No.

In the Supreme Court of the United States

ADRIAN MARTINEZ,

Petitioner,

v.

SEAN JENNEIAHN, LAUREN MACDONALD & PETER VORIS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Police officers released a dog on an unarmed, injured, unconscious man who had wandered out of a hospital in a disoriented daze wearing nothing but his boxers and a hospital gown, and had then passed out in a storage closet. In the four minutes leading up to the use of canine force, the officers gave no warning of their intention to use a dog bite. And, for fifteen to twenty seconds after the bite began, the dog's handler actively encouraged the dog to keep biting, ultimately leaving Petitioner's forearm looking—in the words of one of the officers—"like ground hamburger."

The officers won summary judgment on the basis of qualified immunity. The Tenth Circuit, finding that the multitude of dog-bite and other use-of-force cases cited by petitioner—including two with nearly identical facts to those here—were insufficient to clearly establish the unlawfulness of this conduct, affirmed. The questions presented are:

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

2. Whether the Tenth Circuit correctly decided that the officers were entitled to qualified immunity.

RELATED PROCEEDINGS

Martinez v. *Jenneiahn*, No. 22-1219
(10th Cir. July 12, 2023)

Martinez v. *Jenneiahn*, No. 19-cv-03289
(D. Colo. June 17, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Adrian Martinez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit (App., *infra*, 1a-16a) is unreported, but is available at 2023 WL 4482404. The district court's opinion (App., *infra*, 17a-33a) is also unreported, but is available at 2022 WL 2191563.

JURISDICTION

The court of appeals entered judgment on July 12, 2023; a timely petition for rehearing was denied on August 7, 2023. On October 25, 2023, Justice Gorsuch extended the time to file until December 5, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION 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, 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

This case is emblematic of the manner in which qualified immunity has come to be applied by the

lower courts. Police officers caused a trained dog to bite and severely injure Adrian Martinez, who was, at the time, asleep or unconscious in an empty storage closet wearing nothing but his boxers. The officers knew that he had ended up in the closet by wandering out of the hospital half naked and disoriented, having suffered a severe beating the night before. They had no reason to suspect that Martinez was armed or otherwise dangerous; if anything, they had reason to believe he was *not* armed, since other officers had accompanied him and his belongings to the hospital after the beating. The officers were not confronted with an exigency and made no split-second decisions; rather, they stood around outside the closet for ten to twelve minutes planning the dog bite. In the four minutes immediately preceding the use of force, they gave Martinez no warning of their plan to release a dog. And once the dog started biting, its handler actively encouraged it to continue for fifteen to twenty seconds, giving no reason other than that he could not see Martinez's hands.

The court of appeals found the officers entitled to qualified immunity on these facts. Apparently looking for a single precedent involving precisely the same circumstances, the court of appeals distinguished case after case based on fine-grained factual differences, rather than considering whether the case law as a whole would put a reasonable officer on notice that this conduct was illegal. And, having thus disposed of the rest of the cases cited, the court concluded that two cases it admitted *were* precisely on point could not clearly establish the law standing alone—since it had already discarded every other case.

This Court's review is warranted for two independent reasons.

First, the Court should reverse or recalibrate the doctrine of qualified immunity. As more and more jurists have explained even while applying the doctrine, qualified immunity is an atextual result of judicial policymaking that does not even satisfy the policy goals it was created to serve. This situation is untenable, and the Court should address it now.

Second, even assuming the validity of qualified immunity, the court of appeals stretched it past the breaking point here. In finding immunity, the court disregarded what should have been obvious: The officers had fair warning that they could not sic a dog on an unarmed, sleeping individual who was not attempting to evade police custody.

A. Factual Background

Late in the evening on February 17, 2018, Petitioner Adrian Martinez was pepper-sprayed, tasered, pistol-whipped, and shot with rubber bullets by two bail bondsmen who were looking for someone else. App., *infra*, 2a & n.2. He was later diagnosed with a traumatic brain injury resulting from this beating. C.A. J.A. 1348. When Erie Police arrived, they did not arrest Martinez; instead, they had him transported and admitted to the hospital for his injuries. App., *infra*, 2a. The two bail bondsmen were later arrested and found guilty of assault. C.A. J.A. at 184-86, 188.

The following morning, Martinez woke up in the hospital. App., *infra*, 18a. Confused, alone, and in pain, he left without checking out, clad only in his boxers and a hospital gown. *Id*.; see C.A. J.A. 741. Hospital security did not try to stop Martinez from leaving. *Id.* at 418. But they did notify the Lafayette Police that Martinez had outstanding failure-to-appear warrants for non-violent crimes; that he had been badly beaten the night before; that he had been hospitalized,

but not arrested nor charged; and that now, he had left. App., *infra*, 18a. The Lafayette Police were dispatched to locate him. *Ibid.*

Martinez wandered into the parking lot of an apartment complex next door. App., *infra*, 18a. There, he sought to receive a ride home from an unknown driver, entered and exited a vacant truck, and moved past a parked police car. *Id.* at 19a. The officers in that car said nothing to Martinez, who continued on his haphazard way. To one witness, Martinez simply appeared "confused" and "lost." *Id.* at 2a.

Martinez ultimately made his way to a small closet inside an apartment building in the complex. App., *infra*, 2a-3a. Once there, he went inside, pulled the IV out of his arm, and "passed out." *Id.* at 3a; C.A. J.A. 1405.

Some two hours after police began to search for him, Kenzi, Officer Jenneiahn's Belgian Malinois canine, located Martinez behind the closet door. App., *infra*, 2a-3a. Kenzi alerted and began barking. *Id.* at 3a, 19a; C.A. J.A. 83. Six officers (including the two from the car that had earlier seen Martinez move by nearly naked in a hospital gown) gathered outside the closet; for ten to twelve minutes, they listened as no sounds and no movement came from behind the door. App., *infra*, 3a, 20a.

During that time, Officers Jenneiahn and Voris hatched a plan to use Kenzi to apprehend Martinez. App., *infra*, 3a. Specifically, Voris would pry open the locked closet door with a crowbar. *Id.* at 3a, 19a. Jenneiahn would release Kenzi to "neutralize Martinez." *Id.* at 3a. And the remaining four officers would stand by with "a taser, a shotgun, and a firearm" at the ready. *Ibid.*

Four minutes before Voris opened the closet door, a sheriff's deputy arrived. Her body-worn camera was blocked by a staircase, but it did capture the sound of the incident. D. Ct. Dkt. 74, at 00:00-03:43. And for those four minutes immediately prior to the use of force, no officer communicated with Martinez at all, much less warned him that they planned to release a dog to bite him. *Id.*; see also App., *infra*, 29a.

Eventually, Officer Voris pried open the door of the closet and stepped to the side, revealing Martinez: unconscious, injured, and unclothed. App., *infra*, 20. Martinez was lying motionless in the fetal position in an otherwise empty closet, with his back to the officers. C.A. J.A. 121. At that time, Officer Jenneiahn could have pulled back on the leash to prevent Kenzi from attacking. But he deliberately chose not to, because he could not "see [Martinez's] hands." C.A. J.A. 101.

So Jenneiahn released Kenzi. Martinez woke up screaming in pain, but did not resist, attempt to flee, or attempt to fight off the dog. App., *infra*, 25a. Jenneiahn repeatedly encouraged Kenzi to "get him"[1] while other officers screamed for Martinez to raise his hands. *Id.* at 3a; D. Ct. Dkt. 74, at 03:46-04:18. After fifteen to twenty seconds, Kenzi was forcibly removed from Martinez's arm. App., *infra*, 3a.

Martinez suffered extensive injuries to his forearm. App., *infra*, 3a, 20a. As one officer later described it, Martinez's lacerated arm looked "like ground hamburger." C.A. J.A. 698. He has been left with permanent neurological injuries in his hand and arm as a

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[1] Officer Jenneiahn later admitted that he "regret[ted]" repeatedly encouraging Kenzi with the phrase "get him," because that is the same language used to train police dogs to tear apart toys during training sessions. C.A. J.A. 667-670.

result of the dog bite—he has been assigned a 42% disability rating—leaving him unable to perform work as an auto mechanic, his trade at the time of the incident. C.A. J.A. 1349, 1362-1367.

Afterward, the officers joked that unclothed, unconscious, injured Martinez must be "mentally retarded" for not voluntarily coming outside when the dog began barking. D. Ct. Dkt. 72, at 5:57-6:02.

B. Proceedings Below

1. Martinez brought this suit against Officers Jenneiahn, Voris, and Macdonald, alleging that their conduct violated the Fourth Amendment. The officers moved for summary judgment on the basis of qualified immunity.

The district court granted their motion. Although the court found itself "hard-pressed to conclude that the decision to use Kenzi to restrain Martinez was unreasonable," it did not hold that there was no constitutional violation. App., *infra*, 26a-27a. Instead, the court assumed a constitutional violation, but concluded that the officers were entitled to qualified immunity. *Id.* at 27a. The court faulted Martinez for not being visible to officers "at the time they decided to deploy Kenzi to seize Martinez," using that fact to distinguish this case from two out-of-circuit cases that "come[] close to the facts before the Court." *Id.* at 30a-31a.

2. The court of appeals affirmed. The court held that the law was not clearly established, distinguishing *eighteen* individual circuit cases cited by Martinez one by one. App., *infra*, 7a-15a.

Like the district court, the court of appeals faulted Martinez for not producing cases "involv[ing] a dog, outstanding felony arrest warrants, a suspect who had hidden in a small closet out of officers' view, or a

suspect who had evaded police for over two hours." App., *infra*, 10a. And even where Martinez did raise cases involving unconstitutionally excessive dog bites, the court of appeals explained that (1) the "length" of the dog bites at issue was distinguishable from the twenty-second bite here, and (2) officers could see those suspects before they were bitten. App., *infra*, 10a-14a. The court therefore affirmed on qualified-immunity grounds.

REASONS FOR GRANTING THE PETITION

The Court's intervention is needed to resolve the persistent critiques of qualified immunity. Even as they apply the doctrine, judges across the country announce that they believe qualified immunity is wrong, essentially telling 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.

More, the analysis and result below are gravely wrong even under current law. The court of appeals purported to follow this Court's precedents, but defined clearly established law at such an absurdly granular level that prior dog-bite cases were deemed irrelevant because, for example, the suspect was hiding in "a small wood-fenced area" rather than "a locked closet" as here. App., *infra*, 11a. Even if the Court does not take up the broader validity of qualified immunity, therefore, it should summarily vacate and remand.

I. THE COURT SHOULD OVERTURN QUALIFIED IMMUNITY.

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 and 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.

a. Judicial criticism of qualified immunity in recent years has been biting and sustained. 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; 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 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 qualified immunity); *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) (similar).

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.").

This untenable result undermines the legitimacy of the judicial system. The 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) (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).

Beyond the raw numbers, the continuing vitality of qualified immunity is of profound inherent importance in individual cases. In every case where it is invoked, qualified immunity has the potential to curtail fundamental civil liberties. Apart from the obvious context of excessive force, 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) (action against a college that allegedly restrained students' free speech); *Horvath*, 946 F.3d 787 (action by firefighter alleging that COVID-19 policies violated his free-exercise rights); *Paulk* v. *Kearns*, 596 F. Supp. 3d 491 (W.D.N.Y. 2022) (action alleging that pistol permitting office had violated 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.

Besides 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 "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."). The lack of constitutional decision-making "stunt[s] the development of constitutional rights." 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). 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 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 can stare decisis save the doctrine.

1. Qualified immunity is judge-created and atextual.

a. Nothing in the 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 (emphases 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); *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 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, there "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 [founding-era] rule of personal official liability"). Indeed, there is a compelling case both that the common-law good faith defense was specific to the tort of false arrest, and that common-law immunities did not apply to constitutional violations in any event. See *id.* at 58-60 ; *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 found an official liable "by the simple act of enforcing a void law" with "no allegation of malice need[ed]" (*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. 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).

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, current qualified immunity doctrine is indefensible on those grounds.

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, *e.g.*, *Price* v. *Montgomery County*, 72 F.4th 711, 727 n.1 (6th Cir. 2023) (Nalbandian, J., concurring in part) (discussing this scholarship).

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.) (calling 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").

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 15-17, *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.").

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 immunities. Indeed, that is precisely what the legislative debates 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).

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

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 commission "to revise, simplify, arrange, and consolidate" the accumulated session laws—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. Rev. Stat. § 5596, at 1085 (1874). But it immediately became apparent that the enacted text contained hundreds of errors. 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.[2] Learning from this process, Congress would never again enact a statutory codification into positive law. Wan & Feidler, *supra*, at 1014, 1016.

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

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[2] 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.

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 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) (similar). And 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).

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)). 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 18-21, *supra*.

While such evidence of intent likely could not overcome plain statutory language to the contrary, 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.

Not only is qualified immunity is no longer tethered to its original legal justification based on common-law immunities, it isnow untethered 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."); 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 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.'"). 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 conduct 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 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 conduct as a factual matter, the essential premise 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 lawsuits—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 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 previously offered for the immunity doctrine.

b. Qualified immunity also is unnecessary to prevent "insubstantial lawsuits" from reaching trial. *Harlow*, 457 U.S. at 814, 818.

As Justice Kennedy has explained, "*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) (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 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.

In sum, public policy—the sole basis on which the current version of qualified immunity is premised—cannot justify the doctrine's continued existence.

4. Stare decisis cannot save qualified immunity.

Finally, stare decisis is no impediment to reconsideration: All of the Court's stare decisis factors counsel in favor of overturning qualified immunity. See *Dobbs* v. *Jackson Women's Health Organization*, 142 S. Ct. 2228, 2265 (2022).

First, "the nature of the Court's error" and "the quality of the reasoning" militate in favor of correction. *Dobbs*, 142 S. Ct. at 2265. As described above, not only is qualified immunity "egregiously wrong and deeply damaging" (*ibid.*), its current version was adopted through naked judicial policymaking, a form

of reasoning no longer considered legitimate. And as just explained, even the Court's stated policy goals have been negated by subsequent developments. See pages 22-25, *supra*. This is thus a quintessential scenario in which "doctrinal underpinnings" have "eroded over time." 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 repeatedly change the doctrine. See *Pierson*, 386 U.S. at 555 (creating subjective "good-faith" defense); *Harlow*, 457 U.S. at 818 (replacing subjective standard with objective test used today); *Saucier* v. *Katz*, 533 U.S. 194 (2001) (announcing requirement that courts reach the constitutional merits before qualified immunity); *Pearson*, 555 U.S. at 233-234 (overruling *Saucier*'s sequencing requirement). Qualified immunity has also disrupted "other areas of law" (*Dobbs*, 142 S. Ct. at 2275), particularly the orderly development of the underlying constitutional law, through the constitutional stagnation phenomenon discussed above. See pages 13-14, *supra*.

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. See *Monell* v. *Department of Soc. Servs. of City of N.Y.,* 436 U.S. 658, 700 (1978).

Finally, stare decisis is ordinarily most compelling when interpreting statutes. See, *e.g.*, *Kimble*, 576 U.S. at 456. But qualified immunity is not really the result of statutory interpretation at all; rather, it is judge-made policy. See, *e.g.*, *Crawford-El*, 523 U.S. at 611-612 (Scalia, J., dissenting) (describing the judicial

creation of qualified immunity as an "essentially legislative activity"). The Court has therefore previously observed that super-strong statutory stare decisis is not "implicat[ed]" by qualified immunity. *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 qualms about adjusting or even "completely reformulat[ing]" the doctrine. *Anderson*, 483 U.S. at 645; see page 26, *supra*. The Court should take this case to do so once again.

II. THE COURT OF APPEALS TOOK THE CLEARLY ESTABLISHED LAW INQUIRY TO ABSURDITY.

Even assuming the continued validity of qualified immunity, the court of appeals' application of the doctrine here was plainly unreasonable and contrary to this Court's precedents. The Court should summarily vacate and remand for further proceedings. See *Taylor* v. *Riojas*, 141 S. Ct. 52, 54 (2020) (summary vacatur where "any reasonable officer should have realized" the constitutional violation); *McCoy* v. *Alamu*, 141 S. Ct. 1364 (2021) (vacating and remanding Eighth Amendment excessive-force case "in light of" *Taylor*).

a. To recap, officers were called to locate a dazed assault victim with a traumatic brain injury, who had wandered out of the hospital wearing only boxers and a hospital gown. At the time Martinez left the hospital, he could not have been armed, since he had been escorted there by other officers after being severely beaten. And while he had what the court of appeals refers to as outstanding "felony warrants" (App., *infra*, 2a), those warrants were for non-violent offenses (*id.* at 19a), and he was not currently engaged in or fleeing any crime.

After locating Martinez in a locked closet using a canine, as many as six armed officers stood around for ten to twelve minutes; in that time—with no exigency or need for split-second decision-making—they came up with a plan to pry open the door and then unleash a police dog "trained to find and bite the suspect." C.A. J.A. 95. While the officers claim to have warned Martinez of the impending action, body-camera footage reveals that the officers made no attempt to do so in the four minutes immediately leading up to the use of force.

When the door was opened, Martinez was revealed lying in the fetal position on the ground; Officer Jenneiahn released the dog anyway. C.A. J.A. 101, 121. And, once the canine started biting, for fifteen to twenty seconds Officer Jenneiahn repeatedly urged her to "get him"—a command that "encouraged the dog to continue to bite." C.A. J.A. 667. As a result, Martinez was left with "ground hamburger" for a forearm, and permanent neurological damage rendering him disabled and unable to work as a mechanic. *Id.* at 698, 1349, 1360-1367.

b. This course of conduct was clearly unlawful, as any reasonable officer should have known.

1. To start with the underlying constitutional violation, *none* of the *Graham* factors—"the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"—justifies the use of violent force here. *Graham* v. *Connor*, 490 U.S. 386, 396 (1989).

First, if there even was a "crime at issue" (*Graham*, 490 U.S. at 396), it was a petty trespassing offense under Colorado law, a level of offense less

serious than a misdemeanor. See Colo. Rev. Stat. §§ 18-4-503, -504 (various trespass offenses). As noted above, while Martinez did have outstanding non-violent felony warrants, the officers did not track him down in an attempt to arrest him on those warrants; instead, they simply responded to a call from the hospital. See, *e.g.*, *Cavanaugh* v. *Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010) (first factor did not favor force where officer "responded to Mr. Cavanaugh's non-emergency request for help finding Ms. Cavanaugh, not to a report of a criminal activity").

Second, the officers had no fact-based reason to suspect that Martinez was armed or otherwise "pose[d] an immediate threat to the safety of the officers or others" (*Graham*, 490 U.S. at 396); they claim only that they did not know for sure that he *was not* armed, because they could not see his hands. (Of course, that is because they gave him no opportunity to show his hands before releasing the dog.) Cf., *e.g.*, *Graves* v. *Malone*, 810 F. Appx. 414, 423 (6th Cir. 2020) ("[N]o reasonable officer would * * * perceive a threat of serious physical harm from a suspect who was found * * * unarmed, silent, and constrained by position.").

Third, nor was Martinez "actively resisting arrest" or fleeing at the time of the force (*Graham*, 490 U.S. at 396): he was unconscious in a closet. Having never been under arrest at the hospital, he did not flee; he simply left. See, *e.g.*, C.A. J.A. 414-415 (affidavit of escorting officer), 416-419 (affidavit of hospital security officer). And the fact that officers said nothing to him as they saw him moving past their squad car only confirms that he was not evading attempted custody. App., *infra*, 19a; see *Michigan* v. *Chesternut*, 486 U.S. 567, 573, 575 (1988) (concluding that "a reasonable person would [not] have believed that he was

not free to leave," where officers in squad car did not "activate[] a siren or flashers;" "command[] respondent to halt, or display[] any weapons"). Moreover, this case does not implicate the doctrine's "allowance" for "split-second judgments" and "tense, uncertain, and rapidly evolving" circumstances. *Graham*, 490 U.S. at 396-397. The officers here had ample time—ten to twelve minutes—to decide what to do. And what they decided was to sic a police dog on someone they knew to be a seriously injured assault victim, without giving him any warning or opportunity to surrender once they opened the closet door.

2. Neither court below held that the officers' conduct was lawful; rather, both the district court and the court of appeals rested solely on their analysis of clearly established law. App., *infra*, 7a-15a, 27a-31a. But that analysis defined clearly established law at an absurdly granular level of generality, in plain violation of the Court's repeated admonition that it "is not necessary * * * that 'the very action in question has previously been held unlawful.'" *Ziglar*, 582 S. Ct. at 151 (2017) (quoting *Anderson*, 483 U.S. at 640); see also *ibid.* ("That is, an officer might lose qualified immunity even if there is no reported case 'directly on point.'").

In addition to many cases clearly establishing the illegality of using violent force against a non-resisting, non-dangerous individual as a more general matter,[3] Martinez cited to the court of appeals *six* circuit cases holding the use of a dog bite unconstitutional in

[3] The court of appeals found these cases "not sufficiently on-point," for reasons including that "[n]one involved a dog, outstanding felony arrest warrants, a suspect who had hidden in a small closet out of officers' view, or a suspect who had evaded police for over two hours." App., *infra*, 10a.

similar circumstances. See *Vette* v. *K-9 Unit Deputy Sanders*, 989 F.3d 1154 (10th Cir. 2021);[4] *Cooper* v. *Brown*, 844 F.3d 517 (5th Cir. 2016); *Campbell* v. *City of Springboro*, 700 F.3d 779 (6th Cir. 2012); *Priester* v. *City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000); *Chew* v. *Gates*, 27 F.3d 1432 (9th Cir. 1994); *Watkins* v. *City of Oakland*, 145 F.3d 1087 (9th Cir. 1998).[5]

In addition to quibbles about the length of time the dog bites lasted,[6] the court of appeals' primary attempt to distinguish these cases was that unlike in three of them—*Cooper*, *Campbell*, and *Priester*—"the Officers here could not see Mr. Martinez or otherwise assess the threat that he posed before using the dog." App., *infra*, 12a. But *that is precisely the point*: Given that the officers had no reason to suspect that Martinez was dangerous, the fact that they did not attempt to "assess the threat he posed"—while lying on the floor of an empty closet in the fetal position—before releasing the dog makes their conduct *more*

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[4] The court rejected reliance on *Vette* because it "was decided after the incident" (App., *infra*, 9a)—but *Vette* held that the illegality of the dog bite in that case was *already* clearly established when it occurred in 2017. See *id.* n.4.

[5] Martinez also presented several additional district court dog-bite cases from within the Tenth Circuit, but the court of appeals dismissed them out of hand on the grounds that "district court cases do not establish clear law." App., *infra*, 7a n.3; see C.A. Appellant Br. 49-50 (collecting cases).

[6] The difference between a dog bite lasting "one to two minutes" (App., *infra*, 11a) and the twenty seconds Martinez was bitten here—long enough to sing the entire ABCs, or "Happy Birthday" twice—cannot possibly be of constitutional dimension. See Marc Silver, *My Hand-Washing Song: Readers Offer Lyrics For A 20-Second Scrub*, National Public Radio (Mar. 17, 2020). Either is plainly longer than necessary to subdue a non-resisting individual, and is an eternity for the person being bitten.

unreasonable. Cf*., e.g.*, *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1984) (deadly force may be reasonable "[w]here the officer *has probable cause to believe* that a suspect poses a threat of serious physical harm") (emphasis added); see *Chew*, 27 F.3d at 1441 (second *Graham* factor did not justify force in dog-bite case where "the record does not reveal an articulable basis for believing that Chew was armed or that he posed an immediate threat to anyone's safety.").

Two other cases, however, were so squarely on point that the court of appeals could not distinguish them. As the court described, another court of appeals had found a constitutional violation where police released a dog on a criminal suspect—who had fled a traffic stop and had multiple outstanding felony warrants—"crouching between two metal bins," because "the plaintiff did not pose an immediate threat" at the time of the force. App., *infra*, 13a (quoting *Chew*, 27 F.3d at 1436).

And the same court held that a dog bite lasting between "ten to fifteen" and "thirty seconds" was clearly established as unconstitutional due to the "excessive duration of the bite and improper encouragement of a continuation of the attack by officers," notwithstanding that the suspect, "while resisting the dog, failed to show his hands to prove that he was unarmed"—all of which exactly parallels the facts of this case. *Watkins*, 145 F.3d at 1090.

But the court rejected Martinez's reliance on these cases, too—not because they weren't relevant, but because of the court's view that "two cases from one other circuit are insufficient to clearly establish the law" even when the facts are nearly identical. App., *infra*, 14a. That is, having dismissed the *sixteen* other circuit cases cited by Martinez based on dubious

factual distinctions—along with five in-circuit district court dog-bite cases, see note 5, *supra*—the court found the remaining, undeniably on-point circuit cases insufficiently numerous to clearly establish the law.

3. This approach is not consistent with this Court's precedents. While the Court has warned that the clearly established law inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition" (*Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004)), that means that it is improper "to find fair warning [solely] in the general tests set out in *Graham* and *Garner*," outside of an obvious case (*id.* at 199 (reversing court of appeals for finding *Graham* and *Garner* alone clearly established the law)). It does *not* mean that a case that happened on a Tuesday cannot clearly establish the law for events on Wednesday—or, as the court suggested here, that a case where "the police used both a dog and a helicopter to assist in the search" says nothing about the constitutionality of dog bites that do not involve helicopters. App., *infra*, 14a n.6.

The Court should not permit this plain misapplication of its qualified immunity precedents to stand—even if it does not take this case to reevaluate the doctrine in whole.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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