No. 18-1173

IN THE

Supreme Court of the United States

I.B. AND JANE DOE,
Petitioners,
v.

APRIL WOODARD, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR SCHOLARS OF THE LAW OF QUALIFIED IMMUNITY AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are scholars at universities across the United States with expertise in the law of qualified immunity. Amici submit this brief to demonstrate that in light of the legal and practical justifications for qualified immunity and the current state of the Court's qualified immunity jurisprudence, the time has come to reconsider the doctrine.

BACKGROUND

Section 1983 provides a remedy for those whose federal statutory or constitutional rights have been violated by officials acting under color of state law. 42 U.S.C. § 1983; *Monroe* v. *Pape*, 365 U.S. 167 (1961). Qualified immunity protects such officials from § 1983 damages "'insofar as their conduct does not violate clearly established statutory or constitutional rights.'" *Messerschmidt* v. *Millender*, 565 U.S. 535, 546 (2012). The doctrine is said to "balance[] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009).

Although the text of § 1983 does not expressly provide for a defense of qualified immunity, this Court in *Pierson* v. *Ray* held that, in enacting § 1983, Congress intended to provide a defense to a § 1983 action based

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[1] No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties have consented to the filing of this brief. The parties' written consent to the filing of this brief is on file with the Clerk.

on an official's subjective good faith. 386 U.S. 547, 557 (1967). Because the common law at the time of § 1983's enactment in 1871 was understood to include that defense, the *Pierson* Court reasoned, Congress's silence concerning its application to § 1983 liability should be construed as adopting rather than rejecting the common law rule. *See id.*

Fifteen years later, the Court departed from this view of qualified immunity as an extension of the common law good-faith defense in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), "replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987). *Harlow* refocused the qualified immunity analysis on the objective lawfulness of the defendant's conduct rather than on the defendant's subjective intent. 457 U.S. at 819. *Harlow* was a defendant-friendly elaboration of the doctrine, "specifically designed to avoid excessive disruption of government" by making it easier to resolve "insubstantial claims on summary judgment." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (internal quotation marks omitted).

Since *Harlow*, the Court's qualified immunity doctrine has continued to evolve in a direction generally favorable to defendants. An exception is *Hope* v. *Pelzer*, which disapproved of a lower court's insistence that the plaintiff identify "cases that are 'materially similar'" to the case at bar to defeat qualified immunity, instead focusing on whether preexisting law provided a "fair and clear warning" that the conduct at issue was unlawful, even if arising under "novel factual circumstances." 536 U.S. 730, 735-736, 741 (2002). More recently, however, the Court held in *Ashcroft* v. *al-Kidd* that plaintiffs must identify "existing precedent" that

places the legal question "beyond debate" to "every" reasonable officer, 563 U.S. 731, 741 (2011), and has appeared committed to that stringent iteration of the standard ever since. *See, e.g.*, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam); *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

At the same time, the Court has empowered lower courts to dismiss § 1983 claims without determining whether a constitutional violation has occurred. In *Pearson* v. *Callahan*, the Court relaxed the rigid test of *Saucier* v. *Katz*, 533 U.S. 194 (2001), holding that a trial court might dismiss a § 1983 claim without deciding whether the defendant violated the plaintiff's constitutional rights, so long as the right at issue was not "clearly established." 555 U.S. 223, 227 (2009). As a result, courts frequently resolve § 1983 claims on qualified immunity grounds, declining to address the underlying merits. *See, e.g.*, *Mullenix*, 136 S. Ct. at 308; Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1885, 1891 & n.36, 1894 & n.57 (2018).

Courts now rarely provide substantive analysis of constitutional claims against state officials and such officials are increasingly insulated from § 1983 liability as new fact patterns, technologies, and applications of the Constitution arise. *See* Blum, 93 Notre Dame L. Rev. at 1902-1903; Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1817-1818 (2018). Current doctrine thus forces § 1983 plaintiffs to find "existing precedent" that puts "the statutory or constitutional question *beyond debate*," *Mullenix*, 136 S. Ct. at 308 (emphasis added) (quoting *al-Kidd*, 563 U.S. at 741), even as the Court has all but halted the development of new precedents to rely on in the future.

The effect of the current jurisprudence is to shield unconstitutional conduct by state actors rather than protecting people from such conduct. Courts' frequent rejection of § 1983 claims without analysis of the claimed violation, even where the conduct at issue appears plainly unconstitutional, sends an "alarming signal" to other potential offenders: that "palpably unreasonable conduct will go unpunished." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting); *see also Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting); *Young* v. *Borders*, 850 F.3d 1274, 1299-1300 (11th Cir. 2017) (Martin, J., dissenting from denial of rehearing en banc); Friedman, *Unwarranted: Policing Without Permission* 84-85 (2017); Schwartz, 93 Notre Dame L. Rev. at 1814-1820.

SUMMARY OF ARGUMENT

Section 1983 seeks to redress violations of federal law by state officials, and qualified immunity seeks to ensure that § 1983 does not hamper the effective administration of government. The Court long ago recognized "the evils inevitable" in any attempt to find the right balance between these goals, and decided that qualified immunity from § 1983 damages liability was the "best attainable accommodation of competing values." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813-814 (1982). Amici submit that the Court should grant the petition for certiorari because, in the decades since *Harlow*, it has become increasingly apparent that the doctrine no longer strikes the right balance, and for legal and pragmatic reasons should be revisited.

The important criticisms of existing qualified immunity doctrine are numerous and fundamental, but two stand out: First, the current doctrine lacks a sound basis in law. The Court's original suggestion that the

doctrine was a natural extension of a common law good faith defense to tort liability has not stood the test of time. Nor is there adequate support for the more recent objective version of the defense. Second, even as it frustrates the vindication of constitutional violations, the doctrine is not effectively serving its own purported policy goals of protecting officials from damages liability and reducing litigation costs.

This case, in which the lower court immunized defendants based on the absence of precedent presenting sufficiently similar facts, illustrates the problems with contemporary qualified immunity. Should the Court grant the petition, it will have at its disposal a rich body of scholarship examining the doctrine and, more importantly, offering numerous options for well-considered reform. Amici respectfully submit that the time has come for the Court to revisit qualified immunity.

ARGUMENT

I. THE DOCTRINE LACKS A SOUND LEGAL BASIS

The Court's § 1983 jurisprudence looks to both "common law protections 'well grounded in history and reason'" that were in place in 1871, and "the reasons," *i.e.*, the practical consequences, of the Court's "afford[ing] protection from suit under § 1983." *Filarsky* v. *Delia*, 566 U.S. 377, 384 (2012) (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976)). Viewed from either perspective, the legal foundations of modern qualified immunity are weak. The oft-cited common law basis for today's qualified immunity doctrine does not stand up to scrutiny; nor do the alternative legal justifications offered in response to the missing common law authority.

As noted, the Court's original legal justification for recognizing a defense of qualified immunity against § 1983 liability was the purported existence at common law of a general tort defense of "good faith." *Pierson* v. *Ray*, 386 U.S. 547, 556-557 (1967). The Court interpreted Congress's silence on the availability of the defense to a § 1983 defendant as preserving, rather than abolishing, the defense. *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986).

Yet there is good cause to doubt that rationale: In 1871, there was no generally available defense of good faith for constitutional claims, and probably not for common law torts either. *See* Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 55-57 (2018); Schwartz, 93 Notre Dame L. Rev. at 1801-1802 & nn.24-26. Indeed, such an immunity would have been contrary to founding-era premises of the rule of law and popular sovereignty. *See* Pfander & Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1922-1929 (2010); Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1486-1487 (1987). As a result, efforts to identify support for the "good faith" rationale for qualified immunity have fallen short, typically relying on cases concerning specific intentional torts, in which malice was a requirement for liability, rather than a trans-substantive defense to liability. *See* Baude, 106 Cal. L. Rev. at 58-69; *see also Wyatt* v. *Cole*, 504 U.S. 158, 172 (1992) (explaining that it is a "misnomer" to say the common law "creat[ed] a good-faith *defense*"). The case for construing the statute's silence as preservation (rather than abolition) is significantly weaker if the purportedly preserved doctrine was merely one element of a discrete tort, rather than a standalone and widely available affirmative defense. *See* Baude, 106 Cal. L. Rev. at 59-60.

Indeed, decades before *Pierson*, this Court had already expressly *rejected* a subjective defense to a § 1983 claim, holding instead that the question of § 1983 liability ultimately turned on the lawfulness of the official's conduct. In *Myers* v. *Anderson*, the Court rejected a defense justified by reference to a "traditional" malice requirement at common law because the "very terms" of the statute authorizing the official act at issue violated the Fifteenth Amendment. 238 U.S. 368, 378-379 (1915). This decision, far closer in time to § 1983's enactment than the Court's decision in *Pierson*, better reflects § 1983's common-law background. *See* Baude, 106 Cal. L. Rev. at 57-58. And that common-law background emphatically does not include a defense for government officials who "made honest mistakes" or "were just following orders." Friedman, *Unwarranted*, at 78 (discussing *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804)); *see also* Baude, 106 Cal. L. Rev. at 55-56 (same).

The Court's post-*Harlow* reliance on the common law tradition in qualified immunity cases, *see Filarsky*, 566 U.S. at 383-384, is flawed for yet another reason: In at least two respects, qualified immunity today has diverged radically from the good-faith defense that the Court spoke of in *Pierson*. For one thing, the current doctrine is vastly expanded. While *Pierson* reasoned that § 1983 should be read against the "background" of tort liability at common law in 1871, the Court held only that "[p]art of that background" in "the case of police officers making an arrest" was "the defense of good faith and probable cause." 386 U.S. at 556-557. The Court has since dispensed with that claim-specific view, however, and now applies immunity "across the board" regardless of the claim or defendant at issue, *Anderson* v. *Creighton*, 483 U.S. 635, 642-643 (1987). *See* Baude,

106 Cal. L. Rev. at 60-61. For another, the Court has made subjective good faith irrelevant to the defense, replacing it with an objective "reasonable officer" standard that examines the "clearly established" law in place at the time of an official's conduct. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816-818 (1982); *see also* Schwartz, 93 Notre Dame L. Rev. at 1801-1802. Even if one agrees with *Pierson*'s historical analysis, the Court's modern qualified immunity doctrine far exceeds what that analysis could justify. *See, e.g.*, *Anderson*, 483 U.S. at 645 (acknowledging that modern qualified immunity doctrine furthers "principles not at all embodied in the common law"); *see also* Schwartz, 93 Notre Dame L. Rev. at 1802; Baude, 106 Cal. L. Rev. at 61 & nn.87-91.

As qualified immunity has drifted from its historical moorings, there have been a few other attempts to cast it as something other than a judicial "freewheeling policy choice." *Malley*, 475 U.S. at 342; *accord Tower* v. *Glover*, 467 U.S. 914, 922-923 (1984) (stating that the Court does not have "license" to establish immunities from § 1983 actions "in the interests of what we judge to be sound public policy").

Justice Scalia offered one such alternative in his dissent in *Crawford-El* v. *Britton*, 523 U.S. 574, 611-612 (1998). After criticizing the Court's historical account in *Pierson*, Justice Scalia declared that *Monroe* was incorrectly decided because, in his view, § 1983 was meant to reach only acts by state officials that were *authorized* by state law and thus not subject to state tort law. The Court thus erred in *Monroe*, Justice Scalia explained, when it deemed acts that were *illegal* under state law as nevertheless done "under color of law" within the meaning of § 1983. *See id.*; *see also* Baude, 106 Cal. L. Rev. at 62-63. In Justice Scalia's view, the

Court's post-*Pierson* qualified immunity jurisprudence—though admittedly an "essentially legislative" project of "creating a sensible scheme of qualified immunities"—was an appropriate and justified correction to *Monroe*'s new regime of constitutional torts. *Crawford-El*, 523 U.S. at 611-612 (Scalia, J., dissenting).

Justice Scalia's theory is not persuasive as a defense of the current doctrine for two reasons. The first reason is that *Monroe* was correct. The statute's use of the phrase "under color of law" is best understood as a legal term of art meant to include both legal and illegal acts. *See* Baude, 106 Cal. L. Rev. at 64-65 & nn.110-114. The second reason is that even if *Monroe* were wrong, qualified immunity as currently constituted would not correct its supposed error. If one accepts Justice Scalia's critique of *Monroe*, federal immunity is justified in cases where officers are *not* immunized by state law; there should generally be either state or federal liability for an illegal act. Instead, the current doctrine tracks state law closely—immunity is most easily denied, in other words, when an official is already liable under state law. Today's doctrine is the mirror image of what Justice Scalia's theory would dictate. *See id.* at 68.

The final proffered legal basis for today's qualified immunity doctrine rests on an analogy generally to the rule of lenity in the criminal context, and specifically to the fair warning requirement that the Court long ago read into 18 U.S.C. § 242 (criminalizing willful violations of constitutional rights); *see also Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (stating that civil § 1983 defendants have "the same right to fair notice" as § 242 defendants). The principle is that government officials who can be punished for violating the Constitution should, like criminal defendants, be given advance no-

tice and guidance concerning what specific conduct is unlawful. *See* Baude, 106 Cal. L. Rev. at 72.

But the lenity analogy is strained and legally questionable. Section 1983 is a civil statute, and does not contain the "willful[ness]" requirement contained in the criminal § 242. *See Monroe* v. *Pape*, 365 U.S. 167, 187 (1961); Baude, 106 Cal. L. Rev. at 73. More importantly, qualified immunity is in practice far stronger than the rule of lenity. *See* Baude, 106 Cal. L. Rev. at 74-75 (discussing reliance on circuit splits in the lenity and "clearly established" contexts). This disparate treatment is unwarranted because the grounds for affording private criminal defendants fair notice of the criminal code are at least as compelling (and likely more compelling) than the grounds for excusing government officials who exercise power unconstitutionally.

II. THE DOCTRINE FAILS TO ACHIEVE ITS OWN GOALS

There is also substantial evidence that qualified immunity doctrine fails to achieve its own policy goals. The core goal of qualified immunity doctrine has always been to ensure that "the threat of liability" under § 1983 does not create "perverse incentives that operate to *inhibit* officials in the proper performance of their duties." *Forrester* v. *White*, 484 U.S. 219, 223 (1988); *see also Harlow*, 457 U.S. at 806 ("As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."). By exposing officials to damages liability only when they violate "clearly established" rights, qualified immunity is expected to shield government officials from financial liability and the burdens of discovery and trial in insubstantial cases, and thereby prevent § 1983 from "dampen[ing] the ardor" of current state officials and

deterring "able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814; *see also Filarsky*, 566 U.S. at 389-390.

Yet available evidence indicates strongly that protecting individuals from damages awards in § 1983 cases, even if defensible in concept, is unnecessary in practice, because individual government officials rarely pay damages out of their own pockets, so there is no excessive damages exposure to mitigate. *See generally* Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014). For example, a study of § 1983 settlements involving law enforcement officers in forty-four large jurisdictions over a six-year period showed that individual officers contributed to less than 1% of settlements, paid only 0.02% of the total damages awarded to plaintiffs, and did not pay a penny in punitive damages. *Id.* at 890. Among the few officers who did end up paying, the median contribution was $2,250 and no individual paid more than $25,000. *See id.* at 939. The most frequent reason why individual law enforcement officers do not pay prevailing § 1983 plaintiffs is indemnification—most jurisdictions are required by law or choose to indemnify officials for liability incurred within the scope of employment. Schwartz, 93 Notre Dame L. Rev. at 1806. Even in the tiny subset of cases in which municipalities refuse to indemnify law enforcement officers, those officers virtually never pay anything from their pockets for a variety of reasons. *Id.* at 1806-1807.

The same pattern appears to hold true for other types of public officials. As Justice Breyer has pointed out, many states have statutes that authorize indemnification of state and local officials from damages for § 1983 actions. *See Board of Cty. Comm'rs of Bryan Cty.* v. *Brown,* 520 U.S. 397, 436 (1997) (Breyer, J., dis-

senting). Federal agencies have followed suit. Between 2007 and 2017, employees of the Federal Bureau of Prisons and their insurers paid only 0.27% of the entire amount paid to plaintiffs who brought claims against the employees pursuant to *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See* Pfander et al., *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stanford L. Rev. (forthcoming 2020), at 4, 5, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343800. In total, "the federal government effectively held their officers harmless in just over 97% of the successful cases brought against them, and paid well over 99% of the compensation received by plaintiffs in these cases." *Id.* at 5-6. There is reason to believe that indemnification is the rule, not the exception, for public officials of all kinds. *See* Wells, *Qualified Immunity After* Ziglar v. Abbasi: *The Case for a Categorical Approach*, 68 Am. U.L. Rev. 379, 404 & n.145, 406 (2018) (collecting studies on indemnification of public officials and "suspect[ing]" that findings specific to police officers "are valid across the whole field of constitutional tort litigation"); Shapiro & Hogle, *The Horror Chamber: Unqualified Immunity in Prison*, 93 Notre Dame L. Rev. 2021, 2058-2059 (2018) (stating that "there is reason to believe that personal liability is just as mythical in prison cases as it is in police cases").

This Court has already recognized that affording qualified immunity makes little sense for insured defendants, because employee indemnification "reduces the employment-discouraging fear of unwarranted liability." *Richardson* v. *McKnight*, 521 U.S. 399, 409, 411 (1997). That describes well the current state of § 1983 exposure that individual public officials face today. There is little cause for concern about state officials'

discretion and ardor in the field "when the damages award comes not from the official's pocket, but from the public treasury." *Owen* v. *City of Independence*, 445 U.S. 622, 654 (1980).

Beyond exposure to liability, and though it previously recognized that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity," *Richardson*, 521 U.S. at 411, the Court has increasingly focused on the avoidance of litigation costs and burdens as a main justification for the current qualified immunity doctrine, *see Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009) (describing "basic thrust" of qualified immunity as freeing officials from "the concerns of litigation," including "'disruptive'" discovery). But again, even if one accepts the virtue of that goal, qualified immunity does little to accomplish it.

The weight of the evidence is that qualified immunity likely increases litigation costs overall. In a five-district study of approximately 1,200 cases in which a qualified immunity defense could be raised to a § 1983 claim, the defense was raised in more than a third of all cases, and sometimes raised multiple times. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 60 (2017). Each time the qualified immunity defense is raised it must be researched, briefed, and argued by the parties and decided by the judge. *Id.*; *see also* Schwartz, *Qualified Immunity's Selection Effects* (forthcoming), at 16-19, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330056. But just 8.6% of qualified immunity motions in the study resulted in case dismissals. *See* Schwartz, 127 Yale L.J. at 61. This low rate indicates that qualified immunity is not a significant factor in resolving these cases. *See* Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. __ (forthcoming 2020), at 14, *available at* https://

papers.ssrn.com/sol3/papers.cfm?abstract_id=3330050 (stating that "most civil rights cases fail for reasons other than qualified immunity, and those other barriers to relief would continue to exist in qualified immunity's absence"). It also means that in the 91.4% of cases that remain, qualified immunity increased litigation costs and burdens without shielding defendants from discovery or trial. *See* Schwartz, 127 Yale L.J. at 60-61.

In addition, some denials of qualified immunity rulings are immediately appealable—and litigation over when an appeal is available, the scope of review authorized, and the merits of the appeal itself likely increase costs in most cases, compared to litigation of constitutional claims. *See, e.g.*, *Wheatt* v. *East Cleveland*, No. 1:17-CV-377, 2017 WL 6031816, at *4 (N.D. Ohio Dec. 6, 2017) ("In the typical case, allowing interlocutory appeals actually increases the burden and expense of litigation both for government officers and for plaintiffs."); *see also* Blum, 93 Notre Dame L. Rev. at 1903-1904, 1913-1914; Schwartz, 93 Notre Dame L. Rev. at 1824 & n.156. And if nothing else, these interlocutory appeals can significantly increase the time it takes for cases to be resolved. One study found that interlocutory appeals of the denial of qualified immunity took on average 441 days to resolve. Schwartz, *Qualified Immunity's Selection Effects* 17.

III. THERE ARE MANY PLAUSIBLE IMPROVEMENTS TO THE DOCTRINE

There is now a substantial body of scholarly critique of modern qualified immunity doctrine. If the Court were to grant the petition in this case, it would have the opportunity to strike a better balance between government accountability and efficacy and strengthen the legal underpinnings of the doctrine.

To cite one example, the text and purpose of § 1983 might justify an express reaffirmance that *Hope* remains good law and has not been erased by subsequent decisions like *al-Kidd*. *See, e.g.*, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1159 (2018) (Sotomayor, J., dissenting) (explaining that the "core" of the clearly established inquiry is whether officers have "fair notice" (citing *Hope*, 536 U.S. at 741)); *A.M.* v. *Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting) (concluding that prior decisions addressing punishment for student "disruption" in classroom provided "clearly established" law governing punishment of student who burped in classroom).

The Court could also encourage lower courts to decide more frequently if there has been a constitutional violation—or, at the very least, to consider more carefully whether to address the merits in a given case. Most of the time, neither this Court nor lower courts provide a case-specific justification for declining to reach the merits. *See* Blum, 93 Notre Dame L. Rev. at 1892-1893 & n.44 (describing four cases in which the Court declined to address "important issues of constitutional law" that were "not particularly fact bound" and would have offered "extremely helpful … guidance" for law enforcement); Schwartz, 93 Notre Dame L. Rev. at 1826-1827. Given its gloss on "clearly established," the Court could also reconsider its statement in *Pearson* v. *Callahan* that the "factbound" nature of a claim is a reason not to address the merits. 555 U.S. 223, 238 (2009). Section 1983 plaintiffs should not be required to produce "factbound" precedent while the Court discourages lower courts from generating that precedent. *See* Blum, 93 Notre Dame L. Rev. at 1902-1903; *see also* Schwartz, 93 Notre Dame L. Rev. at 1827 (arguing that the practice of declining to rule on underlying constitu-

tional claims "increases constitutional stagnation, not innovation").

Another alternative would be to more closely conform the defense to the common-law defenses that § 1983 was (purportedly) meant to subsume. *See Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring). The Court could begin by revisiting *Harlow*'s prohibition on considering evidence of subjective intent. *See* Schwartz, 93 Notre Dame L. Rev. at 1832-1835; *cf. District of Columbia* v. *Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring) ("I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry."); *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting). Or, more dramatically, it could limit those common-law defenses to suits where they would actually have applied at common law, or even return to the rule of *Myers* v. Anderson. *See* Baude, 106 Cal. L. Rev. at 53, 58.

As a further alternative, the Court could move to equate qualified immunity to the rule of lenity, as some of its cases have suggested. *See Hope*, 536 U.S. at 739. Whether the Court did this by increasing the solicitude shown to those prosecuted under ambiguous laws, or by making qualified immunity a more modest protection, such a shift would improve the balance between those who exercise government power and those upon whom government power is exercised.

Finally, if the Court wants to reform qualified immunity to better control litigation costs, eliminating the availability of interlocutory appeal from a denial of qualified immunity is one step that would produce immediate results. *See* Blum, 93 Notre Dame L. Rev. at

1914-1915; *see also* Baude, 106 Cal. L. Rev. at 84. More fundamentally, the Court should manage litigation costs directly through procedural reform, not, as it did in *Harlow*, by making it harder for victims of constitutional violations to establish substantive liability against government officials. *Cf.* Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla L. Rev. 851, 866 (2010) ("Much of the problem with 'clearly established' law derives from the effort to devise a substantive standard so narrowly 'legal' in character that it can be applied by courts on summary judgment or a motion to dismiss."). And, in any event, any contribution *Harlow* may have made to reducing litigation costs has been superseded by subsequent changes to pleading and summary judgment standards. *See Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring); Schwartz, 93 Notre Dame L. Rev. at 1808-1811 (reviewing evidence confirming Justice Kennedy's view in *Wyatt* that changes to pleading, summary judgment, and other liability standards "largely obviate the role for qualified immunity doctrine to screen out cases before trial"); *id.* at 1831-1832 (reviewing evidence showing that qualified immunity fails as a pre-filing filter).

While a full consideration of stare decisis principles should await merits briefing, it is worth noting that qualified immunity is not the result of ordinary statutory interpretation, and therefore the Court need not abdicate all decisions about the doctrine to Congress. *See* Baude, 106 Cal. L. Rev. at 80-81. Indeed, some of qualified immunity's *defenders* justify it on the ground that § 1983 is a common law statute, like the Sherman Antitrust Act, that has delegated to the courts the task of shaping and modernizing its remedial scheme over time. *See* Levin & Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Bau-*

de, Cal. L. Rev. Online (forthcoming), at 3-13, *available at* https://ssrn.com/abstract=3131242. If so, that is a reason to revisit the doctrine when it has become misshapen. *Cf. Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007) ("Stare decisis is not as significant in this case, however, because the issue before us is the scope of the Sherman Act."). And in any event, the Court has already done its fair share of pragmatic adjustment to qualified immunity—*Pierson* gave way to *Harlow*, *Saucier* gave way to *Pearson*, and *Monroe*'s prohibition on municipal liability under § 1983 was lifted in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). The time has come once again for the Court to revisit qualified immunity's "principles" and "real world implementation," *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018), and to strike a more durable balance between protection for government officials and redress for those whom they serve.

CONCLUSION

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

Respectfully submitted.

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APPENDIX

APPENDIX

AMICI CURIAE SCHOLARS OF THE LAW OF QUALIFIED IMMUNITY

This Appendix provides amici's titles and institutional affiliations for identification purposes only. The listing of these affiliations does not imply any endorsement of the view expressed herein by amici's institutions.

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