No. ____

In the Supreme Court of the United States

PATRICIA POLANCO, *et al.*,

Cross-Petitioners,

v.

RALPH DIAZ, *et al.*,

Cross-Respondents.

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

CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Cross-petitioners were plaintiff-appellees in four related cases in the court of appeals. They are Patricia Polanco, Vincent Polanco, Selena Polanco, Gilbert Polanco (deceased), Michael Hampton (deceased), Jacqueline Hampton, Daniel Ruiz (deceased), Santos Ruiz, Fernando Vera, Vanessa Robinson, Daniel Ruiz, Jr., Angelina Chavez, Eric Warner (deceased), Henry Warner, Joaquin Diaz (deceased), Hilda Diaz, Yadira Menchu, Blanca Diaz Houle, Donte Lee Harris, Kenneth Allan Cooper, Matthew K. Quale, Jr., Karen Legg, Michelle Legg, Tyrone Love, and Reginald Thorpe (representing a class).

Cross-respondents were the defendants-appellants in those cases. They are Ralph Diaz, the Estate of Robert S. Tharratt, Ronald Davis, Ronald Broomfield, Clarence Cryer, Alison Pachynski, Shannon Garrigan, Louie Escobell, Muhammad Farooq, Kirk A. Torres, Kathleen Allison, Dean Borders, Joseph Bick, Mona D. Houston, the State of California, San Quentin State Prison, and the California Department of Corrections and Rehabilitation (CDCR), and the California Institute for Men (CIM).

RELATED PROCEEDINGS

Diaz v. *Polanco*, No. 23-722 (U.S.)

Polanco v. *Diaz*, No. 22-15496 (9th Cir. Nov. 16, 2023)

Hampton v. *California*, No. 22-15481 (9th Cir. Oct. 3, 2023)

Cooper v. *Allison*, No. 22-16088 (9th Cir. Oct. 13, 2023)

Harris v. *Allison*, No. 22-15921 (9th Cir. Oct. 13, 2023)

Polanco v. *California*, No. 3:21-cv-06516 (N.D. Cal. Mar. 3, 2022)

Hampton v. *California*, No. 3:21-cv-03058 (N.D. Cal. Mar. 20, 2022)

Cooper v. *Allison*, No. 3:22-mc-80066 (N.D. Cal. July 15, 2022)

Harris v. *Allison*, No. 3:20-cv-09393 (N.D. Cal. May 18, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Cross-petitioners respectfully conditionally cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, only in the event the Court grants certiorari in No. 23-722.

OPINIONS BELOW

The opinion of the court of appeals in *Polanco* v. *Diaz* is reported at 76 F.4th 918 (Pet. App. 1a-33a).[1] The opinion and order of the district court is unreported but is available at 2022 WL 625076 (Pet. App. 34a-75a).

The opinion of the court of appeals in *Hampton* v. *California* is reported at 83 F.4th 754 (Pet. App. 34a-75a). The court's memorandum disposition resolving certain remaining issues is unreported but available at 2023 WL 6443897 (Pet. App. 111a-113a). The opinion and order of the district court is unreported but available at 2022 WL 838122 (Pet. App. 114a-148a).

In *Cooper* v. *Allison* and *Harris* v. *Allison*, the opinion of the court of appeals is unreported but available at 2023 WL 6784355 (Pet. App. 181a-186a). The district court opinion and order in *Cooper* is unreported but available at 2022 WL 2789808 (Pet. App. 187a-212a). The district court opinion and order in *Harris* is unreported but available at 2022 WL 2232525 (Pet. App. 213a-236a).

JURISDICTION

The petition in No. 23-722 was docketed on January 4, 2024. This conditional cross petition is timely

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[1] Citations to Pet. App. refer to the petition appendix filed in No. 23-722. See Rule 12.5 of the Rules of this Court.

filed on February 5, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

STATEMENT

In No. 23-722, high-level state officials are alleged to have knowingly exposed staff and inmates at San Quentin State Prison to serious danger from COVID-19, despite readily available protective measures and contrary to clear public health guidance. They sought qualified immunity, which the district court and the court of appeals denied. Those officials have now petitioned this Court, seeking to challenge that determination.

For reasons we will explain in the forthcoming brief in opposition, that petition presents no questions deserving of this Court's review and should be denied. However, should the Court grant certiorari in No. 23-722, it should also review a logically prior question that has animated a growing number of Justices, judges, and commentators: Whether the judge-made qualified immunity doctrine should be overturned or reexamined in whole.

As we explain, it should be. The text of Section 1983 does not provide for qualified immunity, and scholarship has highlighted that the traditional common-law justification for qualified immunity is flawed in multiple respects—indeed, the original text of the Civil Rights Act of 1871 demonstrates Congress's intent to *abrogate* common-law immunities, not incorporate them. Moreover, qualified immunity either fails to serve, or is unnecessary to achieve, the policy goals the Court relied on in constructing the modern version of the doctrine. The time has come to reexamine it.

A. Factual background

On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency due to the COVID-19 pandemic. Polanco E.R. 585-586. Further emergency measures quickly followed. On March 16, 2020, health officials in seven Bay Area counties, including Marin County where San Quentin is located, issued shelter-in-place orders. *Id.* at 586. Marin County's Order required social distancing of at least six feet in all shared spaces and required all essential government functions be performed in accordance with social distancing requirements. *Ibid.* On March 19, 2020, Governor Newsom announced a statewide shelter-in-place order. *Id.* at 587. In April, six Bay Area counties, including Marin County, issued mandatory mask mandates. *Id.* at 587-588.

State officials also issued emergency orders implementing COVID-19 precautions for state prisons. Governor Newsom issued an executive order suspending the intake of new inmates into all state correctional facilities (Cooper E.R. 570), and California Correctional Health Care Services (CCHCS) adopted a policy opposing the transfer of inmates between prisons because the "mass movement of high-risk inmates

between institutions without outbreaks is * * * potentially dangerous" and "carries significant risk of spreading transmission of the disease between institutions." Polanco E.R. 587.

Thus, by May 2020, Defendants—all high-level officials at San Quentin State Prison, the California Department of Corrections and Rehabilitation (CDCR), and the California Institute for Men (CIM)—were well aware of the risks that COVID-19 posed and the public health measures available to combat it. Defendants had been fully briefed about the dangers of COVID-19 and the necessity for precautions to prevent its spread, including social distancing, personal protective equipment (PPE), the need to quarantine those who have been exposed, and the need for regular testing, as many virus carriers can be asymptomatic. *Id.* at 585-586.

Defendants were also aware that a COVID-19 outbreak at San Quentin could be particularly dangerous and difficult to contain, given the antiquated facilities, poor ventilation, overcrowding, and the lack of appropriate quarantine space. *Id*. at 586. In addition, Defendants knew that San Quentin housed a higher population of older inmates compared with other facilities, with high rates of chronic conditions and co-morbidities for COVID-19. *Ibid*. Defendants also knew that many San Quentin staff also had risk factors for COVID-19. *Ibid*.

Nevertheless, on May 30, 2020, Defendants transferred 122 inmates from the California Institute for Men (CIM) to San Quentin. *Id*. at 588. At the time, CIM was suffering from a severe outbreak of COVID-19, which had infected over 600 inmates and killed

nine. *Ibid*. By contrast, at the time, San Quentin still had no known cases of COVID-19. *Ibid*.

This transfer of inmates from CIM to San Quentin led to what the California Office of Inspector General would later call "a public health disaster" (*id.* at 596) that infected over 2,100 inmates and killed 28 inmates and one correctional sergeant, Gilbert Polanco. *Id*. at 596-597.

The transfer was indeed a disaster. Most of the men transferred from CIM had not been tested for COVID-19 in approximately three to four weeks. *Id.* at 588. The transferred inmates were not screened for COVID-19 symptoms before being placed on buses, where they were packed in in numbers far exceeding capacity limits that CDCR had mandated for inmate safety. *Ibid*. Defendants did not quarantine the new inmates when they arrived at San Quentin, instead placing nearly all of them in a housing unit with open-air cells and had them use the same showers and mess hall as the other inmates. *Id.* at 588.

Two days later, the Marin County Public Health Officer Dr. Matthew Willis learned of the transfer and immediately requested a conference call with some of the Defendants. *Id.* at 589-590. Dr. Willis recommended that all transferred inmates be completely sequestered from the existing San Quentin population, that all exposed inmates and staff be required to wear masks, and that staff movement be restricted between different housing units. *Ibid.* Defendants failed to implement any of Dr. Willis's suggestions. Instead, they agreed that Dr. Willis be informed that he lacked the authority to mandate safety measures in state-run prisons. *Id.* at 590.

Unsurprisingly, within days of the transfer, 25 of the transferred inmates tested positive for COVID-19, and an outbreak quickly spread throughout San Quentin. *Id.* at 588-589. Over three weeks, San Quentin went from having no cases of COVID-19 to 499 confirmed cases. *Id.* at 589.

On June 13, 2020, a group of health experts toured San Quentin at the request of the federal court-appointed Medical Receiver. *Id.* at 590. Those experts wrote an "Urgent Memo" dated June 15, 2020, that warned that the COVID-19 outbreak at San Quentin could develop into a "full-blown local epidemic and health care crisis." *Ibid.* The experts noted that San Quentin's COVID-19 practices were woefully inadequate: Defendants failed to provide adequate masks and PPE to staff and inmates, even though masks and PPE were easily obtainable. *Ibid*. There were "completely unacceptable" delays in testing. *Ibid*. Multiple medical facilities offered to provide San Quentin with free COVID-19 testing—offers the Defendants rejected. *Id.* at 591.

Even as the outbreak raged on, prison staff were not given adequate PPE and were not regularly tested for COVID-19. *Ibid*. When they asked for masks or respirators, correctional officers (including Sergeant Polanco) were told that to the extent San Quentin had PPE, it was reserved for medical professionals. *Ibid*. Thus, prison staff were relegated to wearing handmade masks sewn by their families or inmates. *Ibid*. Cross-Petitioner Patricia Polanco, surviving spouse of Sergeant Polanco, personally sewed dozens of masks for San Quentin prison staff. *Ibid.*

By July 30, 2020, more than 2,181 San Quentin inmates and 270 staff had been infected with COVID-

19. *Id.* at 592. As of September 2, 2020, approximately 26 inmates, along with Sergeant Polanco, had died from COVID-19. *Ibid*.

Understandably, the outbreak caused significant public outcry. The California Senate Committee on Public Safety held a meeting on July 1, 2020, during which one California Assemblymember called the transfer the "worst prison health screw up in state history." *Ibid*. The California OIG was called to investigate, and eventually issued three reports evaluating CDCR's COVID-19 policies in light of the outbreak. *Id.* at 595-598. The OIG discovered that officials at CIM explicitly ordered that inmates should *not* be retested for COVID-19 the day before the transfer, and multiple high-level officials were aware that the prior tests were outdated. *Id.* at 598. Nurses at CIM also questioned the decision to transfer untested inmates on buses to San Quentin, asking "What about COVID precautions?" *Ibid*. The report thus concluded that the decision to transfer inmates in such unsafe conditions "was not simply an oversight, *but a conscious decision made by prison and CCHCS executives*." *Ibid* (emphasis added).

Similarly, in February 2021, the California Division of Occupational Safety and Health cited the CDCR and San Quentin with 14 worker safety violations arising from the outbreak, including five groups of violations that were "serious" and four that were "willful-serious." *Id.* at 598-600. The conduct leading to those violations included failure to provide staff with PPE or training and regularly shifting staff between infected and non-infected units. *Ibid*.

Finally, a series of state habeas cases addressing the outbreak resulted in the California Court of

Appeal determining that Defendants Broomfield and CDCR "concede[d] 'actual knowledge' of the 'substantial risk of serious harm' to San Quentin inmates" and called the COVID-19 outbreak at San Quentin "the worst epidemiological disaster in California correctional history." *Id.* at 593-594 (quoting *In re Von Staich*, 56 Cal.App.5th 53, 78 (2020)).

* * *

At the time of the transfer, Sergeant Polanco was fifty-five years old and had served as a correctional officer for 34 years. *Id.* at 584. Sergeant Polanco had multiple high-risk factors for COVID-19, including his age, obesity, diabetes, and hypertension. *Id.* at 600 One of Sergeant Polanco's job duties during the pandemic was transferring sick inmates—including inmates with COVID-19—to local hospitals. *Id.* at 601. Defendants refused to provide Sergeant Polanco or the inmates he was driving with adequate PPE for those trips, even though PPE was available. *Ibid*.

Sergeant Polanco became infected with COVID-19 around June 21, 2020. *Id.* at 602. By July, his condition had worsened, and on August 9, he died from COVID-19. *Id.* at 603. On the day Sergeant Polanco died, Governor Newsom ordered the flag be flown at half-staff. That flag that was later sent to Sergeant Polanco's surviving wife and cross-petitioner, Patricia Polanco. *Id.* at 584, 603.

The outbreak's victims also included Daniel Ruiz, Eric Warner, David Reed, Joaquin Diaz, and Michael Hampton, among others. Each of these men had multiple known risk factors for COVID-19; contracted COVID-19 after being exposed to the disease in the San Quentin outbreak; and died from COVID-19 as a

result. *See* Cooper E.R. 439-441, 483-484, 582-584, 732-733; Hampton E.R. 193-194.

B. Proceedings below

1. *Polanco* v. *Diaz.* Sergeant Polanco's surviving wife and children brought an action under the Fourteenth Amendment for violation of Sergeant Polanco's due process right to be free from state-created danger. Pet. App. 35a. The Defendants moved to dismiss based on qualified immunity, which the district court denied in relevant part, and the court of appeals affirmed. Pet. App. 1a-33a.

The court of appeals concluded that two of its prior precedents, *L.W.* v. *Grubbs*, 974 F.2d 119 (9th Cir. 1992), and *Pauluk* v. *Savage*, 836 F.3d 1117 (9th Cir. 2016), clearly established that officials "could be held liable for affirmatively exposing their employees to workplace conditions that they knew were likely to cause serious illness," including when the danger "was created by requiring the employee to work in close proximity to people who posed a risk" and "the danger was a potentially fatal illness caused by breathing contaminated air." Pet. App. 19a.

2. *Hampton* v. *California*. Michael Hampton's wife brought suit under 42 U.S.C. § 1983, alleging violations of the Eighth Amendment. Pet. App. 114a-115a. The district court denied qualified immunity (Pet. App. 136a), and the court of appeals affirmed (Pet. App. 92a). The court of appeals concluded that an inmate's right to be free from exposure to a "serious, communicable disease * * * has been clearly established since at least 1993." (Pet. App. 102a (citing *Helling* v. *McKinney*, 509 U.S. 25 (1993)). *See also id.* at 103a (collecting cases).

3. *Cooper* v. *Allison* and *Harris* v. *Allison.* The *Cooper* and *Harris* appeals addressed nine consolidated cases filed by additional inmates or their surviving families alleging Eighth Amendment violations based on the same general facts. Pet. App. 183a, 184a. As with *Hampton*, the district court denied Defendants' motions to dismiss for qualified immunity. *Id*. at 190a, 215a. The court of appeals affirmed in a memorandum disposition. *Id.* at 183a-186a.

REASONS FOR GRANTING THE CROSS-PETITION

As will be explained in the forthcoming brief in opposition to certiorari in No. 23-722, the Defendants in this case present no questions worthy of this Court's review. But if the Court were to disagree and grant certiorari in No. 23-722, it should also grant this petition to resolve the persistent and recurring critiques leveled at qualified immunity.

Even as they apply the doctrine to the cases before them, judges across the country announce that they believe qualified immunity is ungrounded in text and common law. Further, the statutory text, its original public meaning, and the incoherence of the policy justifications on which this Court has previously relied all support overturning qualified immunity. The Court should do so now.

A. The Court should settle the ongoing debates regarding qualified immunity.

The status of qualified immunity is an important and recurring issue. Justices of this Court and dozens of federal judges have repeatedly called for reexamination of the doctrine. Moreover, the status quo—in which judges deny relief for constitutional violations while criticizing the doctrine that requires them to do

so—harms the legitimacy of the judiciary in the eyes of the public.

1. Jurists lack confidence in the qualified immunity framework.

Judicial criticism of qualified immunity has been biting and sustained, both from Justices of this Court and judges throughout the federal system.

a. For example, Justice Thomas has explained that, because the qualified immunity "analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act," the Court is not "interpreting the intent of Congress in enacting the Act." *Ziglar* v. *Abassi*, 582 U.S. 120, 159 (2017) (Thomas, J., concurring in part and concurring in the judgment) (alterations incorporated). Instead, qualified immunity reflects the kind of "freewheeling policy choice[]" that the Court has "disclaimed the power to make" in other contexts. *Id.* at 159-160. As a result, "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe." *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of cert.).

Justice Thomas has therefore urged the Court to "reconsider [its] qualified immunity jurisprudence" "in an appropriate case." *Ziglar*, 582 U.S. at 160. *See also Baxter*, 140 S. Ct. at 1862. Cf. *Wyatt* v. *Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., joined by Scalia, J., concurring) (reserving the question "whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy").

Justice Sotomayor has also criticized the doctrine. Because "[n]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials," the doctrine has

transformed "into an absolute shield for law enforcement officers." *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). This "one-sided approach" "gut[s] the deterrent effect" of constitutional guarantees, such as the Fourth Amendment. *Id.* *See also Mullenix* v. *Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) ("By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.").

b. Judges from across the country have echoed these concerns. Some, following Justice Thomas, observe that qualified immunity lacks textual and historical support. See, *e.g.*, *McKinney* v. *City of Middletown*, 49 F.4th 730, 757 (2d Cir. 2022) (Calabresi, J., dissenting) ("[T]here was no common law background that provided a generalized immunity that was anything like qualified immunity."); *Cole* v. *Carson*, 935 F.3d 444, 470-471 (5th Cir. 2019) (Willett, J., dissenting) ("respectfully voic[ing] unease" with "[t]he entrenched, judge-invented qualified immunity regime"); *Horvath* v. *City of Leander*, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (explaining that neither the "common law of 1871 [n]or [] the early practice of § 1983 litigation" supports the qualified immunity defense); *Sosa* v. *Martin County*, 57 F.4th 1297, 1304 (11th Cir. 2023) (Jordan, J., joined by Wilson & Jill Pryor, JJ., concurring in the judgment) ("[T]he Supreme Court's governing (and judicially-created) qualified immunity jurisprudence is far removed from the principles existing in the early 1870s."); *Goffin* v. *Ashcraft*, 977 F.3d 687, 694 n.5 (8th Cir. 2020) (Smith, C.J., concurring) (concluding that "increased legal and historical scrutiny" on qualified immunity is "warranted").

Others focus on the doctrine's scope and policy deficiencies. See*, e.g.*, *Jefferson* v. *Lias*, 21 F.4th 74, 87 (3d Cir. 2021) (McKee, J., joined by Restrepo & Fuentes, JJ., concurring) ("[T]he deference to law enforcement that consistently results in qualified immunity in excessive force cases is inconsistent with the vast amount of research in such cases as well as the evolving national consensus of law enforcement organizations."); *Thompson* v. *Clark*, 2018 WL 3128975, at *6 (E.D.N.Y. June 26, 2018) (Weinstein, J.) ("The Court's expansion of immunity, specifically in excessive force cases, is particularly troubling.").

And still others raise difficulties with applying the "clearly established" test and the absurd outcomes it creates. *Quintana* v. *Santa Fe County Bd. of Comm'rs,* 2019 WL 452755, at *37 n.33 (D.N.M. 2019) (Browning, J.) ("Factually identical or highly similar factual cases are not * * * the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way.").

Thus, a growing "chorus of jurists" has continued to explicitly call on this Court to act. *Cole*, 935 F.3d at 470 (Willett, J., dissenting) ("[Q]ualified immunity * * * ought not be immune from thoughtful reappraisal."). *See also*, *e.g.*, *Horvath*, 946 F.3d at 795 (Ho, J., concurring in the judgment in part and dissenting in part) ("I would welcome a principled re-evaluation of our precedents."); *Sosa*, 57 F.4th at 1304 (Jordan, J., joined by Wilson & Jill Pryor, JJ., concurring in the judgment) ("[T]he qualified immunity doctrine we have today is regrettable. Hopefully one day soon the Supreme Court will see fit to correct it.").

2. The status quo harms the credibility of the judicial system.

Despite their open questioning of qualified immunity's legal basis and policy wisdom, judges have no choice but to faithfully apply the current doctrine. This forces judges to deny litigants relief while simultaneously doubting the grounds of that decision. See, *e.g.*, *Ziglar*, 582 U.S. at 157 (Thomas, J., concurring in part and concurring in the judgment) ("The Court correctly applies our precedents * * *. I write separately, however, to note my growing concern with our qualified immunity jurisprudence."); *Horvath*, 946 F.3d at 795 (Ho, J., concurring in the judgment in part and dissenting in part) ("But be that as it may, I am duty bound to faithfully apply established qualified immunity precedents."); *Rogers* v. *Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023) (Willett, J.) (concurring in part) (similar); *Ventura* v. *Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) (similar).

This untenable result undermines the legitimacy of the judicial system. This Court has long recognized the "necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). But there is nothing reasoned about judges allowing bad deeds to go unpunished based on a doctrine that those same judges simultaneously decry as flawed and in need of reform. Cf. *Horvath*, 946 F.3d at 801 (Ho, J., concurring in the judgment in part and dissenting in part) ("Public officials who violate the law without consequence only further fuel public cynicism and distrust of our institutions of government.") (quotation marks omitted).

In other words, when courts openly fail to redress constitutional wrongs, they undermine the people's "respect for the rule of law in general and increase[] the chance that they will refuse legal directives." Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Inst. (Sept. 14, 2020), perma.cc/A98Q-WHZD. Litigants also have little reason to accept losing in court when judges openly admit the basis for the decision was unfair or unlawful. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime and Just. 283, 283 (2003) ("Considerable evidence suggests that the key factor shaping public behavior is the fairness of the processes legal authorities use when dealing with members of the public."). Failure to resolve this issue will erode public trust in the judiciary.

3. This is an important and recurring issue.

The issue is also important and constantly recurring. Countless cases implicate qualified immunity. A Westlaw search for the phrase "qualified immunity" found more than 1,200 federal decisions mentioning the doctrine in the last three years. And, each year, thousands of lawsuits are filed in which defendants might invoke the qualified immunity defense. *See* Civil Federal Judicial Caseload Statistics, tbl. C-2 (Mar. 31, 2022) (identifying that, during the 12 months ending in March 2022, 14,960 "other civil rights" lawsuits were filed—virtually all of which could involve a qualified immunity defense). This Court should settle the qualified immunity debates for the thousands of plaintiffs and government actors who must litigate the issue each year.

Beyond the raw numbers, the continuing vitality of qualified immunity is profoundly important in each individual instance where it applies. In every case where it is invoked, qualified immunity has the potential to curtail fundamental civil liberties. Litigants rely on Section 1983 to vindicate a wide-ranging set of constitutional rights. See, *e.g.*, *Uzuegbunam* v. *Preczewski*, 592 U.S. 279 (2021) (Section 1983 action against a college that allegedly restrained students' free speech); *Paulk* v. *Kearns*, 596 F. Supp. 3d 491 (W.D.N.Y. 2022) (Section 1983 action alleging that the county pistol permitting office had violated the plaintiff's Second and Fourteenth Amendment rights). Qualified immunity precludes the vindication of these and other rights; by definition, it makes a difference only in cases where a court has determined that there was a constitutional violation—or at least, has not determined that individual rights were *not* violated.

Besides the constitutional rights of individual Americans—a weighty interest in any event—qualified immunity impedes the development of constitutional law on the whole by allowing judges to stay silent on whether there was a constitutional violation in the first place. Research shows that after *Pearson* v. *Callahan*, 555 U.S. 223 (2009), increasing numbers of courts are doing just that. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37-38 (2015) (finding a post-*Pearson* decrease in circuit courts deciding constitutional questions).

When courts "leapfrog the underlying constitutional merits" in difficult cases, they deprive the public of "matter-of-fact guidance about what the Constitution requires." *Zadeh* v. *Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and

dissenting in part). *See also Thompson*, 2018 WL 3128975, at *8 ("The failure to address whether or not an act was constitutional prevents the creation of 'clearly established' law needed to guide law enforcement and courts."). The lack of constitutional decision-making "stunt[s] the development of constitutional rights" "[a]t a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices." Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 Mich. L. Rev. 1219, 1248, 1250 (2015).

Perversely, the post-*Pearson* approach traps Americans suffering constitutional wrongs in a "Catch-22," requiring them to "produce precedent even as fewer courts are producing precedent." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part). Constitutional violations go unpunished simply because courts have yet to address an issue. This "Escherian Stairwell" (*id.* at 480) allows "government officials and officers [to] continue to operate in clear violation of constitutional standards * * * without fear of redress" (*Thompson*, 2018 WL 3128975 at *13). For this reason, too, current doctrine is untenable, requiring the Court's intervention.

B. Qualified immunity is wrong and needs recalibration.

Qualified immunity is also wrong: It is not based in the text of Section 1983; the analogy to common-law tort defenses that gave rise to qualified immunity does not hold up under scrutiny; and the doctrine does not even serve the policy goals it was unabashedly created to address. Nor does stare decisis present a bar to reevaluating the doctrine.

1. Qualified immunity is judge-created and atextual.

a. Nothing in the plain text of Section 1983 provides for any immunities from suit whatsoever. The text provides, in relevant part:

> *Every person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law*, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (emphases added).

Thus, the Court has time and time again acknowledged that "Section 1983, on its face admits of no defense of official immunity." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993)). *See Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976) ("The statute thus creates a species of tort liability that on its face admits of no immunities."); *Owen* v. *City of Independence*, 445 U.S. 622, 635 (1980) ("[Section 1983's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted").

That should be the end of the matter. As the Court has affirmed, the plain meaning of a statute governs over "extratextual considerations." *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1737 (2020). *See also id.* ("Only the written word is the law."). Because the statutory text includes no references to any immunities or

defenses, the plain text of Section 1983 is at odds with the doctrine of qualified immunity.

b. Despite the absence of any textual basis for qualified immunity, the Court initially created the doctrine by looking to the defense of good faith available in some common-law tort actions at the time of enactment. *See Pierson* v. *Ray*, 386 U.S. 547, 552-558 (1967). But as important scholarship highlights, "[t]here also may be no justification for a one-size-fits-all, subjective immunity based on good faith." *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of cert.). *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018).

While "[n]ineteenth-century officials sometimes avoided liability because they exercised their discretion in good faith, * * * officials were not *always* immune from liability for their good-faith conduct." *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of cert.) (collecting authorities); Baude, *supra*, at 56 (discussing the "strict rule of personal official liability" that "was a fixture of the founding era"). Indeed, there is a compelling case both that the common-law good-faith defense was specific to the tort of false arrest and that common-law immunities were understood not to apply to constitutional violations in any event. *See* Baude, *supra*, at 58-60 (describing "[t]he role of good faith as an element of specific torts," rather than as a "freestanding defense"). As Justice Thomas explained, "the defense for good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. * * * An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense." *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of cert.). *See also Myers* v. *Anderson*,

238 U.S. 368, 378-379 (1915) (rejecting the defense of "nonliability in any event" where the lower court had held that a state official enforcing an unconstitutional law is "made liable to an action for damages by the simple act of enforcing a void law" (*Anderson* v. *Myers*, 182 F. 223, 230 (C.C.D. Md. 1910))).

Thus, even if Section 1983 was enacted against the backdrop of common-law immunities, immunity from suit for *constitutional* violations, as opposed to particular tort claims, was not available at common law. Because the plain text of the statute makes no reference to immunities, and because the common law in 1871 likely provided no immunity from constitutional tort claims, there is simply no basis to read qualified immunity into Section 1983. And even if the subjective qualified immunity standard could be supported by common-law principles (it cannot), current qualified immunity doctrine is indefensible on those grounds. *See Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987) (noting the evolution of the doctrine); *Filarsky* v. *Delia*, 566 U.S. 377, 383-384 (2012) (continuing to expand the doctrine with reference to common law).

2. The original text of the Civil Rights Act further undermines qualified immunity.

Not only does the current text of Section 1983 say nothing about qualified immunity, the original text of the Civil Rights Act of 1871 specifically *abrogated* state common-law defenses, thereby precluding qualified immunity. Recent scholarship has reinvigorated interest in the original text as evidence that "any immunity grounded in state law has no application to the cause of action we now know as Section 1983." Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 238 (2023). *See*

alsoPrice v. *Montgomery County*, 72 F.4th 711, 727 n.1 (6th Cir. 2023) (Nalbandian, J., concurring in part) (discussing this scholarship); *Pike* v. *Budd*, 2023 WL 3997267, at *12 n.18 (D. Me. June 14, 2023) (same); *Crosland* v. *City of Philadelphia*, 2023 WL 3898855, at *4 n.8 (E.D. Pa. June 8, 2023) (same).

Judges have contended that this renewed attention to the original text should trigger a "seismic" shift in our understanding of Section 1983. *Rogers*, 63 F.4th at 980 (Willett, J., concurring) ("[T]he Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common law immunities absent explicit language—is faulty because the 1871 Civil Rights Act expressly included such language."). See*, e.g.*, *Erie* v. *Hunter*, 2023 WL 3736733, at *3 n.2 (M.D. La. May 31, 2023) (Jackson, J.) (joining Judge Willett's call for this Court to grapple with the original text which "inarguably eliminates *all* . . . immunities"); *Thomas* v. *Johnson*, 2023 WL 5254689, at *7 (S.D. Tex. Aug. 15, 2023) (similar).

a. As originally enacted, the Civil Rights Act of 1871 read:

> Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, ***any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding***, be liable to the party injured * * * ."

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (emphasis added).

This text plainly abrogated state common law, including the common-law immunities that formed the original basis for qualified immunity. *See* pages 19-21, *supra*. State common law is "any" state "law." 17 Stat. at 13. It is also state "custom, or usage." *Ibid.* Contemporary dictionaries confirm that, in 1871, "custom" and "usage" unambiguously included "common law." See Noah Webster, *An American Dictionary of the English Language* (1828) (defining the "unwritten or common law" as "a rule of action which derives its authority from long usage, or established custom"); Noah Webster, *Webster's Complete Dictionary of the English Language* 757 (1886) (same). Accord, *e.g.*, *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 659 (1834) ("The judicial decisions, the usages and customs of the respective states" established the "common law."); *Strother* v. *Lucas*, 37 U.S. (12 Pet.) 410, 437 (1838) ("Every country has a common law of usage and custom.").

Accordingly, in 1871, an ordinary reader of the Civil Rights Act would have unambiguously understood Congress to have created liability that was not limited by state common-law immunities. Indeed, that is precisely what the legislative debates surrounding the Civil Rights Act suggest Congress understood as well. *See* Reinert, *supra*, at 238-239 & nn.247-250 (collecting legislative evidence). Cf., *e.g.*, *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1085 (2019) (employing "legislative history" to "confirm[]" a text-based statutory construction).[2]

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[2] And, of course, courts shared the same understanding for nearly a century. See, *e.g.*, *Picking* v. *Pennsylvania R. Co.*, 151 F.2d 240, 250 (3d Cir. 1945) ("We think that the conclusion is

b. The "notwithstanding clause," however, "was inexplicably omitted from the first compilation of federal law in 1874" "for reasons lost to history." *Rogers*, 63 F.4th at 980 (Willett, J., concurring).

Congress in 1866 had authorized a compilation of federal statutes, empowering a three-person commission "to revise, simplify, arrange, and consolidate" all the session laws that had accumulated to that point—but not to substantively change the law. *See* An Act to Provide for the Revision and Consolidation of the Statute Laws of the United States, ch. 140, § 1, 14 Stat. 74, 74-75 (1866). In fact, the task was later stripped from the commission and given to a different, single reviser after the congressional committee overseeing the effort determined that the commission's proposed codification *would* significantly change the law. Ralph H. Wan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1013 (1938).

The resulting compilation was enacted into positive law, and the corresponding session laws were repealed, in the Revised Statutes of 1874. *See* Rev. Stat. § 5596, at 1085 (1874) ("All acts of Congress passed prior to [December 1, 1873], any portion of which is embraced in any section of said revision, are hereby

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irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate [common-law judicial immunity] to the extent indicated by that act and in fact did so."); *Burt* v. *City of N.Y.*, 156 F.2d 791, 793 (2d Cir. 1946) (Hand., J.) ("[S]o far as we can see, any public officer of a state, or of the United States, will have to defend any action brought [under the Civil Rights Act] in which the plaintiff, however irresponsible, is willing to make the necessary allegations.").

repealed, and the section applicable thereto shall be in force in lieu thereof."). But it immediately became apparent that the enacted text contained literally hundreds of errors. *See* Wan & Feidler, *supra*, at 1014; Andrew Winston, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, Library of Congress (July 2, 2015), perma.cc/WL5N-HS3D.[3] Learning from this process, Congress would never again enact a statutory codification into positive law. *See* Wan & Feidler, *supra*, at 1014, 1016.

The notwithstanding clause was lost from what is now Section 1983 due to this haphazard revision process. *See* Rev. Stat. § 1979, at 347 (1874). That is, "[t]he Reviser of Federal Statutes made an unauthorized alteration to Congress's language" by dropping it. *Rogers*, 63 F.4th at 980 (Willett, J., concurring).

c. The 1871 Act's original language is nonetheless crucially relevant to the interpretation of the current statute—and demonstrates the error in the Court's adoption of qualified immunity.

The Court's foundational cases on immunity under Section 1983 recognize that, in the absence of text addressing immunities one way or the other, the interpretive task is fundamentally one of determining congressional intent. See, *e.g.*, *Pierson*, 386 U.S. at 554-555 ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. * * * [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine" of judicial immunity);

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[3] Congress itself apparently spent very little time reviewing the reviser's work. "It has been said that the revision passed the Senate in about 40 minutes." Wan & Feidler, *supra*, at 1015 n.38.

Tenney v. *Brandhove*, 341 U.S. 367, 376 (1951). And even after the reformulation of qualified immunity in *Harlow*, the Court has "reemphasize[d] that [its] role is to interpret the intent of Congress in enacting § 1983, * * * and that [it is] guided in interpreting Congress' intent by the common-law tradition." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986).

In short, the Court has arrived at qualified immunity through an intent-based presumption that Congress does not, through silence, intend to depart from the common law. See, *e.g.*, *Buckley*, 509 U.S. at 268 ("Certain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume Congress would have specifically so provided had it wished to abolish' them.") (quoting *Pierson*, 386 U.S. at 555).

But such a presumption is nothing more than a "guide[] 'designed to help judges determine the Legislature's intent"—and as such, "other circumstances evidencing congressional intent can overcome their force." *Scheidler* v. *Nat'l Org. for Women, Inc.*, 547 U.S. 9, 23 (2006) (quoting *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001)). And here, there are the strongest possible "circumstances evidencing congressional intent" to the contrary: Congress's enacted language *did* abrogate state-law immunities, until what was supposed to be a non-substantive revision deleted the abrogating language from the final text. *See* pages 22-26, *supra*.

While such evidence of intent likely could not overcome plain language to the contrary appearing in the statutory text, qualified immunity is not based on statutory text at all. At best, it is based on statutory silence; at worst, it is policymaking by the judiciary.

And when all evidence indicates that Congress intended *not* to be silent on the issue of immunities—but was thwarted by an "unauthorized alteration" of the text (*Rogers*, 63 F.4th at 980 (Willett, J., concurring))—the presumption that forms the entire foundation of qualified immunity is wholly unjustified.

3. Qualified immunity does not satisfy the policy goals the Court created it to serve.

As described above, qualified immunity is no longer tethered to its original legal justification based on common-law immunities. In fact, it is no longer tethered to any *legal* justification at all. Instead, the doctrine's current form reflects the Court's naked balancing of policy goals. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813 (1982) ("[P]etitioners assert that public policy at least mandates an application of the qualified immunity standard. * * * We agree."); *ibid.* ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."). *See Crawford-El* v. *Britton*, 523 U.S. 574, 611-612 (1998) (Scalia, J., dissenting) ("We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities.").

Specifically, the Court in *Harlow* expressed concern that fear of personal liability in Section 1983 actions would inhibit officials from fully discharging their duties and reformulated the good-faith standard to serve that policy goal, as well as the goal of dismissing "insubstantial" lawsuits without trial. 457 U.S. at 814 ("[T]here is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"); *id.* at 808 (noting that in

prior official immunity analyses, the Court "emphasized [its] expectation that insubstantial suits need not proceed to trial"). But qualified immunity does not actually serve either of those stated goals.

a. To begin, officers are not sufficiently aware of "clearly established law" to structure their exercise of discretion around qualified immunity in the first place. A recent empirical study of hundreds of use-of-force policies, trainings, and other educational materials revealed that "officers are not regularly or reliably informed about court decisions interpreting [watershed Fourth Amendment precedents] in different factual scenarios—the very types of decisions that are necessary to clearly establish the law about the constitutionality of uses of force." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 610 (2021).

This evidence therefore undermines one of qualified immunity's underpinning assumptions—that "a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-819. Because officers lack knowledge of the clearly established law governing their day-to-day exercises of discretion as a factual matter, the essential assumption of qualified immunity—that officials structure their conduct around existing law—cannot be supported.

Qualified immunity also is not necessary to shield government officials from the financial costs of Section 1983 suits—thus, the thinking goes, protecting "the vigorous exercise of official authority" (*Harlow*, 457 U.S. at 807)—because officers "are virtually always indemnified." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). A

groundbreaking study found that law enforcement officers' financial contributions account for only 0.02% of settlements and judgments in civil rights damages actions against them. *Ibid.* Indeed, governments satisfied settlements and judgments against officers "even when indemnification was prohibited by statute or policy" and "even when officers were disciplined or terminated by the department or criminally prosecuted for their conduct." *Ibid.*

In light of this widespread practice of police indemnification, there is no practical "risk that fear of personal monetary liability * * * will unduly inhibit officials in the discharge of their duties" (*Anderson*, 483 U.S. at 638)—again undermining the key policy justification the Court has offered for the immunity doctrine.

b. Qualified immunity also is unnecessary to prevent "insubstantial lawsuits" from reaching trial. Cf. *Harlow*, 457 U.S. at 814, 818 (stating that the "objective reasonableness" test "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment").

As Justice Kennedy has explained, however, "*Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question." *Wyatt*, 504 U.S. at 171 (Kennedy, J., joined by Scalia, J., concurring). But "subsequent clarifications to summary-judgment law have alleviated that problem." *Ibid.* (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986)). Additional defendant-friendly procedural innovations have followed, further undermining any

need for immunity on top. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 680-684 (2009) (together with *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), significantly heightening the Rule 8 pleading standard, and concluding that *Bivens* plaintiffs had failed to plausibly plead a constitutional violation).

In Section 1983 cases concerning alleged Eighth Amendment violations, courts have additional tools to dispose of insubstantial cases. The Prison Litigation Reform Act of 1996 was "enacted * * * to reduce the quantity and improve the quality of prisoner suits." *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). The Act's requirement of an internal review of complaints by corrections officials before a federal lawsuit may also "filter out some frivolous claims." *Id.* at 525 (quoting *Booth* v. *Churner*, 532 U.S. 731, 737 (2001)).

In sum, qualified immunity is not necessary to further the policy goals it was created to serve. The ubiquity of indemnification among state, city, and local governments indicates that officers are virtually never personally liable in Section 1983 actions and therefore will not be deterred from carrying out their duties by the fear of liability. Qualified immunity is also not needed to sort the meritorious from the insubstantial civil-rights claims. Courts have a number of procedural tools at their disposal to evaluate and dispose of frivolous cases, and these tools can both operate independently of and survive the reversal of qualified immunity. Public policy—the sole basis on which the current version of qualified immunity is premised—therefore cannot justify the continued existence of the doctrine.

4. Stare decisis cannot save qualified immunity.

Finally, stare decisis is no impediment to reconsideration of current qualified immunity doctrine. To the contrary, all the factors the Court considers in evaluating whether stare decisis should apply counsel in favor of overturning qualified immunity. See *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215, 267 (2022) (enumerating factors that weigh "strongly in favor of overruling" precedent: "the nature of [the] error, the quality of [the] reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas," and "the absence of concrete reliance").

As we have described, qualified immunity rests on a flawed legal foundation. This Court's prior qualified-immunity decisions did not faithfully construe the text of Section 1983 either as codified or as originally enacted by Congress. Instead, early qualified immunity cases turned to flawed reasoning about the common law and functionalist considerations. See*, e.g.*, *Pierson*, 386 U.S. at 557 (applying Mississippi state common law defense); *Harlow*, 457 U.S. at 816 (relying on policy concerns). This Court has since rejected both modes of statutory analysis as improper. See*, e.g.*, *Rehberg* v. *Paulk*, 566 U. S. 356, 363 (2012) (rejecting Court's authority to make "freewheeling policy choice[s]"); *Van Buren* v. *United States*, 141 S. Ct. 1648, 1655 n.4 (2021) ("[C]ommon-law principles should be imported into statutory text only when Congress employs a common-law term—not when Congress has outlined an offense analogous to a common-law crime without using common-law terms.").

And as just described, even the Court's stated policy goals for qualified immunity have been negated by subsequent developments, like widespread indemnification and heightened pleading standards. *See* pages 28-31, *supra*. This is thus a quintessential scenario in which "doctrinal underpinnings" have "eroded over time," providing the justification needed to overcome stare decisis. See *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

Furthermore, qualified immunity has proven "unworkable" (*Dobbs*, 597 U.S. at 286), and the Court has not hesitated to change the doctrine repeatedly to account for implementation problems. See*, e.g.*, *Pierson*, 386 U.S. at 555 (creating a subjective "good-faith" defense to Section 1983 claims); *Harlow*, 457 U.S. at 818 (finding a subjective standard to be unworkable and replacing it with the objective test used today); *Saucier* v. *Katz*, 533 U.S. 194 (2001) (announcing requirement that courts reach the merits of a plaintiff's Section 1983 claim before reaching question of qualified immunity); *Pearson*, 555 U.S. at 233-234 (overruling *Saucier*'s sequencing requirement). Moreover, that judges express concern that qualified immunity is not grounded in text or history even as they are bound to follow this Court's precedents suggests the doctrine only erodes "public faith in the judiciary." *Moragne,* 398 U.S. at 403. *See* pages 14-16, *supra*.

Qualified immunity has also disrupted "other areas of law" (*Dobbs*, 597 U.S. at 286), particularly the orderly development, through iterative judicial interpretation, of the underlying constitutional law. Qualified immunity has created a vicious cycle in which lower courts must grant qualified immunity unless they can find a prior Supreme Court decision, binding precedent, or consensus of cases in which "an officer

acting under similar circumstances" has been found to have violated the Constitution. *White* v. *Pauly*, 580 U.S. 73, 79 (2017) (per curiam). Yet the Court has also advised lower courts that they can grant qualified immunity without ruling on plaintiffs' underlying constitutional claims—reducing the frequency with which lower courts announce clearly established law. *See* pages 17-18, *supra*; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1815-1816 (2018). Furthermore, the existence of qualified immunity discourages people whose rights have been violated from bringing cases in the first place. *Id.* at 1818.

Nor is this a case where "substantial reliance interests" (*Dobbs*, 597 U.S. at 287), counsel in favor of retaining qualified immunity. As this Court has explained, officers can have no legitimate reliance interest in the opportunity to violate constitutional rights, or even in their ability to push the boundaries of constitutional rights without overdeterrence. *See Monell* v. *Department of Soc. Servs. of City of N.Y.,* 436 U.S. 658, 700 (1978).

Ordinarily, the case for stare decisis is most compelling when interpreting statutes, given Congress's ability to overrule this Court where it disagrees with statutory precedents. *See Kimble*, 576 U.S. at 456; Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 317 (2005) ("[T]he Supreme Court's refusal to revisit a statutory interpretation is a means of shifting policy-making responsibility back to Congress").

However, qualified immunity is not really the result of statutory interpretation at all; rather, it is a judge-made doctrine. See, *e.g.*, *Crawford-El*, 523 U.S.

at 611-612 (Scalia, J., dissenting) (describing the judicial creation of qualified immunity an "essentially legislative activity"). The Court has previously observed that the super-strong statutory form of stare decisis is not "implicat[ed]" by qualified immunity, which "is judge made and implicates an important matter involving internal Judicial Branch operations." *Pearson*, 555 U.S. at 233-234. And, of course, the relatively short history of qualified immunity demonstrates that the Court has not previously had any qualms about adjusting or even "completely reformulat[ing]" the doctrine. *Anderson*, 483 U.S. at 645. The court should not hesitate to revisit the question of qualified immunity once again.

C. This case is a suitable vehicle.

The petition in No. 23-722 poses a question about what it means for the law to be clearly established for qualified immunity purposes. Pet. i. As we will explain in our forthcoming brief in opposition, that petition presents no issues warranting the Court's consideration, and should be denied.

However, if the Court were to grant in No. 23-722, that would squarely tee up the question presented in this conditional cross-petition. The issue of how to define "clearly established law" for qualified immunity purposes presupposes that qualified immunity is good law. The question presented here is both logically prior to the question presented in No. 23-722, and dispositive of the officers' claims to immunity.

CONCLUSION

If the Court grants the petition in No. 23-722, it should grant the conditional cross-petition as well.

Respectfully submitted.

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