No. 23-664

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

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice (IJ) is a nonprofit public-interest law firm dedicated to protecting individual rights and defending the foundations of a free society. One such foundation is the American people's ability to hold the government and its officials accountable. But doctrines created by courts often make it impossible for plaintiffs to vindicate their rights. For this reason, IJ seeks to remove procedural barriers to enforcing constitutional rights. IJ does this through litigation, legislative advocacy, public education, and grassroots activism.

In litigation, IJ represents clients who seek redress for rights violations, and it regularly files amicus briefs on government accountability through civil-rights lawsuits.[2] For example, IJ represents clients who, like the petitioner here, were deprived of a constitutional right and later faced qualified immunity when trying to redress their injuries in court.[3]

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[1] No counsel for a party authored this amicus brief in whole or in part. No person other than Amicus has made any monetary contributions intended to fund the preparation or submission of this brief. Amicus timely notified the parties that it intended to file this brief. See Sup. Ct. R. 37.6.

[2] See, *e.g.*, *Chiaverini* v. *City of Napoleon*, No. 23-50 (certiorari granted Dec. 13, 2023); *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, 143 S. Ct. 1444 (2023); *Egbert* v. *Boule*, 142 S. Ct. 1793 (2022); *Thompson* v. *Clark*, 142 S. Ct. 1332 (2022).

[3] See, *e.g.*, *Gonzalez* v. *Trevino*, 42 F.4th 487 (CA5 2022), cert. granted, No. 22-1025 (Oct. 13, 2023); *Bailey* v. *Iles*, 87 F.4th 275 (CA5 2023); *Rosales* v. *Bradshaw*, 72 F.4th 1145 (CA10 2023); *Pollreis* v. *Marzolf*, 66 F.4th 726 (CA8 2023), petition for cert. pending (filed Dec. 7, 2023); *Novak* v. *City of Parma*, 33 F.4th 296 (CA6 2022), cert. denied, 143 S. Ct. 773 (Feb. 21, 2023);

IJ advocates for legislative reform with model bills that pave ways to hold government actors accountable when they violate individuals' rights.[4] IJ educates the public about government immunity and accountability through articles,[5] research reports,[6] podcasts,[7] and other media.[8] And IJ raises awareness about government immunities through its Project on Immunity and Accountability and accompanying grassroots initiative, Americans Against Qualified Immunity.[9]

Central Specialties, Inc. v. *Large*, 18 F.4th 989 (CA8 2021), cert. denied, 143 S. Ct. 369 (Oct. 31, 2022); *Mohamud* v. *Weyker*, 2018 WL 4469251 (D. Minn. Sept. 18, 2018).

[4] See Protecting Everyone's Constitutional Rights Act, *A State Legislative Solution to Problems Caused by the Federal Judiciary's Creation of Qualified Immunity*, Institute for Justice, https://perma.cc/5XUQ-EL67.

[5] See, *e.g.*, Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity*, 112 J. Crim. L. & Criminology 105 (2022); Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of* Butz v. Economou, 126 Dick. L. Rev. 719 (2022); Will Baude, *Jaicomo and Nelson Respond to Codifiers' Errors*, Volokh Conspiracy (July 24, 2023), https://perma.cc/ZJ77-AE4V.

[6] See Marie Miller et al., *Constitutional GPA*, https://perma.cc/9FGF-J3CW; Kendall Morton et al., *50 Shades of Government Immunity*, https://perma.cc/R2X6-NU4R.

[7] See, *e.g.*, Bound by Oath by IJ, *They're Going to Kill This Man*, https://perma.cc/4FS2-5WYS.

[8] See, *e.g.*, Alexa L. Gervasi & Daryl James, *Cops Love Immunity—Until They're the Ones Abused by Police*, Daily Beast (Aug. 23, 2022), https://perma.cc/2JLK-TPZV; Adam Liptak, *Cracks in a Legal Shield for Officers' Misconduct*, N.Y. Times (Mar. 8, 2021), https://perma.cc/FD3Q-ESBL.

[9] See Project on Immunity and Accountability, https://perma.cc/35DK-XZYN; Americans Against Qualified Immunity, https://perma.cc/F7CL-SA4H.

The Eleventh Circuit's decision here granting qualified immunity to respondents undermines government accountability for rights violations. IJ thus has an interest in this Court's consideration of the petition.

SUMMARY OF ARGUMENT

Inside a Georgia prison, Ralph Benning sent electronic messages to his sister. Prison officials intercepted the messages without notifying Benning and without giving him a chance to contest the interception.

These two omissions are sure violations of Benning's Due Process rights. Fifty years ago, this Court held in *Procunier* v. *Martinez* that the Fourteenth Amendment requires a prisoner to be notified and given the opportunity to be heard if a prison intercepts outgoing "correspondence" or "communication." 416 U.S. 396, 418–419 (1974). A century before that, Congress supplied a remedy for Fourteenth Amendment violations: "Every person" who, under color of state law, "subjects, or causes to be subjected" another person "to the deprivation of any rights * * * 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.

The Eleventh Circuit denied this remedy to Benning. It did so based on an over-expansive take on the modern qualified-immunity doctrine. Specifically, in the Eleventh Circuit, desk-bound officials who unhurriedly violate a person's rights receive qualified immunity unless a prior case involved near-identical facts; no other case can clearly establish the law.

This crabbed view of "clearly established law" offends the text and purpose of the Fourteenth Amendment and Section 1983. It also ignores Congress's explicit abrogation of common-law defenses in 1871. Those are reasons enough to reverse.

But the common law and policy considerations further spotlight the need for this Court's guidance. The Eleventh Circuit's decision stretches the modern qualified-immunity doctrine, which hardly resembles ancestral common-law principles and which fails to advance the policy objectives that shaped the doctrine from its inception in 1982. The Eleventh Circuit's decision highlights how lower courts struggle to apply the doctrine correctly, and how their circuit precedent creates nonsensical disparities—leaving officers in some circuits less protected than officers in others.[10]

The Court should grant the petition and reverse the Eleventh Circuit's decision.

ARGUMENT

Petitioner Ralph Benning was given no notice that his electronic messages to his sister were intercepted by prison officials, and he was given no opportunity to contest that decision. He sued the officers for violating his Due Process rights, and the Eleventh Circuit agreed that the officers violated those rights. But the Court of Appeals held that Benning may not sue the officers under Section 1983 because this Court's decision in *Pecunier* v. *Martinez*, which established Benning's Due Process rights concerning his "outgoing correspondence," arose from correspondence in the

[10] Amicus also agrees with Benning that a writ of certiorari should be granted for the reasons stated in his petition.

form of snail mail instead of email. The Eleventh Circuit's decision is wrong.

Because Fourteenth Amendment Due Process rights are the basis for Benning's claims, the Due Process Clause is the starting point to determine whether his claims can proceed. The next places to look are the text, history, and purpose of Section 1983, which provides a remedy for violations of constitutional rights at the hands of state actors. If those two provisions don't do the trick, common-law principles can fill the gaps. Here, the Constitution, Section 1983, the common law, and sound policy all indicate that Benning's claims should proceed.

I. The text and purpose of the Fourteenth Amendment and Section 1983 support a damages remedy.

Benning's claims, like all claims under 42 U.S.C. 1983, arise from violations of rights guaranteed by the Constitution or other federal laws. That is why the Constitution is the starting place for courts to figure out whether Section 1983 claims can proceed. See *Manuel* v. *City of Joliet*, 580 U.S. 357, 370 (2017) (observing that "the threshold inquiry in a § 1983 suit * * * requires courts to 'identify the specific constitutional right' at issue"). But the Eleventh Circuit's decision that the respondents here are entitled to qualified immunity has no basis in the Fourteenth Amendment or the text or enforcement aim of Section 1983.

A. The Fourteenth Amendment's Due Process Clause protects against interception of prisoners' outgoing correspondence without minimal procedural safeguards.

Benning's claims rest on violations of the Fourteenth Amendment's Due Process Clause, which promises that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Addressing this clause in *Procunier* v. *Martinez*, 416 U.S. 396, 417–418 (1974), and *Thornburgh* v. *Abbott*, 490 U.S. 401, 411 (1989), this Court explained that prisoners have a liberty interest in uncensored "outgoing personal correspondence." *Thornburgh*, 490 U.S. at 411. And prison officials' decision to withhold delivery of that correspondence must be accompanied by two procedural safeguards: (1) the inmate must be notified that his correspondence has been rejected, and (2) the inmate must be given a reasonable opportunity to protest the decision with an official other than the person who originally disapproved the correspondence. *Martinez*, 416 U.S. at 418.

The Fourteenth Amendment was created to serve an enforcement purpose. It sought to secure for all citizens—including newly freed slaves—the rights enjoyed by other citizens. Among concerns animating the Fourteenth Amendment's protections were the suppression of anti-slavery speech and the mistreatment of former slaves and Northern whites in Southern states. See, *e.g.*, William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 Tex. L. Rev. 1065, 1075 (2021) (observing that "[t]he ratification debates for the Thirteenth and Fourteenth Amendments reveal" that the Reconstruction

Republicans who drafted and supported the post-Civil War constitutional amendments were "concerned with ensuring that the new constitutional order would protect against the lynchings, murders, and prosecutions inflicted post hoc upon abolitionists and slaves in retaliation for their speech and expressive activities denouncing slavery").[11] The Fourteenth Amendment specifically aimed to "incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land," thus removing all "doubt as to the constitutional validity of the Civil Rights Act as applied to the States." *Hurd* v. *Hodge*, 334 U.S. 24, 32–33 (1948). The Civil Rights Act of 1866 itself aimed to "protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication." 14 Stat. 27.[12] Based on this history, alone, there is little doubt that the Congress which proposed the Fourteenth Amendment, and the states that ratified it, envisioned that the Due Process rights it promised could be vindicated.

Confirming the overarching goal to enforce rights, Section 5 of the Fourteenth Amendment provides that

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[11] See also Michael Kent Curtis, *The 1859 Crisis over Hilton Helper's Book,* The Impending Crisis*: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 Chi.-Kent L. Rev. 1113 (1993).

[12] The same Congress that passed the Civil Rights Act of 1866 proposed the Fourteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess. 3148–3149, 3042 (reflecting that the House passed the Joint Resolution submitting the Fourteenth Amendment to the States on June 13, 1866, after it previously passed the Senate on June 8). Both the Civil Rights Act of 1866 and the Fourteenth Amendment were "products of the same milieu and were directed against the same evils." *General Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 391 (1982).

"Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Enforcement legislation came in part through the Civil Rights Act of 1871, now codified at Section 1983. See *Monroe* v. *Pape*, 365 U.S. 167, 171 (1961) (observing that the Act was designed "to enforce the Provisions of the Fourteenth Amendment to the Constitution" (citation omitted)), overruled in part by *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

B. Section 1983 provides a damages remedy for deprivations of Due Process rights.

The Civil Rights Act of 1871 endorsed a damages remedy for victims of civil-rights abuses. The Act "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution." *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972). The text enacted by Congress in 1871 makes clear that liability is categorical; state actors who violate federal constitutional rights are liable, regardless of whether state law otherwise gives them some excuse, defense, or justification. The original text read:

> [A]ny 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 in any action at law, suit in equity, or other proper proceeding for redress * * * .

Civil Rights Act of 1871, ch. 22 § 1, 17 Stat. 13 (1871) (emphasis added); see *W. Union Tel. Co.* v. *Call Pub. Co.*, 181 U.S. 92, 102 (1901) (observing that "usages and customs" "form the common law"). Cf. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (stating that all citizens shall be entitled and allowed to vote "without distinction of race, color, or previous condition of servitude; *any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding*" (emphasis added)).

Extra-textual rules narrowing the availability of recovery have emerged from a long-unnoticed edit to Congress's language. When compiling the federal laws in 1874, the Reviser of the Federal Statutes omitted—without congressional imprimatur—the "notwithstanding" clause. That omission has been carried into the published United States Code. But the deletion was not by congressional pen. Instead, while Congress recognized that some changes were necessary to condense seventeen volumes of law into one, Congress meant "to preserve absolute identity of meaning" in the consolidated law. 2 Cong. Rec. 4220 (1874) (Sen. Conkling).[13] So the original "notwithstanding" clause remains textual evidence that

[13] See also 2 Cong. Rec. 129 (1873) (Rep. Butler) ("We have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense.").

Congress abrogated common-law defenses when it passed what is now Section 1983.[14]

Even without the "notwithstanding" clause, Section 1983 undoubtedly exists "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt* v. *Cole*, 504 U.S. 158, 161 (1992). And as a remedial statute, it is "well settled that § 1983 must be given a liberal construction." *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 399–400 (1979).

The result is that when, as here, a person has suffered a violation of a right secured by the Fourteenth Amendment, Section 1983 provides a remedy. The Eleventh Circuit's qualified-immunity decision foreclosing that remedy has no basis in the text or purposes of the Fourteenth Amendment and Section 1983.

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[14] See generally *Rogers* v. *Jarrett*, 63 F.4th 971, 980 (CA5 2023) (Willett, J., concurring); see also *Price* v. *Montgomery County*, 72 F.4th 711, 726–727 & n.1 (CA6 2023) (Nalbandian, J., concurring in part and in judgment); Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023); Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of* Butz v. Economou, 126 Dick. L. Rev. 719, 735 n.87 (2022) ("The statutory text shows that Congress intended to abrogate defenses or immunities from other sources (including the common law), even if they would have otherwise been folded into Section 1983 as background law.").

II. Neither the common law nor sound policy justify the Eleventh Circuit's qualified-immunity decision.

The common law and sensible policy provide two more reasons to reverse the Eleventh Circuit's decision. The common law lacked a freestanding defense like qualified immunity. And although this Court created the qualified-immunity defense through "freewheeling policy choice[s]" in 1982, the defense does not advance those policy objectives. *Ziglar* v. *Abbasi*, 582 U.S. 120, 159–160 (2017) (Thomas, J., concurring in part and in judgment). While qualified immunity has been generally criticized on common law and policy grounds, those criticisms are particularly true of the qualified-immunity decision the Eleventh Circuit issued here.

A. The common law points to liability.

This Court often tries to read Section 1983 "in harmony" with general common-law principles that existed in 1871, when Section 1983 was enacted. *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976). Naturally, not all common-law principles harmonize with the authoritative text and purpose of Section 1983. For example, the "notwithstanding" clause of the statute's original text confirms that Congress explicitly abrogated common-law defenses when enacting Section 1983. See *supra* Part I.B. In line with this original text, for a time after Section 1983's enactment this Court rejected a good-faith defense like one that may have been found in the common law. See *Myers* v. *Anderson*, 238 U.S. 368, 378–379 (1915) (rejecting officials' argument for a good-faith defense).

Later this Court changed course, providing a good-faith defense to a Section 1983 claim. *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967). At the time, the Court was misguided by the omission of Congress's "notwithstanding" clause from compilations of the federal laws. See *id.* at 554 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities."). But the Court also departed from the good-faith defense when, 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." *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987).

Even with that complete reformulation (and despite the "notwithstanding" clause), this Court has charted a two-step analysis to help figure out whether a Section 1983 claim can proceed. The first step involves identifying the most analogous tort as of 1871 and discerning "common-law principles that were well settled" then. *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997). If the prevailing common-law rule is consistent with the "values and purposes" of the constitutional provision at issue, Section 1983 incorporates the common-law rule. *Thompson* v. *Clark*, 596 U.S. 36, 48 (2022) (quoting *Manuel*, 580 U.S. at 370).

Here the closest analogue—though a rough fit—may be trover. That is because the prison officials who took hold of Benning's messages did so lawfully, but they were wrong to continue holding onto the messages without giving Benning certain procedural protections. For the tort of trover, "the original taking [of property] is supposed or assumed to be lawful, and often the only wrong consists in a refusal to surrender a possession which was originally rightful, but the

right to which has terminated." Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 442 (1879). A plaintiff alleging trover made a prima facie case by showing that "property in his possession has been taken and converted"; and conversion lay in "[a]ny distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it." *Id.* at 445, 448.

No well-settled principle resembling qualified immunity protected trover defendants, including officers. See, *e.g.*, *Dane* v. *Gilmore*, 49 Me. 173 (1862). Indeed, the common law was often "extremely harsh to the public official" and did not excuse officers from liability even for good faith. See David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 17–18 (1972).

Had there been a well-settled principle that shielded official defendants from liability—and there was not—such a principle would conflict with the "values and purposes" of the constitutional provision at issue: the Due Process Clause of the Fourteenth Amendment. *Manuel*, 580 U.S. at 370. That's because official immunity would allow officers to escape liability even for deliberately violating a person's rights to minimal procedural protections of a liberty interest. See *supra* Part I.A. Indeed, the rule of qualified immunity that the Eleventh Circuit applied enables officers to shield themselves from liability by offending rights in ever-novel ways. Little imagination is needed to envision malicious state officials in the Reconstruction-era South taking advantage of such a rule. Thus, common-law principles as of 1871 do not

endorse the Eleventh Circuit's decision that Benning's claims were dead on arrival.

B. Sound policy points to liability.

This Court has explained that qualified immunity advances certain interests. But evidence suggests that qualified immunity does not meaningfully further those goals, especially for cases like this one, involving no split-second decisionmaking by police officers in dangerous situations. The doctrine also creates disparities in the protection it affords officers from one circuit to the next.

1. Qualified immunity does not effect its purported policy goals.

This Court has justified qualified immunity as advancing four policy objectives. First, as "an immunity from suit rather than a mere defense to liability," qualified immunity theoretically reduces the costs and other burdens of litigation on government officials. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (emphasis omitted). Second, relatedly, the doctrine aims to minimize the "diversion of official energy from pressing public issues." *Harlow*, 457 U.S. at 814. Third, it seeks to avoid deterring "able citizens from acceptance of public office." *Ibid.* And fourth, it targets "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.'" *Ibid.* (alteration in original) (citation omitted).

To begin, the concern that officials may flinch when discharging their duties arises only when the defendants are police officers whose decisions in

dangerous, urgent situations gave rise to the claims. By contrast, when the relevant government actions take place over days, weeks, months, or years, officials do much more than flinch—they deliberate. As a case in point, here the prison officials were not under time constraints in deciding whether to give Benning information about the interception of his messages. They were simply implementing a department policy to withhold the messages without notice.

In other cases, judges have wondered whether they "should apply the same qualified-immunity inquiries for First Amendment cases, Fourth Amendment cases, split-second-decisionmaking cases, and deliberative-conspiracy cases." *Gonzalez* v. *Trevino*, 42 F.4th 487, 507 (CA5 2022) (Oldham, J., dissenting), cert. granted, 144 S. Ct. 325 (2023). After all, as far as "the unflinching discharge of * * * duties" is concerned, *Harlow*, 457 U.S. at 814, "[t]here is a big difference between 'split-second decisions' by police officers and 'premeditated plans to arrest a person * * *,'" *Villarreal* v. *City of Laredo*, 17 F.4th 532, 540–541 (CA5 2021) (Ho, J.), reh'g en banc granted, 52 F.4th 265 (2022). And 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?" *Hoggard* v. *Rhoades*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of certiorari).

While concern with unflinching performance of duties applies only to police officers in urgent situations, all four policy justifications have been undermined by research. One study found that less than 1% of Section 1983 cases against law-enforcement officers and

agencies were dismissed on qualified-immunity grounds before discovery, and only about 3% were dismissed on qualified-immunity grounds before trial. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1805 (2018).[15] Individual officers virtually never pay for defense counsel or contribute to settlements and judgments against them. *Ibid.* And although judges may usually have litigation at the forefront of their minds, police officers do not. *Id.* at 1811 & n.98 (citing studies). Nor does the threat of civil liability deter people from becoming police officers or deter current officers from performing their duties with ardor. *Id.* at 1813. See also generally *McKinney* v. *City of Middletown*, 49 F.4th 730, 756–758 (CA2 2022) (Calabresi, J., dissenting appendix).

2. Qualified immunity creates disparities across the circuits.

The "clearly established law" standard that governs the modern qualified-immunity doctrine creates at least two kinds of arbitrary disparities among the circuits.

First, circuits disagree about how clear the law must be to clearly establish rights. Some understand that "[t]he search is for an *appropriate* level of generality, not the most particular conceivable level." *Weiland* v. *Loomis*, 938 F.3d 917, 920 (CA7 2019).

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[15] Also, asserting qualified immunity early and often does not mean the case will end quickly. It is possible that the case will be resolved on qualified-immunity grounds only after many rounds of litigation on that defense, including interlocutory appeals each time. See *Joseph ex rel. Joseph* v. *Bartlett*, 981 F.3d 319, 330–331 (CA5 2020).

Others, like the Eleventh Circuit here, effectively require matching facts in a precedential case. For example, in the Sixth Circuit, a prior case held that an officer violated the Fourth Amendment when he unleashed a dog on an unarmed suspect who had surrendered lying on the ground. See *Baxter* v. *Bracey*, 751 Fed. Appx. 869 (CA6 2018). That case, according to the Sixth Circuit, did not clearly establish that a police officer violates the Fourth Amendment by unleashing a dog on a suspect who had surrendered sitting on the ground with his hands raised. *Ibid.*[16] The circuits are also internally divided about whether a prior case clearly established the relevant right.[17]

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[16] Perhaps claims based on the Fourth Amendment or split-second decisionmaking call for closer symmetry of facts than other situations. But that reasoning lends no support for the Eleventh Circuit's insistence on matching facts here. See *supra* Part II.B.1.

[17] See, *e.g.*, *Gonzalez* v. *Trevino*, 60 F.4th 906, 912 (CA5 2023) (per curiam) (Ho, J., dissenting from denial of rehearing en banc) (observing that the Fifth Circuit "has been summarily reversed by the Supreme Court for both wrongly granting *and* wrongly denying qualified immunity" and opining that the court is "getting qualified immunity backwards. * * * We grant qualified immunity to officials who trample on basic First Amendment rights—but deny qualified immunity to officers who act in good faith to stop mass shooters and other violent criminals."); *Meadows* v. *City of Walker*, 46 F.4th 416, 424 (CA6 2022) (Nalbandian, J., dissenting); *Sloley* v. *VanBramer*, 945 F.3d 30, 50 (CA2 2019) (Jacobs, J., dissenting); *Managed Protective Servs., Inc.* v. *City of Mesa*, 654 Fed. Appx. 276, 277 (CA9 2016) (Bea, J., dissenting in part); *Kinney* v. *Weaver*, 367 F.3d 337 (CA5 2004) (en banc); *Doe* v. *Broderick*, 225 F.3d 440, 452–455 (CA4 2000); *id.* at 457–462 (Williams, J., dissenting in part); see also Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. Ann. Serv. Am. L. 445, 455 (2000).

Circuits differ as well in their views of obvious constitutional violations. In the Seventh Circuit, for instance, it should have been obvious to an officer that stealing a painting was an unreasonable seizure. *Nelson* v. *Streeter*, 16 F.3d 145, 151 (CA7 1994). But in the Ninth Circuit, it was not obvious (and supposedly still isn't clear) that officers who steal $225,000 of property perform an unreasonable seizure. *Jessop* v. *City of Fresno*, 936 F.3d 937, 942 (CA9 2019).

This relates to the second kind of disparity. Officers in some circuits are more likely to receive qualified immunity than officers in other circuits. Specifically, our research suggests that, generally, officers in more populous circuits are less likely to be entitled to qualified immunity. See Marie Miller et al., *Constitutional GPA*, "Notable Findings" (Sept. 26, 2022), https://perma.cc/2UN4-5PLG. Officers in the Ninth Circuit are least likely to find protection in qualified immunity, while officers in the District of Columbia are most likely. *Ibid.* This is unsurprising. Qualified immunity by design depends primarily on the absence of a prior case holding that an officer's conduct was unconstitutional. More populous circuits see more civil-rights claims. So those circuit courts generally issue more decisions finding official conduct unconstitutional.

Still, population isn't the only factor. So are a circuit court's tendencies to publish decisions and to exercise discretion to decide constitutional questions. In practice, unpublished decisions may show that the law was unsettled, but they do not conversely clearly establish rights. See, *e.g.*, *Bell* v. *City of Southfield*, 37 F.4th 362, 367–368 (CA6 2022); *Crocker* v. *Beatty*, 995 F.3d 1232, 1241 n.6 (CA11 2021); *Grissom* v. *Roberts*,

902 F.3d 1162, 1168 (CA10 2018). In recent years, the circuit courts of appeals publish an average of about 13% of their merits decisions. Table 2.5—U.S. Courts of Appeals Judicial Facts and Figures (Sept. 30, 2022), https://perma.cc/Y55G-5HBU. The courts of appeals also now have discretion to address the clearly-established prong of qualified immunity without deciding whether a constitutional violation occurred. *Pierson* v. *Callahan*, 555 U.S. 223, 236 (2009).

Chance plays a role, too. If analogous facts happened to have come before the circuit court previously, an officer is less likely to be shielded from suit. For example, had an officer stolen a painting in California instead of Illinois in 1994, and had the Ninth Circuit found the theft an unreasonable seizure, the officers who stole $225,000 may not have been spared from liability, whether or not they knew about the prior case holding that theft is an unreasonable seizure.

Regardless of the source for these disparities, they do not reflect good policy at work in the qualified-immunity doctrine.

CONCLUSION

The Eleventh Circuit's qualified-immunity decision offends the text and aims of the Fourteenth Amendment and Section 1983, and it finds no justification in the common law or sound policy. The Court should grant review and reverse the Eleventh Circuit's decision to ensure that the qualified immunity doctrine does not further depart from text, history, and sensible policy.

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Respectfully submitted,

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