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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

Fifty years ago, this Court squarely held that the Constitution requires that, when a prison administrator "restricts inmate correspondence" and withholds an outgoing communication, the prisoner must be informed and "be given a reasonable opportunity to protest that decision." *Procunier v. Martinez*, 416 U.S. 396, 414, 418 (1974). And yet, the Eleventh Circuit here granted respondents qualified immunity, despite their having withheld Petitioner's correspondence without giving him notice, solely on the grounds that the correspondence at issue was *email*, rather than *postal* mail.

There are two reasons that holding warrants this Court's intervention.

First, that holding is egregiously wrong. Indeed, it is so misguided that it is an appropriate candidate for summary reversal. Clearly established law shows that respondents violated the Constitution. *Martinez* repeatedly frames its holding as protecting "inmate correspondence." *Id.* at 407-09, 413-14. Whatever else a prisoner's email is, it is obviously "inmate correspondence." Everyone who uses email, including judges, can see that. Thus, "few doubt that e-mail should be treated much like the traditional mail it has largely supplanted." *Carpenter v. United States*, 585 U.S. 296, 400 (2018) (Gorsuch, J., dissenting). Respondents' arguments to the contrary are meritless.

Second, and more profoundly, the Eleventh Circuit's decision illustrates the need for this Court to revisit the doctrine of qualified immunity.

Respondents' only argument in favor of qualified immunity here is stare decisis. But stare decisis should not "compel unending adherence" to precedents that were "egregiously wrong from the start," whose foundations are "exceptionally weak," that have had profoundly "damaging consequences." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). Qualified immunity checks every one of those boxes, as jurists from the across the nation, and members of this Court, have recognized. *See Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari); *N. S., only child of decedent Stokes v. Kansas City Bd. of Police Comm'rs*, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting from denial of certiorari); *see also* Pet. 25. Given that qualified immunity is a judge-made doctrine, this Court has the same common-law power to stop its expansion that it had to create it in the first place. *See Egbert v. Boule*, 596 U.S. 482, 491-94 (2022). At the very least, this Court should clarify that qualified immunity does not apply to constitutional violations like the one at issue here.

ARGUMENT

I. This case is the ideal vehicle to revisit the scope of qualified immunity.

This case is an excellent vehicle for both questions presented. Unlike in recent qualified immunity cases where this Court denied certiorari, BIO 34 (collecting cases), Petitioner relies solely on precedent from this

Court as sources of clearly established law;[1] the lower court addressed and resolved the constitutional question in his favor;[2] and none of the facts are in dispute. Pet 22-23.

Respondents do not contest any of that. Instead, respondents claim this case is a "bad vehicle" because the Eleventh Circuit got the constitutional question wrong and should have affirmed the grant of summary judgment on the merits. BIO 11, 35. Respondents also claim there is no split that warrants this Court's intervention. BIO 13-15. Neither argument is persuasive.

A. The decision below correctly found a constitutional violation.

Respondents' assertion that the Eleventh Circuit "was wrong to hold there was constitutional liability," BIO 16, flies in the face of *Martinez*. *Martinez* made clear that a prisoner's "uncensored correspondence with an outsider" implicates a constitutionally

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[1] Accordingly, the Court need not confront the open question whether lower court precedent can clearly establish the law. *Cf., e.g.*, *Felkner v. Nazarian*, 2024 WL 674715 (2024); *N.S. v. Kansas City Bd. of Police Comm'rs*, 143 S. Ct. 2422 (2023); *Gregory v. Brown*, 144 S.Ct. 484 (2023); *Lombardo v. City of St. Louis*, 143 S. Ct. 2419 (2023); *Ramirez v. Guadarrama*, 142 S. Ct. 2571 (2022); *Frasier v. Evans*, 142 S. Ct. 427 (2022) (all examining lower court precedent in qualified immunity analysis).

[2] That is, the finding of qualified immunity was not harmless. *Cf., e.g.*, *N.S.*, 143 S. Ct. 2422; *Lombardo*, 143 S. Ct. 2419; *Frasier*, 142 S. Ct. 427 (all declining to address the constitutional issue).

protected liberty interest. *Martinez*, 416 U.S. at 408. It does not matter that *Martinez* involved letters instead of emails, BIO 20,22. *Martinez*'s logic applies to all manners of "correspondence." Pet. 7-8, 10.[3]

Likewise, respondents' invocation of *Mathews v. Eldridge*, 424 U.S. 319 (1976), BIO 26-30, is misplaced. *Mathews* lays out the framework this Court uses when evaluating in the first instance what processes must attend a deprivation of liberty. 424 U.S. at 322-329. But *Martinez* already struck that balance; courts addressing the process requirements attending outgoing mail can thus rely on *Martinez* without doing the *Mathews* analysis in the first instance. And this Court reaffirmed *Martinez* 15 years later in *Thornburgh v. Abbott*, 490 U.S. 401 (1989). *See* Pet. 7.

Courts of appeals have read *Martinez* this way, affording prisoners "minimum procedural safeguards," *id.*, without turning to *Mathews*. *See, e.g.*, *Prison Legal News v. Cook*, 238 F.3d 1145, 1152-53 (9th Cir. 2001); *Montcalm Pub. Corp. v. Beck*, 80 F.3d

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[3] Citing *Pell v. Procunier*, 417 U.S. 817 (1974), respondents also claim "prisoners do not have a First Amendment right to access any particular form of communication." BIO 19. But *Pell* did not so hold. It explained that prisoners "*retain*[] those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell*, 417 U.S. at 822 (emphasis added). *Pell* went on to explain that one such right is the right to "written correspondence" that *Martinez* had recognized. *Id.* at 824 (citing *Martinez*).

105, 107 (4th Cir. 1996). But even on *Mathews*' turf, respondents' arguments falter because they provided Petitioner with *no process at all*.

Nor did this Court "walk[] away" from *Martinez* in *Thornburgh*. BIO 20-21. In *Thornburgh*, this Court merely clarified the "substantive standard" for determining whether certain censorship violates the First Amendment. BIO 21. It left undisturbed the *procedures* that must be followed before mail may be censored. *See, e.g.*, *Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004) ("[N]othing [in *Thornburgh*] suggests that the qualified liberty interest recognized in *Martinez* was overruled."); *Krug v. Lutz*, 329 F.3d 692, 697 (9th Cir. 2003) ("Although *Thornburgh* overruled *Martinez*'s substantive component, it did not disturb *Martinez*'s procedural due process aspects."). Moreover, *Thornburgh* overruled *Martinez* only for cases involving incoming correspondence. 490 U.S. at 413. *Thornburgh* retained *Martinez*'s reasoning as to outgoing correspondence. *Id.*

B. The decision below incorrectly granted qualified immunity.

Respondents claim *Martinez* could not have "*clearly established*" Petitioner's right to minimal procedural protections because that case is distinguishable in two ways. BIO 31 (emphasis in original). First, they argue, *Martinez* involved letters, not emails, BIO 31; second, the substantive censorship policy in *Martinez* was more "controversial," BIO 33. But, as Chief Judge Sutton has explained, it "defeats

the purpose of § 1983 to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas)." *Hagans v. Franklin Cnty. Sheriff's Off.*, 695 F.3d 505, 509 (6th Cir. 2012). The distinctions respondents rely on do just that.

Contrary to respondents' claims, email and mail are closely analogous: each operates by sending discrete items of correspondence from one person to another. Respondents argue that email is "fundamentally" different from mail, as different as an "airline flight" is from the "Lewis and Clark expedition." BIO 20. But the only distinctions respondents offer are that email is faster and it is (allegedly) easier to generate more of it. BIO 32-33 (asserting emails create the unique "risk" of prisoners "instantly" transmitting "dangerous messages" and are harder to "monitor" due to their potentially high "volume").

But those distinctions do not matter with respect to the question at hand. The Constitution does not forbid prison authorities from preventing the "instant[]" transmission of emails. It requires only that prisoners be given notice *after* intercepting their emails. And if anything, it's *easier* to provide notice after intercepting an email than after intercepting a letter. Because prisons have automated the process of screening and flagging emails, *see* BIO 5, they can similarly automate the process of sending notice should an email be flagged. By contrast, because

letters are manually reviewed, some manual effort would be required to issue notice of an intercepted letter. At any rate, this Court's directive in *Martinez* concerns *all* "correspondence." Pet. 7-8, 10; *see also Carpenter*, 585 U.S. at 400 (Gorsuch, J., dissenting).

Respondents also assert that the censorship policy here (which forbids emails with requests to forward) is "completely different" from the policy in *Martinez* (which forbade emails that "magnify grievances"). BIO 33. But that difference matters—if at all—only as to the *substantive* constitutionality of the censorship, not as to the *procedures* that must follow the censorship. Indeed, courts have repeatedly held that *Martinez*'s procedural protections apply even when the substantive censorship policy is content neutral. *See, e.g.*, *Jacklovich*, 392 F.3d at 427 (rejecting the state's argument that censorship was "content neutral"); *Vogt v. Wetzel*, 8 F.4th 182, 186-87 (3d Cir. 2021) (censoring emails that lacked a return address).

C. On the qualified immunity question, the decision below conflicts with the opinions of other circuits.

Respondents assert that "there is no split of authority" because the Eighth Circuit did not address the question presented and Petitioner "point[s] only to" *Bonner v. Outlaw*, 553 F.3d 673 (8th Cir. 2009). BIO 14. Respondents are wrong.

First, respondents misrepresent what the split is about. True, *Bonner* involved a "*physical* package sent

by an *attorney*," not "*email* communications from the *inmate*." BIO 14 (emphasis in original). But the split is not about—as respondents narrowly frame it—whether *Martinez* clearly established a prisoner's right to notice when his *email* is intercepted. The split is about whether *Martinez* created a right to notice when the manner of communication is *something other than letters*. The Eight Circuit, when confronted with packages, held that "[t]he reasoning of [*Martinez*] clearly applies to *all* forms of correspondence" in the qualified immunity analysis. *Bonner*, 552 F.3d at 680 (emphasis added). Email is undeniably a "form[] of correspondence," *supra* p. 1. So the Eighth Circuit rule would apply to email as well as packages. But the opinion below, when confronted with emails, held that it does not, noting that the lack of precedent "specifically rul[ing] that the *Martinez* due process framework governs emails" entitles respondents to qualified immunity. Pet. App. 18a.[4]

Second, this case deepens lower courts' disagreement over whether to grant qualified immunity when prior case law deals with an older technology. Pet. 10-11 (collecting cases in the Fourth, Seventh, and Ninth Circuits). Even more broadly, this case deepens the disagreement "over precisely what

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[4] In a similar vein, that *Bonner* involved communications from an attorney, BIO 14, is irrelevant. Neither the Eighth Circuit in *Bonner* nor this Court in *Martinez* suggested that communications with lawyers require different procedural safeguards from those with non-lawyers.

degree of factual similarity must exist" for the clearly established law inquiry. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring) (noting a "divide" among circuit courts); *see also* IJ Amicus Br. 17-18. Respondents do not attempt to argue otherwise.

Given the Eleventh Circuit's radical misapplication of qualified immunity, this Court may choose to summarily reverse—as it has done in recent years. *See Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam); *Sause v. Bauer*, 585 U.S. 957 (2018) (per curiam); *see also* Pet. 11.

II. The Court should take this case to reconsider qualified immunity.

The doctrine of qualified immunity has no grounding in the text or history of § 1983, has proven unworkable, and could not have engendered any reliance interests. This Court should reconsider or, at the very least, limit the scope of qualified immunity.

1. Given the widespread calls from across the ideological spectrum and from both this Court and others, Pet. 25-26, the Court may wish to clarify or reconsider qualified immunity. Stare decisis should not be a hurdle. All "five factors" this Court has identified as "weigh[ing] strongly in favor of overruling" precedent are present. *Dobbs*, 597 U.S. at 268.

a. The nature of the error. Qualified immunity, a judge-made doctrine, hamstrings § 1983 without any textual or historical basis, *see* Pet. 12-15, and is far

removed from its common-law roots. Pet. 17-19; Cato Amicus Br. 6-12. The text of Section 1983 says nothing about—indeed, it explicitly disclaims—qualified immunity. *See* Pet. 26. The Court should "apply, not rewrite, the law enacted by the people's representatives." *A.M. v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting) (criticizing that some applications of qualified immunity can go "a step too far").

Moreover, "the absence of legislative intervention," BIO 35, is no reason to deny certiorari. Congressional inaction is "a poor beacon to follow," *Zuber v. Allen*, 396 U.S. 168, 185 (1969), since "the views of a subsequent Congress" can only "form a hazardous basis for inferring the intent of an earlier one," *United States v. Price*, 361 U.S. 304, 313 (1960). There's "no way to tell what [Congress] intended except" looking to the text it enacted. Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 Geo. Wash. L. Rev. 1610, 1612 (2012).

b. The quality of reasoning. Because qualified immunity has no basis in the statute from which it purportedly arises, the quality of the reasoning weighs in favor of overruling. "Without any grounding in the [statute's] text, history or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation." *Dobbs*, 597 U.S at 270-71. "It was "the Court's own brainchild." *Id.* at 271.

c. Workability. Qualified immunity is unworkable. Lower courts are hopelessly confused, "grant[ing]

immunity when we should deny—and [] deny[ing] immunity when we should grant." *Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020) (Ho, J., concurring). And that confusion has repeatedly required this Court to intervene and reverse. *See* Pet. 16.

d. Disruptive effect on other cases. Qualified immunity stymies the development of constitutional law. By "leapfrog[ging] the underlying constitutional merits" in qualified immunity cases, courts skip the opportunity to provide "matter-of-fact guidance about what the Constitution requires." *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part and dissenting in part).

e. Absence of concrete reliance. Officers do not have a reliance interest in the ability to violate constitutional rights. *See Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 700 (1978). Governments do not rely on the doctrine either, as invoking qualified immunity actually *increases* the length and overall cost of litigation, thereby harming one of the interests the doctrine was originally meant to protect. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1824 (2018).

2. Even if the Court does not wish to overrule qualified immunity, the Court should grant review to clarify and limit qualified immunity. For instance, this Court should consider limiting the doctrine to only those officials who were entitled to invoke qualified immunity at common law. Pet. 17-20. Or it should clarify 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. Pet. 20-22; *see Horvath*, 946 F.3d at 802 (Ho, J., concurring in part and dissenting in part).

CONCLUSION

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

Respectfully submitted,

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