No. 23-

IN THE

Supreme Court of the United States

RALPH HARRISON BENNING,

Petitioner,

v.

TYRONE OLIVER, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS; MARGARET PATTERSON, GEORGIA DEPARTMENT OF CORRECTIONS; JENNIFER EDGAR, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Easha Anand
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

R. Stanton Jones
Counsel of Record
Andrew T. Tutt
Katie Weng
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
(202) 942-5000
stanton.jones@arnoldporter.com

QUESTION PRESENTED

Nearly 50 years ago, this Court held that the Due Process Clause requires that a prisoner be notified and given the opportunity to be heard if the prison intercepts outgoing "correspondence" or "communication." *Procunier v. Martinez*, 416 U.S. 396, 418-19 (1974). It is undisputed that respondents intercepted three of Mr. Benning's outgoing emails and did not give him notice or an opportunity to be heard. The Eleventh Circuit correctly held that conduct violated the Due Process Clause, but nonetheless granted qualified immunity to respondents because *Procunier* was about mail, not email.

1. Where the Supreme Court has required that a prisoner is entitled to procedural safeguards if their "correspondence" is intercepted, are respondents entitled to qualified immunity simply because the correspondence in the Supreme Court case was postal mail, rather than email?

The judge-made doctrine of qualified immunity has been assailed as inconsistent with the text of 42 U.S.C. § 1983, untethered from the common law, and divorced from its ostensible policy rationales. In addition, qualified immunity has been applied to all public employees, without regard to whether those officials would have received qualified immunity at common law, and all kinds of claims, without regard to whether this Court's concern for "split-second decisionmaking" is relevant to the case at hand.

2. Should the doctrine of qualified immunity be abolished, pared back, or clarified?

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Benning v. Commissioner, Georgia Department of Corrections Margaret Patterson*, No. 21-11982 (11th Cir. Aug. 17, 2023) (denying petition for rehearing en banc)
- *Benning v. Commissioner, Georgia Department of Corrections Margaret Patterson*, No. 21-11982 (11th Cir. June 23, 2023)
- *Benning v. Commissioner Gregory C. Doazier*, No. 5:18-cv-0087 (M.D. Ga. Apr. 30, 2021).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued **Page(s)**

Cases—Continued **Page(s)**

Cases—Continued **Page(s)**

Cases—Continued **Page(s)**

Constitutional Provisions

Statutes

Other Authorities

Other Authorities—Continued **Page(s)**

Other Authorities—Continued **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ralph Harrison Benning respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported and available at 71 F.4th 1324. Pet. App. 1a-32a. The opinion of the United States District Court for the Middle District of Georgia granting respondents' motion for summary judgment is unreported but available at 2021 WL 1713333. Pet. App. 33a-61a.

JURISDICTION

The opinion of the court of appeals was filed on June 23, 2023. The Eleventh Circuit denied a timely petition for rehearing en banc on August 17, 2023. On October 23, 2023, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including December 15, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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 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 OF THE CASE

1. The Georgia Department of Corrections partners with a private company, JPay, to provide electronic mail services to incarcerated individuals. Pet. App. 2a. Each email sent or received by a prisoner requires a JPay stamp, which cost $0.35. Court of Appeals Appendix (C.A.A.) 48.

Every email is routed through the Georgia Department of Corrections Central Intelligence Unit and automatically screened for certain key words and phrases. C.A.A. 89. An email containing one of those key words or phrases is flagged for additional review

by the Intelligence Unit, and the email does not reach its intended recipient unless an Intelligence Unit employee reviews the email and releases it. If the employee does not release the email, he can either "indefinitely detain[]" the email or "discard[]" it "entirely." C.A.A. 132.

The Georgia Department of Corrections has imposed a number of policies restricting prisoners' ability to communicate via email. One such limitation: "Offenders shall not request emails to be forwarded, sent, or mailed to others." Pet. App. 3a.

2. Petitioner Ralph Harrison Benning is incarcerated at Wilcox State Prison, operated by the Georgia Department of Corrections. Pet. App. 34a. In September and October 2017, Mr. Benning attempted to send three emails to his sister, Elizabeth Knott. All three emails raised concerns about gang activity and corruption at the prison. Pet. App. 3a.

The first email, sent on September 24, 2017, included a letter seeking to raise awareness about corruption at the Georgia Department of Corrections. Pet. App. 3a-4a. He asked his sister to send a copy of the letter to his other sisters and to "any else" she thought "might be interested." C.A.A. 123-26. The email never reached Ms. Knott. Instead, Georgia Department of Corrections employees intercepted the email. Pet. App. 4a. The reason provided in the Georgia Department of Corrections internal database was "Entering into a Contract/Engaging in Business." During this litigation, defendants defended intercepting the email based on the policy forbidding a request to forward an email. C.A.A. 123.

The second and third emails were sent on October 9, 2017, also to Ms. Knott. Pet. App. 3a-4a. Mr.

Benning drafted a lengthy message about corruption among prison officials. C.A.A. 112-13, 115-16. Due to JPay's character limits, he sent the message in three separate emails. *Id.* At the end of the email, Mr. Benning mentioned that Ms. Knott could send the letter to congressmen and senators. *Id.* Two of the three emails were flagged for further review and were intercepted. *Id.*

Prison officials did not notify Mr. Benning that any of these emails had been intercepted. Pet. App. 3a-4a. They did not provide Mr. Benning with any explanation for the interception decisions. *Id.* Mr. Benning was given no opportunity to challenge the interception decisions. *Id.*

Mr. Benning learned six months later that his emails were not delivered. C.A.A. 41.

3. In 2018, Mr. Benning, proceeding *pro se*, filed suit under 42 U.S.C. § 1983. He raised First Amendment and procedural due process claims; the latter is at issue in this petition. The district court granted summary judgment to defendants.

4. Mr. Benning appealed to the Eleventh Circuit. Now represented by counsel, he argued that defendants' handling of his emails was unconstitutional under *Procunier v. Martinez*, 416 U.S. 396 (1974). *Procunier* holds that the Due Process Clause requires two things when prison officials intercept "outgoing correspondence": Officials must notify the prisoner of the interception and give him a reasonable opportunity to protest that decision, including the opportunity to complain to someone other than the person who intercepted the correspondence. Respondents argued that *Procunier*

was a case about mail and so did not govern their handling of Mr. Benning's email.

The Eleventh Circuit rejected respondents' arguments and found that their interception of Mr. Benning's messages without notice or an opportunity to be heard violated the Due Process Clause. *First*, the court explained that the emails were no less free speech for being disseminated over the Internet. As the Eleventh Circuit put the point, "[T]he Supreme Court has told us that First Amendment scrutiny is not more relaxed in cyberspace." Pet. App. 10a.

Second, the Eleventh Circuit explained that "the rationale of *Procunier* is concerned with correspondence from inmates, regardless of the form (or medium) the correspondence takes." *Id*. In today's day and age, the court explained, "emails serve as the electronic equivalent of physical letters (i.e. correspondence)"; thus, "it makes both doctrinal and practical sense to treat outgoing email the same as physical letters." Pet. App. 11a.

And *finally*, respondents themselves treat outgoing emails like physical letters. Emails are not immediately transmitted to their intended recipients but are inspected en route. Pet. App. 12a. "From the perspective of the [Georgia Department of Corrections], emails are the functional equivalent of letters written or typed on paper. And we can think of no persuasive reason why prison officials should not be required to provide notice and other procedural safeguards when they intercept or otherwise censor emails." *Id*.

The Eleventh Circuit nevertheless granted qualified immunity to respondents. It found that although the conduct at issue violated the

Constitution, there was no "clearly established law" putting respondents on notice. Pet. App. 16a-18a. It acknowledged that *Procunier* applied its rule to all manner of correspondence. Pet. App. 17a. But since no case had specifically applied *Procunier* to email, Mr. Benning was out of luck. "Although the issue is close," the Eleventh Circuit ultimately granted qualified immunity to respondents.

5. Respondents sought rehearing en banc to challenge the court of appeals' holding that they had violated the Constitution. The petition was denied; no judge called for a vote. Pet. App. 64a.

6. This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Is Wrong And Conflicts With The Opinions Of Other Circuits

1. The concern underlying the current version of the judge-made qualified immunity doctrine is that officers must be "on notice their conduct is unlawful" before being subjected to damages suits. *Saucier v. Katz*, 533 U.S. 196, 206 (2001). An officer is entitled to qualified immunity unless he has violated "clearly established law." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The "clearly established law" must be "fundamentally similar" to the case at hand, but "precise factual correspondence" is not necessary. *Id.* "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning" and "a general constitutional rule already identified in the decisional law may apply with obvious clarity," even though "the very action in question has not previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In this case, the "clearly established law" consists of two cases from this Court. *Procunier v. Martinez*, 416 U.S. 396 (1974), held that the Due Process Clause of the Fourteenth Amendment protects prisoners' interest in "uncensored communication" from "arbitrary governmental invasion." To effectuate that rule, *Procunier* required prison officials to notify prisoners of the interception of outgoing mail and to give him an opportunity to protest that decision. *Id.* at 418-19. Fifteen years later, *Thornburgh v. Abbott*, 490 U.S. 401 (1989), confirmed that *Procunier v. Martinez* continued to govern regulations regarding outgoing correspondence despite other changes in the case law in the intervening years. *Id.* at 411-12.

It is undisputed that respondents did not provide Mr. Benning with notice or an opportunity to protest their interception of outgoing emails. The Eleventh Circuit held that doing so violated the Due Process Clause under *Thornburgh* and *Martinez*. The question is whether violating those two Supreme Court cases' clear holdings was a violation of "clearly established law." The court below said no. The sum total of the Eleventh Circuit's analysis: "Email is created and transmitted in a different medium than physical mail." Pet. App. 18a.

But as the Eleventh Circuit itself recognized, in analyzing whether respondents violated the Constitution, that is a distinction without a difference. *See supra*, 5; Pet. App. 8a-12a. Emails sent by a prisoner are clearly a form of "outgoing correspondence." The Georgia Department of Corrections itself defines "electronic mail" as "*correspondence* sent electronically over an authorized network." C.A.A. 94. This Court has recognized since the 1990s that an email is "generally akin to a note or

a letter." *See Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 851 (1997). And most dictionary definitions of "correspondence" include email. Merriam-Webster, *Correspondence*, https://www.merriam-webster.com/dictionary/correspondence.

Moreover, the logic of *Thornburgh* and *Procunier* applies with full force to outgoing email. This Court justified its holdings in those cases on two bases. First, as this Court explained that "[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment" and is thus "protected from arbitrary governmental invasion." *Martinez*, 416 U.S. at 418. But as the court below acknowledged, there is no lesser First Amendment interest just because speech is communicated via the Internet rather than by lower-tech means. Pet. App. 9a-11a.

Second, prison officials have less leeway in intercepting outgoing correspondence because such correspondence poses less risk to prison order and security (as it cannot be circulated among prisoners) and because outgoing correspondence falls within certain "readily identifiable" categories. *Thornburgh*, 490 U.S. at 411-12; *Martinez*, 416 U.S. at 416. Those things are equally true about outgoing email as outgoing mail—outgoing email is directed to individuals outside the prison (and is thus unlikely to cause disruption inside prison walls), and the categories of concern for outgoing email are also "readily identifiable."

2. The Eleventh Circuit's analysis departs markedly from how other circuits have handled the "clearly established law" test in analogous cases.

The opinion below squarely splits with the Eighth Circuit's opinion in *Bonner v. Outlaw*, 552 F.3d 673 (8th Cir. 2009). In that case, prison officials intercepted two packages. The plaintiff was not notified or given an opportunity to protest. The officials tried to distinguish *Procunier* on the grounds that "its holding applies to 'letters,' not to the 'packages' rejected in this case," and "packages have unique characteristics and pose greater security concerns than other types of correspondence." *Id.* at 676-77. The Court rejected that argument: "Although *Procunier* discusses letters, that is because letters were simply the form of correspondence at issue in that specific case. Nothing about the reasoning of *Procunier* justifies treating packages differently than letters." *Id.* at 677.

The Court went on to deny qualified immunity to the prison official. "Over thirty years ago, the Supreme Court in *Procunier* declared that inmates have a due process right to notice whenever correspondence addressed to them is rejected." *Id.* at 679-80. Defendant's argument that the law was not "clearly established" because *Procunier* discussed letters instead of packages "strains credulity"—"[t]he reasoning of *Procunier* clearly applies to all forms of correspondence, even if the decision only discussed letters." *Id.* at 680. And "even if [defendant's] strained interpretation of *Procunier* was reasonable" at some point, "subsequent case law gave fair warning that *Procunier* applies to more than just letters." *Id.* (collecting cases applying *Procunier* to "play-by-mail games," copy of *Georgetown Law Journal*, and various magazines and newspapers). Because defendant was "unable to cite a single case holding *Procunier* does not

apply to a specific form of correspondence," qualified immunity was not warranted. *Id.*

Had Mr. Benning's case arisen in the Eighth Circuit, respondents would not have been entitled to qualified immunity. As in *Bonner*, this case involved an application of the *Procunier* rule to a new type of correspondence (here, email). As in *Bonner*, there is "[n]othing about the reasoning of *Procunier*" that would justify treating email differently. As in *Bonner*, defendants' reading of *Procunier* "strains credulity." And as in *Bonner*, defendants have not "cite[d] a single case holding *Procunier* does not apply to a specific form of correspondence."

Other circuits, too, have rejected qualified immunity in cases that apply *Procunier* to a different type of correspondence. *See, e.g.*, *Jacklovich v. Simmons*, 392 F.3d 420 (10th Cir. 2004) (newspapers); *Montcalm Pub. Corp. v. Beck*, 80 F.3d 105 (4th Cir. 1996) (magazines).

More generally, circuits deny qualified immunity even where prior case law deals with an older technology. For instance, in the Fourth and Eighth Amendment contexts, "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 796 (9th Cir. 2018) (quoting *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994)); *see also Nelson v. City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012) ("[a]n officer is not entitled to qualified immunity on the ground[] that the law is not clearly established every time a novel method is used to inflict injury); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) ("Every time the police employ a new weapon, officers do not get a free pass to use it

in any manner until a case from the Supreme Court or from this circuit involving that particular weapon is decided."); *Thompson v. Commonwealth of Va.*, 878 F.3d 89, 102 (4th Cir. 2017) ("To draw a line between…different means of effectuating the same constitutional violation…would encourage bad actors to invent creative and novel means" of violating Constitution.).

3. The Eleventh Circuit's error in this case is so clear that this Court may wish to consider summary reversal. Lower courts need to know this Court stands behind its precedent holding that qualified immunity cannot be conferred based on meaningless distinctions. In particular, "[i]t has become commonplace for defendants…to support their claims to qualified immunity by pointing to the absence of prior case law concerning the precise weapon, method, or technology employed…" *Terebesi v. Torreso*, 764 F.3d 217, 237 n.20 (2d Cir. 2014). This is just such a case: The Eleventh Circuit held that a square Supreme Court holding on precisely the issue in this case was not sufficient under the "clearly established law" inquiry because it dealt with postal mail, rather than email. It would make just as much sense to say that because the inmates in *Procunier* had written letters to relatives the case would not reach censorship without notice of letters written to an inmate's former teachers. This Court should make clear that sort of distinction without a difference isn't dispositive under the "clearly established law" inquiry.

II. This Court Should Grant Certiorari To Overrule, Pare Back, Or Clarify The Doctrine Of Qualified Immunity

This Court should grant certiorari to address the doctrine of qualified immunity itself. First, this Court should consider doing away with the doctrine of qualified immunity altogether, as the doctrine finds no home in the text of the statute itself. Second, this Court should consider limiting the doctrine to only those officials who were entitled to invoke qualified immunity at common law. Third, this Court should consider clarifying that where officials are not faced with making split-second decisions, precise factual correspondence between prior decisions and the instant case is not necessary to overcome qualified immunity.

1. This Court should grant certiorari to abolish the doctrine of qualified immunity, which is untethered from the text of Section 1983, its historical backdrop, and its purported policy objectives.

a. *Text*: To begin, the doctrine of qualified immunity appears nowhere in the text of Section 1983 itself. What's more, the language Congress *did* put in Section 1983 is broad and unqualified. Section 1983 holds that "every person"—including a public official—"*shall* be liable." The language is mandatory and admits of no exceptions; it's not "shall be liable only if he also violated clearly established law." *See* 42 U.S.C. § 1983.

Definitive proof comes from the version of Section 1983 that was passed by the original Reconstruction Congress. *See* Civil Rights Act of 1871, Ch. 22, § 1, 17 Stat. 13 (1871). As enacted by Congress, the statute imposed liability "any such law, statute, ordinance,

regulation, custom, or usage of the State to the contrary notwithstanding." *Id.*; Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 234-241 (2023). The language is "unsubtle and categorical." *Rogers v. Jarrett*, 63 F.4th 971, 979-80 (5th Cir. 2023) (Willett, J., concurring). The reference to "custom or usage" expressly displaces common-law defenses, such as qualified immunity. Reinert, *supra*, at 235 & n.230; *W. Union Tel. Co. v. Call Pub. Co.*, 181 U.S. 92, 102 (1901) ("common law…derive[s]…from usages and customs"). That "notwithstanding" clause was inexplicably omitted from the first compilation of federal law in 1874. Reinert, *supra*, at 207, 237. The Reviser of Federal Statutes made some sort of unauthorized alteration to Congress's language, and the error has simply been carried forward. *Id.* But the actual statute Congress passed expressly excludes qualified immunity.

b. *Historical backdrop:* Despite the text's clear import that no qualified immunity should shield public officials, this Court chose to import that doctrine (purportedly from the common law), reasoning that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). As just described, the text of the statute gives that "clear indication"—the "notwithstanding" clause makes clear that the common law was not supposed to constrain liability under Section 1983. But even on its own terms, the "no clear indication Congress meant to abolish" reasoning is at least triply flawed.

To start, the "common-law immunit[y]" on which qualified immunity was ostensibly modeled bears no resemblance to the modern-day doctrine. Qualified

immunity at common law was the exception, not the rule; early public officials generally bore personal liability for any acts, even acts authorized by the state. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55-58 (2018) (hereinafter "Baude I"); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1922-24 (2010); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14 (1972).

Where qualified immunity existed, it was an element of a specific tort, not a freestanding defense that could apply to any tort. Baude I, *supra*, at 58-60. And even where qualified immunity was invoked under one of those handful of torts, proof was subjective, not objective. *Id.* at 60-61; *Wearry v. Foster*, 33 F.4th 260, 279 (5th Cir. 2022) (Ho, J., concurring dubitante). Qualified immunity was a good faith defense. By contrast, today's "clearly established law" standard is objective—it turns on what's in the pages of the U.S. Reports, not what on what an officer believed. *Id.*

Second, the idea that common-law immunities should be imported into Section 1983 rests on a shaky foundation. The so-called "Derogation Canon"—the idea that statutes should not be read in "derogation" of the common law—has a checkered history. Reinert, *supra*, at 234-41. It is unlikely Reconstruction-era legislators would have operated against that backdrop. *Id.* The canon is "a relic of the courts' historical hostility to the emergence of statutory law" and should be narrowly construed. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of

Legal Texts 318 (2012). And "since the Founding era, the Supreme Court had only used the Derogation Canon (criticized by mid-nineteenth courts and treatises for arrogating power to judges) to protect preexisting common law *rights*, never to import common law *defenses* into new remedial statutes." *Rogers v. Jarrett*, 63 F.4th 971, 980 n.8 (5th Cir. 2023) (Willett, J., concurring) (emphasis original).

Finally, the "legislative record" makes crystal clear that Congress *did* seek to "abolish…common-law immunities." *See Pierson*, 386 U.S. at 554-55. The "very purpose" of Section 1983 "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). By offering a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution," Congress was turning its back on the then-prevailing law. *Id.* at 239. Indeed, for the first century after Section 1983's passage, no one so much as suggested that the law might provide for common-law immunities. *See Myers v. Anderson*, 238 U.S. 368, 378-79 (1915).

c. *Policy justifications:* Without the text of the statute or its common-law backdrop, the sole basis for today's qualified-immunity doctrine is a set of "freewheeling policy choices" of the sort this Court has generally "disclaimed the power to make." *Ziglar v. Abbasi*, 582 U.S. 120, 159-60 (2017) (Thomas, J., concurring). Even assuming those policy preferences could be an adequate basis to uphold an atextual, ahistorical doctrine, the policy balance tips away from qualified immunity.

This Court's primary policy rationales for developing the clearly established law test were to

"shield [officials] from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Neither holds water. Empirical evidence makes clear that the availability of qualified immunity actually *adds* to the time and expense of proceedings, for defendants. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1824 (2018). And near-universal indemnification of public officials means that "potentially disabling threats of liability" are few and far between. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 892-93 (2014).

On the flip side of the ledger, the clearly established law analysis has proven totally unworkable. It's produced a "mare's nest of complexity and confusion," forcing this Court to time and again summarily reverse lower courts who both grant and deny qualified immunity. John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010); *see, e.g.*, *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9 (2021) (per curiam); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021) (per curiam); *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (per curiam); *White v. Pauly*, 580 U.S. 73, 79 (2017) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases."). And "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" for the clearly established law inquiry. *Zadeh v. Robinson*, 928 F.3d 457, 498 (5th Cir. 2019) (Willett, J., concurring dubitante).

Perhaps most importantly, "qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior." *Id.* And that puts the modern qualified immunity doctrine entirely at odds with the text and context of Section 1983, which was intended to end such "unqualified impunity."

2. Even if the qualified immunity doctrine needn't be jettisoned altogether, it should at least be returned to its common-law roots. As Justice Thomas has explained, "[i]n developing immunity doctrine," this Court "started off by applying common-law rules." *Ziglar*, 582 U.S. at 158 (Thomas, J., concurring). For instance, in *Pierson v. Ray*, 386 U.S. 547 (1967), this Court granted qualified immunity to police officers in a case involving an arrest pursuant to an unconstitutional statute because "the defense of good faith" was "available against the analogous torts of false arrest and imprisonment at common law." *Ziglar*, 582 U.S. at 158 (Thomas, J., concurring) (discussing *Pierson*). But "[i]n further elaborating the doctrine of qualified immunity for executive officials," this Court has "diverged from" that "historical inquiry." *Id.* "Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer." *Id.* at 159.

a. This case marks a perfect opportunity to "attempt[] to locate" the qualified immunity standard in the common law by considering whether the specific officer or claim would have warranted qualified immunity. *See id.* This Court extended qualified immunity to correctional officials in an opinion that, as Justice Scalia later objected, "did not trouble itself

with history." *Richardson v. McKnight*, 521 U.S. 399, 415 (1997) (Scalia, J., dissenting) (discussing *Procunier v. Navarette*, 434 U.S. 555 (1978)). That opinion reasoned, essentially, that all public officials must be entitled at least to qualified immunity by virtue of their public employ. *Procunier*, 434 U.S. at 562. But at common law, there was no "one-size-fits-all doctrine" of immunity that applied in a blanket way to all public officials, across "a wide range of responsibilities and functions." *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421-22 (2021) (Thomas, J., respecting denial of certiorari). Instead, courts analyzed the specific office and the "nature of the duty" a defendant performed to decide whether immunity from suit was appropriate. Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 381 (1879).

b. Were this Court to ask "whether officers in [defendants'] positions would have been accorded immunity at common law in 1871 from claims analogous to" those at issue here, as Justice Thomas has urged, *Ziglar*, 582 U.S. at 160 (Thomas, J., concurring), the answer here would be no.

Start with the officers in defendants' position. Suits against jailers—usually sheriffs, at the time of Section 1983's passage—were routine, and no mention was made of qualified immunity. *See, e.g.*, *Commonwealth v. Stockton*, 21 Ky. (5 T.B. Mon.) 192, 193 (1827); *Perkins v. Reed*, 14 Ala. 536, 537-38 (1848); *Knowlton v. Bartlett*, 18 Mass. (1 Pick.) 271, 280 (1822); *Matthis v. Pollard*, 3 Ga. 1, 3 (1847); *see also Cooley*, *supra*, at 392-98.

Nor was qualified immunity available for "claims analogous to" those at issue here—claims about the treatment of prisoners. Civil damages were routinely

allowed in cases challenging the conditions under which prisoners were kept. *See, e.g.*, *Dabney v. Taliaferro*, 25 Va. (4 Rand.) 256, 261, 263 (1826) (affirming judgment against sheriff where prisoner suffered frostbite and disease while incarcerated); *Perrine v. Planchard*, 15 La. Ann. 133, 134-35 (1860) (allowing civil damages against keeper of police jail who "under color of his authority…cause[d] [plaintiff] to be forcibly whipped"); *Peters v. White*, 53 S.W. 726, 726 (Tenn. 1899) (allowing civil damages against superintendent of county workhouse facility who whipped an inmate); *Asher v. Cabell*, 50 F. 818, 827 (5th Cir. 1892) ("That a United States marshal may take prisoners into his custody, permit them to be disarmed and shackled, and then negligently and knowingly deliver them over to incompetent deputies and the known hostility of mobs, without liability for his neglect of duty, is a proposition which we think cannot be sanctioned.").

Equally telling: At the time of Section 1983's passage, there was "an unbroken current of authorities" holding that "where the law requires absolutely a ministerial act to be done by a public officer," the public officer was not entitled to qualified immunity. *Amy v. Supervisors*, 78 U.S. (11 Wall.) 136, 138 (1871). And it was generally understood that a sheriff acted "[i]n his ministerial capacity" when he was "keeper of the county jail, and answerable for the safe-keeping of prisoners." *South v. Maryland ex rel. Pottle*, 59 U.S. (18 How.) 396, 402 (1856). As a result, the "history of the common law for centuries" reveals that "[a]ctions against the sheriff for a breach of his ministerial duties…are to be found in almost every book of reports." *Id.* at 403.

c. Returning the question of which defendants are entitled to qualified immunity to its common-law basis is well within courts' competence. After all, courts continue to conduct that assessment when considering absolute immunities or when extending qualified immunity to private, non-state actors. *See Ziglar*, 582 U.S. at 158-60 (Thomas, J., concurring) (collecting cases).

If this Court does not grant certiorari to altogether reconsider the qualified immunity doctrine, then, it should at least grant certiorari to reconsider which defendants can invoke qualified immunity and return that inquiry to its common-law roots.

3. At the very least, this Court should grant certiorari to clarify the "clearly established law" inquiry. As explained *supra*, 6-11, the Eleventh Circuit erred in granting qualified immunity in this case even under existing doctrine. But that doctrine was largely developed in the context of police excessive-force cases involving split-second decisionmaking, and the justifications it offers for requiring relatively precise factual correspondence between the "clearly established law" and the facts of a particular case do not apply to cases like this one.

The modern qualified immunity doctrine's focus on clearly established law that is "particularized to the facts of the case" derives from its concern that public officials—chiefly police officers—making split-second decisions should only be subjected to liability if they contravened a specific, unmistakably on-point rule. *See White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam). When the Eleventh Circuit explained that the inquiry "must be undertaken in light of the specific context of the case, not as a broad general

proposition," it was relying on this Court's cases dealing with Fourth Amendment claims levied against police officers making split-second decisions. Pet. App. 16a-17a (quoting *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5-6 (2021)).

But applying qualified immunity as a "one-size-fits-all doctrine" is an "odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions." *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421-22 (2021) (statement Thomas, J., respecting denial of certiorari). As Justice Thomas has asked, why should officials "who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" *Id.* This Court has "never offered a satisfactory explanation to this question." *Id.*

As a result, jurists around the country have advocated for a standard that would demand less specificity from "clearly established law" where a state actor has the luxury of time and space to deliberate. *See, e.g.*, *Villarreal v. City of Laredo*, 44 F. 4th 363, 371-72 (5th Cir. 2022) (Ho, J.); *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021) (Kobes, J.); *Boyd v. McNamara*, 74 F.4th 662, 670-71 (5th Cir. 2023) (Elrod, J.); *Gonzalez v. Trevino*, 42 F.4th 487, 507 (5th Cir. 2022) (Oldham, J., dissenting).

A less demanding standard for overcoming qualified immunity makes particular sense when the constitutional right at issue is one related to free speech. As Judge Ho put the point, in cases like this one, "[t]here is an additional reason why the fear of chilling public officials does not justify a 'clearly

established' requirement unsupported by text": "[W]e are concerned about government chilling the citizen—not the other way around." *Horvath v. City of Leander*, 946 F.3d 787, 802 (5th Cir. 2020) (Ho., J., concurring in part and dissenting in part); *see also Olivier v. Arnold*, 19 F.4th 843, 853-54 (5th Cir. 2021) (Ho, J., concurring in denial of reh'g en banc); *Gonzalez v. Trevino*, 42 F.4th 487, 507 (5th Cir. 2022) (Oldham, J., dissenting) ("And it's not at all clear that we should apply the same qualified-immunity inquiries for First Amendment cases, Fourth Amendment cases, split-second-decisionmaking cases, and deliberative-conspiracy cases.").

In this case, the violation of Mr. Benning's constitutional rights occurred pursuant to a longstanding official policy. In adopting and enforcing the policies, Department of Corrections officials had access to precisely the sources of information the Eleventh Circuit later used to determine that the policy was unconstitutional: They and their counsel could have read *Procunier* and its progeny.

In these circumstances, it makes more sense to hold that officials are entitled to qualified immunity, if at all, only when the law is clearly unsettled. Thus, this Court should grant certiorari to clarify that the level of factual correspondence it has required in cases involving split-second decisionmaking does not apply outside that context.

III. This Is The Right Case At The Right Time To Address The Questions Presented.

1. This case is the ideal vehicle to resolve the questions presented.

To start, this case is the rare case where we are certain that qualified immunity made the difference.

Because current doctrine allows courts to skip over the question whether there has been a constitutional violation at all in favor of finding there was no clearly established law, very few cases granting qualified immunity actually reach the constitutional question. Per one study, in only eight percent of cases do courts actually find a constitutional violation before granting qualified immunity. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 35 fig. 2 (2015). This case thus presents a rare opportunity to isolate the qualified immunity question, without needing to address the underlying constitutional violation question as well.

In addition, the relevant facts are straightforward and essentially uncontested. There is no dispute that defendants prevented three of Mr. Benning's emails from reaching their intended recipients; that Mr. Benning received no notice that the emails were intercepted; and that he received no "reasonable opportunity to protest that decision," let alone an opportunity "referred to a prison official other than the person who originally disapproved the correspondence." *See* Pet. App. 3a, 5a, 14a; *Procunier*, 416 U.S. at 417-19. And no ancillary issues would obstruct this Court's consideration of the questions presented—there are no procedural barriers, and the sole basis for the decision below was the doctrine of qualified immunity.

What's more, Mr. Benning's clearly established law argument turns entirely on *Procunier v. Martinez*, a Supreme Court case. It's an open question whether circuit-court precedent, as opposed to Supreme Court precedent, can clearly establish the law for qualified immunity purposes. *See, e.g.*, *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (per curiam)

(assuming, without deciding, that "Circuit precedent can clearly establish law for purposes of § 1983"). In this case, the relevant body of law is entirely Supreme Court precedent; reversing in this case would not require this Court to resolve that difficult question.

This case also doesn't implicate the areas where the arguments for qualified immunity are at their apex. The few scholarly defenses of qualified immunity fall into two buckets. Some defend qualified immunity in Fourth Amendment cases on the basis that such immunity is embedded in the word "unreasonable" in that provision. *See, e.g.*, Hon. Andrew S. Oldham, *Official Immunity at the Founding*, 46 Harv. J. L. & Pub. Pol'y 105, 105-06 (2023). Others defend the doctrine as applied to discretionary acts. *See, e.g.*, Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337 (2021). Even spotting those critics, *but see generally id.*, those defenses would have no purchase in this case, which deals with a Due Process Clause claim, not a Fourth Amendment claim, and with a ministerial, rather than discretionary, duty. *See supra*, 19.

Nor does this case implicate the policy justifications this Court has invoked for upholding qualified immunity in the context of split-second decisionmaking: Defendants weren't faced with some sort of urgent decision that they resolved without deliberation. Instead, the Due Process Clause violation in this case was the result of prison policies promulgated with the luxury of time and consultation.

Finally, this case highlights the ways in which lower courts' interpretation of this Court's clearly established jurisprudence has gone awry. This isn't a case where the governing rule admits of nuance—a

question over what constitutes adequate notice or a "reasonable" opportunity, for instance. *Procunier*, 416 U.S. at 417-19. Rather, Mr. Benning had *no* notice and *no* opportunity at all to challenge the interception decision. And requiring a new Supreme Court case to reiterate an already clear governing rule each time technology evolves would bring qualified immunity still closer to absolute immunity—and farther away from any conceivable common-law ancestor.

2. The time has come for this Court to reconsider—or at least clarify—its qualified-immunity doctrine.

Calls to do so have come from across the ideological spectrum and from both this Court and others. *See, e.g.*, *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from denial of certiorari); *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *Wyatt v. Cole*, 504 U.S. 158, 171-72 (1992) (Kennedy, J., joined by Scalia, J., dissenting); *McKinney v. City of Middletown*, 49 F.4th 730, 756-57 (2022) (Calabresi, J., dissenting); *Wearry v. Foster*, 33 F.4th 260, 278-79 (5th Cir. 2022) (Ho, J., dubitante); *Jefferson v. Lias*, 21 F.4th 74, 87, 93-94 (3d Cir. 2021) (McKee, J., joined by Restrepo & Fuentes, JJ., concurring); *Goffin v. Ashcraft*, 977 F.3d 687, 694 n.5 (8th Cir. 2020) (Smith, C.J., concurring); *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring dubitante); *McCoy v. Alamu*, 950 F.3d 226, 234-37 (5th Cir. 2020) (Costa, J., dissenting); *Reich v. City of Elizabethtown*, 945 F.3d 968, 989 n.1 (6th Cir. 2019) (Moore, J., dissenting); *Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019); *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir.

2018); *Rodriguez v. Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018).

To the extent this Court has been awaiting a fuller airing of the flawed origins of the qualified-immunity doctrine, that airing has taken place. The scholarly conversation regarding the history of that immunity is fully developed. *See* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115, 115-17 (2022) (summarizing existing scholarship); James Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. Rev. 148, 157-64 (2021); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55-61 (2018); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863-64 (2010); John F. Preis, *Qualified Immunity and Fault*, 93 Notre Dame L. Rev. 1969, 1986 (2018); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 258-64 (2013); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Rsrv. L. Rev. 396, 414-33 (1987).

Particularly notable are the recent revelations that the congressionally enacted text of Section 1983 seems to have explicitly disapproved state-law limitations on the new cause of action, including state-law immunities. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 234-241 (2023); *supra*, 26-27. As Judge Willett put the point: "These are game-changing arguments, particularly in this text-centric judicial era when jurists profess unswerving fidelity to the words Congress chose." *See Rogers v. Jarrett*, 63 F. 4th 971, 981 (2023) (Willett, J., concurring).

And if this Court was waiting on Congress to step in and clarify its centuries-old statute, Congress has made clear it has no intention of doing so. *See* Zolan Kanno-Youngs & Luke Broadwater, *Many of Biden's Goals on Police Reform Are Still Incomplete*, N.Y. Times (Feb. 8, 2023); *see also Wearry v. Foster*, 33 F.4th 260, 279 (5th Cir. 2022) ("[A]though Congress can fix what ails us…it shouldn't have to. … [T]his is a problem of the courts' own making.").

The time has come for this Court to grapple in some way with its qualified-immunity doctrine, and this is the case in which to do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Easha Anand
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

R. Stanton Jones
Counsel of Record
Andrew T. Tutt
Katie Weng
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
(202) 942-5000
stanton.jones@arnoldporter.com

December 15, 2023