adopt those

interpretations when statutes are re-enacted without a relevant change. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009).

Since *Harlow*'s application to Section 1983, Congress has amended the statute without modifying or overriding the objective qualified immunity standard. In 1996, Congress amended Section 1983 in the Federal Courts Improvement Act of 1996. 110 Stat. 3847, 3853 §309(c).[4] The amendments did not disturb the Court's qualified immunity standard or precedents.

Because qualified immunity's objective standard was well-settled by 1996, Section 1983's reenactment without changes "provides strong support for the proposition that Congress has accepted, and even endorsed, the Court's approach." Levin & Wells, *supra*, at 69. Congress has acquiesced in the interpretation this Court has given. *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 139 (2008).

Recent legislative activity also shows Congress's acquiescence (and the stronger stare decisis effect *see infra* §(C)). There have been recent proposals to abolish qualified immunity under Section 1983. Rosenthal, *supra*, at 551 (citing H.R. 7120, 116th Cong. §102 (2020)). But Congress has not acted. Its refusal establishes acceptance of the doctrine. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 457 (2015).

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[4] Section 1988 was also amended.

C. Let Qualified Immunity Stand.

1. Statutory Stare Decisis Applies.

Jackson posits that qualified immunity should not be retained as a matter of stare decisis. Cross-Pet.30. To avoid super-strong statutory stare decisis, *Kimble*, 576 U.S. at 456, Jackson contends that the Court is not *actually* doing what it says it's doing. Cross-Pet.33. According to Jackson, the Court has been engaged in judicial activism rather than statutory interpretation. *Id.*

But, repeatedly, this Court has explained that its qualified immunity doctrine cases are an exercise of *statutory* interpretation. It often "reemphasize[s] that [its] role is to interpret the intent of Congress in enacting §1983, not to make a freewheeling policy choice, and that [it is] guided in interpreting Congress' intent by the common-law tradition." *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

Jackson may not agree with the results of the Court's statutory interpretation, but it *is* statutory interpretation all the same.[5] Suppose Jackson were halfway right (she isn't), statutory stare decisis still applies "even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute." *Kimble*, 576 U.S. at 456. Every interpretive

[5] Jackson asserts that qualified immunity hurts the Judiciary's credibility. Cross-Pet.13-15. But the real harm comes from rhetoric like Jackson's which equates "trust" and "credibility" with favorable outcomes. The Court does not lose credibility or trust when decisions are reached through good faith legal efforts.

decision, "in whatever way reasoned, effectively become[s] part of the statutory scheme, subject (just like the rest) to congressional change." *Id.* And Congress's long acquiescence to the current qualified immunity doctrine enhances the super-strong precedential force given to statutory interpretations. *Watson v. U.S.*, 552 U.S. 74, 82-83 (2007).

2. There is No "Special Justification" to Overrule Qualified Immunity.

a. "As against this superpowered form of *stare decisis*," Jackson offers no "superspecial justification" for overruling qualified immunity except that she thinks it was wrongly adopted. *Kimble*, 576 U.S. at 455-58. This not enough. As shown above, qualified immunity does not rest on a flawed legal foundation. *Cf.* Cross-Pet.31.

b. Jackson next retreats to policy rationales. None warrants dumping qualified immunity. Jackson theorizes that procedural developments at the motion to dismiss and summary judgment stages since *Harlow* render the doctrine unnecessary to prevent meritless lawsuits. Cross-Pet.29. But some statistical studies undermine Jackson's hypothesis.

One district court study between 2011 and 2012 (after *Celotex*, *Twombly*, and *Iqbal*) found motions raising qualified immunity "were only denied in their entirety about one third of the time (31.6%-29.9%) at the motion to dismiss/pleadings stage and 32.2% at the summary judgment stage." Nielson & Walker*, supra*,

at 1879-80 (analyzing Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017)). If one considers "all of the decisions that granted qualified immunity in full or in part or in the alternative, it totals 29.3% of the qualified immunity motions filed." *Id.* at 1880.

The data reveals that qualified immunity is still doing a lot of work to weed out "insubstantial lawsuits" under the current Federal Rules of Civil Procedure. These findings also "cast empirical doubt on the more conventional criticism of qualified immunity that it 'slams the courthouse doors' for civil rights and constitutional claims." *Id.* at 1880 (quotations omitted).

c. Jackson also contends that officers are not taught the "clearly established law" so a fundamental assumption is invalid. Cross-Pet.28. Jackson rests on just one study which only examines California law enforcement materials. *Id.* (citing Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 610 (2021)). No other states or departments were examined—certainly not from Sparks, Nevada.

But Jackson's study supports granting the petition in No. 23-377. It acknowledges the uncertainty about whether precedents other than this Court's can clearly establish law. Schwartz, *supra*, at 614-15. The study laments that officers cannot be expected to memorize the facts and holdings of thousands of qualified immunity cases from this Court, the Circuits, and district courts. *Id.* at 612, 664-65. Still, the study finds that officers are trained on, and have fair notice of, *this*

Court's precedents. *See id.* at 629-30, 683. It insists "[i]f Congress or the Supreme Court decides to amend qualified immunity instead of ending it, the definition of 'clearly established law' should be at the top of the list for adjustment." *Id.* at 678.

The Court can fix Jackson's concern by granting the petition in No. 23-377.

d. Without elaboration, Jackson declares that qualified immunity has proven "unworkable." Cross-Pet.32. She provides no examples beyond some judges' contemplative statements about the doctrine. *Id.*; *see infra* §(E). But "[a] difference of opinion within the Court . . . does not keep the door open for another try at statutory construction" or overcome the "special force" of statutory stare decisis. *Watson*, 552 U.S. at 82.

e. Jackson contends that qualified immunity has disrupted areas of the law by allowing courts to resolve cases without reaching constitutional questions. Cross-Pet.16-17, 32. Yet Jackson's worry is not a defect in the underlying doctrine. Rather, Jackson seeks to relitigate *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), which held that courts have discretion to decide which of the two qualified immunity prongs to consider first. Jackson's complaint is less about qualified immunity and more about the foundational constitutional avoidance doctrine. *Id.* at 241.

In any event, the evidence of alleged constitutional stagnation is equivocal. Rosenthal, *supra*, at 610. After *Pearson*, courts still "reach the merits in the overwhelming majority of qualified immunity cases (81.1%,

80.5%, and 73.3% of cases in the three studies)." *Id*. This Court also "either reached the merits or directed the lower courts to reach the merits in half of them." *Id.* at 611. It is hard to see any disruption in constitutional development, assuming there was universal agreement on the proper rate of development to start. *Id.* at 612.

f. On the flipside, overruling qualified immunity would have disrupting effects on wide swaths of civil rights law. Abandoning qualified immunity would require revisiting or overruling other precedents like *Monroe v. Pape*, 365 U.S. 167, 187 (1961) and its expansion of liability and litigation. *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). There can't be a lopsided approach to Section 1983. *Cole v. Carson*, 935 F.3d 444, 479 (5th Cir. 2019) (Ho, J., dissenting).

g. Finally, Jackson asserts that indemnification policies insulate officers from fretting over crushing damage awards and, as a result, qualified immunity is not needed to prevent a chilling effect on the execution of the law. Cross-Pet.28-29.

Jackson misses that fear of liability may lead to underenforcement of laws (and under protection) even if damages are ultimately paid by government employers (and taxpayers). "[T]here is at least a reasonable chance that fear of liability—which will be paid for out of the public fisc—may *sometimes* cause governments to adopt policies that favor less aggressive action for fear of crossing constitutional lines that cannot be

identified ex ante." Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 282 (2020).

Qualified immunity is therefore implicated when governmental bodies—especially smaller ones like Cross-Respondents'—may have less ability to protect citizens due to liability risk. *Id*. at 283-84.

h. Indemnification, however, is significant evidence of the heavy reliance engendered by qualified immunity. "[W]idespread indemnification supports qualified immunity as a stare decisis matter because [it] demonstrates deep reliance. The way state and local governments have arranged their affairs, including how resources are allocated to various government functions and services . . . is built against a backdrop of qualified immunity." *Id.* at 263. Governmental budgets, tax rates, bond obligations, hiring, and employee salaries have been set in a qualified immunity environment. *See id.* at 268. These things directly impact finances and "necessarily affect[] the amount and nature of public services provided and the vigor with which those services are provided, especially where litigation is most likely." *Id.*

These arrangements emerge from complex interactions between state and local governments, police departments, insurers, and citizens. *See id.* at 288. "[D]isrupting qualified immunity, which is a part of those ecosystems, would upset the reliance interests of all of those stakeholders who helped pass laws,

regulations, and ordinances and entered into contractual arrangements against that backdrop." *Id.*

"[C]oncerns of *stare decisis* are thus 'at their acme'" when parties have negotiated contracts and structured other transactions against the backdrop of immunity. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014).

Given the sovereign financial and law execution considerations involved, reversing or modifying qualified immunity would affect states *as states* and governments *as governments*. *Id.* As a consequence, any drastic action would have far-reaching federalism implications. Nielson & Walker, *Qualified Immunity and Federalism*, *supra*, at 235-38, 259-63.

This all leads to the conclusion that there is monumental reliance on qualified immunity from top to bottom. So long as there is a "reasonable possibility" of reliance on a statutory precedent, the Court will not overturn it. *Kimble*, 576 U.S. at 457. Because qualified immunity is an interpretation of Section 1983, Congress is always free to change it. *Id.* at 456. Jackson should take her concerns "across the street, and Congress can correct any mistake it sees." *Id.*

D. The Court Should Await a Better Vehicle.

Jackson claims this case is an appropriate vehicle to reconsider the doctrine of qualified immunity *in toto*. Cross-Pet.34. She asserts that her question presented is logically prior to the questions presented in No.

23-377—whether this Court's precedents are the only source for clearly established law and, if not, whether the Ninth Circuit construed its precedents too abstractly. Pet.i.

But Jackson did not fully develop her legal arguments below even though she pressed the general issue that qualified immunity should not apply at all. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

Moreover, this case only presents the application of qualified immunity to excessive force and false arrest or unlawful seizure cases. The Court will have no need to address qualified immunity's application in any other context or across-the-board. *Cf.* Cross-Pet.15-16.

And the outcome of this case will not change even if Jackson prevails on her question. As the body camera footage shows, Cross-Respondents' actions cannot conceivably be considered a constitutional violation under any possible standard the Court could adopt—without or without qualified immunity.[6]

Thus, the Court should wait for a better vehicle to consider any wholesale reversal of qualified immunity

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[6] Jackson does not challenge the Ninth Circuit's vicarious liability or excessive force rulings for Officer Edmonson. App.4.

even if Jackson's question is "fairly included" within the issues presented in No. 23-377. Rule 14(a).

E. Jackson Overstates the Debate and Need to Revisit Qualified Immunity.

Jackson contends there are growing calls in this Court and elsewhere to overturn qualified immunity. Cross-Pet.10. She claims "[j]urists lack confidence in the qualified immunity framework." *Id.* To be sure, Justices and judges have sometimes reflected on the doctrine's moorings. Even after those deliberations, individual Justices continue to author or join opinions applying qualified immunity, and the Court continues to summarily reverse misapplications of it. Thus, despite intermittent introspection, qualified immunity remains firmly ensconced in this Court's precedents.

Virtually every Justice has written or joined a unanimous opinion applying qualified immunity and explaining its importance. *See* Nielson & Walker, *supra*, at 1858. Even so, Jackson calls out Justices Thomas and Sotomayor as models of the supposed "biting and sustained" criticism of qualified immunity in this Court. Cross-Pet.10-11.

But both Justices have joined summary reversals for denying qualified immunity in excessive force cases after writing separately about the doctrine. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021); *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9 (2021); *see also Egbert v. Boule*, 596 U.S. 482, 523 n.5, (2022) (Sotomayor, J., concurring in the judgment in part and

dissenting in part in *Bivens* action, stating "[t]he doctrine of qualified immunity will continue to protect government officials from liability for damages."); *D.C. v. Wesby*, 583 U.S. 48, (2018) (Thomas, J., after *Ziglar*).

In 2022, six Justices reassured officers that they "are still protected . . . by qualified immunity" in Fourth Amendment cases. *Thompson v. Clark*, 596 U.S. 36, 49-50 (2022). This is not the track record of a doctrine on shaky ground.

Without much uncertainty in this Court, Jackson searches for a few critiques in the lower courts. Cross-Pet.11-14. Jackson counts Judge Willett's dissent in *Cole v. Carson*, as part of a "a growing 'chorus of jurists' [that] has continued to explicitly call on this Court to act." Cross-Pet.12-13. Yet Judge Willett also recognizes that this "Court's direction on qualified immunity is increasingly unsubtle" and "the doctrine enjoys resounding, *even hardening favor at the Court*" despite a few Justices writing or joining opinions questioning it. 935 F.3d at 471-72 & n.10 (emphasis added).

If there is a legitimate controversy to be resolved, granting the underlying petition in No. 23-377 will end it.

Indeed, Judge Willett acknowledges that one of the "'mend it, don't end it' options" for qualified immunity is for the Court to "confront the widespread inter-circuit confusion on what constitutes 'clearly established law,'" *Cole*, 935 F.3d at 472 (Willett, J.,

dissenting)—the first question presented in Case No. 23-377.

CONCLUSION

For these reasons, the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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