No. 18-913

IN THE

Supreme Court of the United States

JOSHUA BRENNAN,
Petitioner,

v.

JAMES DAWSON, ET AL.,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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Over time, qualified immunity has broadened from its common law roots to an unwieldy judicial policy doctrine that is unpredictable and most often absolves officers—leaving them completely unaccountable—for obvious violations of civil rights. With such an overactive qualified immunity doctrine, 42 U.S.C. § 1983 is near-meaningless. The Brief in Opposition only underscores these points, illustrating how the qualified immunity doctrine has become a *post hoc* hunt for anything that might justify an officer's actions. Officer Dawson asks the Court to narrow its decision in *Florida* v. *Jardines*, 133 S. Ct. 1409, 1414 & 1416 (2013) to its facts and adopt the broad exception to the knock-and-talk doctrine dreamt up by Dawson's lawyers after Brennan sued him. But there is no justification for Dawson's actions, and when the Court adopted the qualified immunity doctrine, it expressed a desire to protect well-meaning but reasonable government officials from liability for error. It expressed no intent to shield police officers who push beyond the boundaries of settled law by expanding narrow exceptions to clearly established rights.

I. This Case Presents a Question of Exceptional Importance.

In the 1950s, the Court introduced immunity to liability under Section 1983's predecessor with the limitations existing at common law in 1871. *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951) (applying absolute immunity to legislative action). Qualified immunity for police officers first appeared in this Court in *Pierson* v. *Ray*, where the Court held there is a good faith immunity to liability for false arrest. 386 U.S. 547, 557 (1967). The Court recognized that "a policeman's lot is not so unhappy that he must choose

between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.* at 555. But it recognized that the balance struck must still allow officers to be held liable if they acted in bad faith or unreasonably. *Id.* at 557.

In *Scheuer* v. *Rhodes*, the Court further discussed the origins of qualified immunity. 416 U.S. 232 (1974). It rejected the circuit court's application of "an absolute 'executive immunity,'" recognizing that Section 1983 "included within its scope the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Id.* at 243. Thus, "government officials, as a class, could not be totally exempt." *Id.*

Immunity already had developed and "mutat[ed]" over time, but "one policy consideration that seem[ed] to pervade the analysis" was that "the public interest requires decisions and action to enforce laws for the protection of the public." *Id.* at 241. Government officials thus need some immunity for their acts in "recognition that they may err." *Id.* at 242. And the Court held that "a qualified immunity is available to officers of the executive branch of the government" based on "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances *coupled* with good faith belief." *Id.* at 247-48 (emphasis added).

The Court eschewed the common law and eliminated the subjective need for a "good faith" belief "formed" by the officer in *Harlow* v. *Fitzgerald*. 457 U.S. 800, 817-18 (1982). The subjective inquiry

proved too expensive in time and money by forcing government officials through discovery and to trial to allow factfinders to decide what the official intended. *Id.* The Court again transformed qualified immunity, holding "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The Court expressed that it did not intend for this change to protect officers who go beyond established license, but that eliminating the subjectivity element would help "avoid excessive disruption of government" while still "provid[ing] no license to lawless conduct." *Id.* at 818-19. "Where an official could be expected to know that certain conduct would violate constitutional rights, *he should be made to hesitate*; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* at 819 (emphasis added).

Then, in *Anderson* v. *Creighton*, the Court introduced the concern that courts correctly determine "the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. 635, 639 (1987). If a clearly established right is defined at too high a level of generality, "it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Id.* Thus, the Court held that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

Lower courts have wrestled with the level of generality at which a right must be defined ever since. Occasionally, a court defines the level of generality as high as the base constitutional right, which the Court directly rejected in *Anderson*. And in those instances, the Court summarily reverses. *E.g. City of Escondido* v. *Emmons*, 139 S. Ct. 500 (2019). Far more often, the lower courts require the right to be defined in such a granular way that "objective legal reasonableness" is lost in search of a case that fits the exact same fact pattern, even when existing cases have facts similar enough that distinctions do not make a *legal* difference.

Qualified immunity has thus, over time, floated farther and farther from its moorings and nearly "transform[ed] . . . into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment" and Section 1983. *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). Under the common law at the time Congress enacted Section 1983, a suit against an offending officer was the only option for relief. *Collins* v. *Virginia*, 138 S. Ct. 1663, 1676 (2018) (Thomas, J. concurring). The exclusionary rule then offered an opportunity for direct relief in criminal cases. *Id.* But the exclusionary rule provides no relief for the innocent victim of government malfeasance. And its application has been further limited as qualified immunity has expanded. *See Utah* v. *Strieff*, 136 S. Ct. 2056, 2061 (2016) (noting that the Court has "recognized several exceptions to the rule"). That has rendered law enforcement officers largely unaccountable for malfeasance—particularly when their victims are *innocent*.

The circuit courts have taken this cue and erected further barriers to accountability. Here, it took the form of allowing officers to apply a narrow exception to a clearly established right, even though the facts before the officer clearly do not fit the facts of that exception. It has thus taken the plaintiff's the burden of showing a clearly established right and expanded it to *disproving* exceptions to clearly established rights when officers expand those exceptions beyond the facts of the case.

The Brief in Opposition renders this analysis an "attack on qualified immunity." Opposition at 9. It is not. The analysis supports a sustainable and legally tenable qualified immunity regime that returns qualified immunity to its roots of protecting government officials from legal consequence for their *reasonable* but erroneous discretionary decisions. As it currently stands, qualified immunity has become an unwieldy hunt for a case with the exact same fact pattern as the case at issue, followed by a drawn out and pedantic debate over whether factual distinctions make a legal difference, divorced from whether a reasonable officer actually would engage in the conduct at issue.

Here, the right can be defined specifically as a right against warrantless searches of the curtilage of a probationer's home when neither the probation agreement nor a statute diminishes the probationer's privacy interests. Between *Jardines*, 133 S. Ct. 1409 and *United States* v. *Knights*, 534 U.S. 112, 118 (2001), the three judges on the Sixth Circuit panel had no trouble agreeing that the right would have been clearly established but for an exception the Sixth

Circuit stated in *Hardesty* v. *Hamburg Twp.*, 461 F.3d 646 (6th Cir. 2006), which allows officers to not only knock on the front door, but walk around to knock on the back door. App. 10a. It did not authorize peering into windows. It did not authorize *staying* in the curtilage for a significant amount of time. It did not authorize destroying security cameras in the curtilage. The Court has not expressly addressed how an *exception* to a clearly established right fits in, and whether officers may reasonably formulate a significant expansion to that exception. Two Sixth Circuit judges ruled here that they can, while one ruled they cannot. App 18a-19a, 26a.

The Court also has not addressed whether qualified immunity allows officers to ignore clearly established law from this Court when they can locate a pre-existing inconsistent case within the Circuit. Even if *Hardesty* had been on point, all three judges on the Sixth Circuit panel agree it is inconsistent with *Jardines*. Yet, two members of the panel ruled that officers can rely on that inconsistent precedent because the Sixth Circuit had not yet declared that inconsistency and expressly overruled the case. App. 17a-18a.

The Brief in Opposition repeatedly asserts that nothing is wrong with qualified immunity jurisprudence, *e.g.* Opposition at 9. But this case shows the absurdity of how broadly qualified immunity is now applied. Without willingness to say so expressly, the Brief in Opposition asserts that Brennan had to find a case expressly establishing that there is no exception to the clearly established right against curtilage searches by an officer for 90 minutes

that include banging on doors and windows, peering into windows, and disabling a security camera. The Sixth Circuit basically agreed, allowing Dawson to rely on a case that clearly had been abrogated by this Court, and then *expand* on the allowance made in that abrogated case. As Judge Moore noted in dissent, "no reasonable officer could have concluded that, following the Supreme Court's decision in 2013 in *Jardines*, Dawson engaged in actions that 'any private citizen might do' while conducting a knock and talk for a probationer." App. 31a. No reasonable officer would believe he could go around the house banging on doors and windows 10 to 15 times. No reasonable officer would believe he could peer into doors and windows. No reasonable officer would believe he could physically manipulate an exterior camera, cover it with tape, and in the process, break it. And no reasonable officer would believe he could continually repeat these intrusions over the course of 90 minutes. Yet Dawson did all those things, and the panel majority ruled that there was no clearly established law against any of them, in light of its prior decision in *Hardesty*. The over-broadening of a narrow exception to a clearly established right to prevent liability presents a critically important issue in the ever-expanding scope of qualified immunity. This Court should grant the writ and rein in that expansion of qualified immunity by providing guidance to the lower courts that officers cannot reasonably rely on their (or their eventual lawyers') imagined expansion of a limited exception to the right against searches.

II. This Case Is the Ideal Vehicle to Bring Qualified Immunity Closer to Its Common Law Roots Without Reintroducing a Subjective Inquiry.

The Sixth Circuit ruled that, despite this Court's clear direction in *Jardines*, a reasonable officer in Dawson's position would rely on *Hardesty* to not just go to the back door and knock, but to linger in the curtilage for an hour-and-a-half, banging on doors and windows, peering in, and disabling the security camera. App. 4a, 18a-19a. But the outer boundaries of qualified immunity cannot bring in absolving an officer who uses a narrow exception to a clearly established right to swallow the right by grossly expanding on that exception. That is particularly true when the exception from Circuit precedent is inconsistent with this Court's subsequent decisions.

The Brief in Opposition raises a distinction that does not make a difference.[1] Respondents primarily rely on a line of cases recognizing that a probationer's liberty is "'dependent on observance of special [probation] restrictions.'" Opposition at 16, *citing* *Griffin* v. *Wisconsin*, 483 U.S. 868, 874 (1987). But it is undisputed that Brennan's probation agreement

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[1] The Brief in Opposition also discusses the two-step approach created in *Saucier* v. *Katz*, 533 U.S. 194 (2001) at pages 10-12 and block quotes an opinion that does not involve a narrow exception to a clearly established right at pages 12-15, but the Petition does not request that *Saucier* be overturned or abrogated in any way, and *City of Escondido* v. *Emmons*, 139 S. Ct. 500 (2019) is not relevant to whether the Court should grant the petition.

did not include a search condition allowing suspicionless searches, even though such conditions of parole are common in Michigan. App. 3a; Opposition 19 ("the present case does not involve an express provision allowing the search of a residence").[2] Thus, the general interests in controlling a probationer, *see* Opposition at 18, are not implicated. The State of Michigan already decided against allowing home searches as a condition of probation here.

Respondents are apparently proud that "Deputy Dawson did not enter the mobile home," Opposition at 19, and readily concede he could not have kicked down the door consistent with the Fourth Amendment, Oral Argument at 21:30 & 23:20.[3] But this Court's precedents establish that entering the curtilage beyond the implied license available to "girl scouts and trick-or-treaters" is the same as entering the home from a Fourth Amendment standpoint. *Jardines*, 133 S. Ct. at 1414 & 1416; *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 235 (1986). Indeed, "[a]t the founding, curtilage was considered part of the 'hous[e]' itself." *Collins*, 138 S. Ct. at 1676 (Thomas, J. concurring). Thus, Deputy Dawson's actions were

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[2] The Sixth Circuit did not rely on Brennan's probation status to justify the intrusion. App. 13a ("we note that Brennan's probation does not undermine his unlawful search claim").

[3] Available at: www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/08-02-2018%20%20Thursday/172210%20Joshua%20Brennan%20v%20James%20Dawson%20et%20al.mp3&name=172210%20Joshua%20Brennan%20v%20James%20Dawson%20et%20al

clearly limited, at most, to the exception outlined by the Sixth Circuit in *Hardesty*.

Deputy Dawson's conduct went far beyond the conduct the Sixth Circuit allowed in *Hardesty*. It was nowhere near any "hazy border." Opposition 23. As Judge Moore noted in dissent, *Hardesty* did not suggest Dawson could "*linger*" in the curtilage for an hour. App. 26a. Under *Jardines* and *Griffin*, Brennan had a clearly established right as a probationer not subject to a search condition against a government official invading the curtilage of his home to do any more than knock on the front door, and if it is not answered, leave. The Sixth Circuit held that its decision in *Hardesty* expanded the exception to go around to the back door, and a reasonable officer could take that exception and expand it to all the things Dawson did. App. 18a-19a. Thus, this case squarely presents the important question of whether a government official may reasonably rely on a narrow exception to a specific and clearly established right to shield him from civil liability when his conduct far exceeds the limits of that exception.

The ultimate quandary is how the Court can return to something akin to the common law "good faith" immunity without re-injecting a subjective inquiry that renders almost all cases triable (and at least subject to discovery), regardless of merit. The common law good faith immunity provided officers who relied on concrete statements of law a safe harbor from subsequent suit. *Scheuer*, 416 U.S. at 243. But the Court ultimately determined that a subjective standard was unworkable. *Harlow*. 457 U.S. at 817-18. Here, the Court can address the historical

underpinnings of qualified immunity while retaining the objective standard, insofar as an officer who commits an unconstitutional act that a reasonable officer, relying on concrete statements of law, also would commit, is protected. There were no concrete statements of law for a reasonable officer in Dawson's position to rely on to justify his conduct. The only relevant concrete statements of law here are that (1) Dawson had the same ability as anyone to knock on the front door, and if no one answered, leave, *Jardines*, 133 S. Ct. at 1414, (2) Brennan's status as a probationer did not change that, in light of the fact that no statute or agreement diminished his right against search, *Knights*, 534 U.S. at 118, and (3) the doors, windows, and security cameras were part of the protected curtilage, *United States* v. *Dunn*, 480 U.S. 294, 300 (1987). As the Court recognized in *Jardines*, these principles "do not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." 133 S. Ct. at 1415.

Hardesty was not a concrete statement of law. First, as all three judges on the panel agreed, it no longer was good law after *Jardines*. App. 16a, 27a. Second, the only concrete statement *Hardesty* offered was that there was a narrow exception to the right against a curtilage search by which an officer, having received no response at the front door, may also go around to the back door and knock. *Hardesty*, 461 F.3d at 654. Dawson has pointed to *no* concrete statement of law expanding that right to Dawson's far more intrusive conduct. Reasonable officers rely on pronouncements of law by bodies with authority to make those pronouncements. Reasonable officers do

not hypothe-size unfounded expansions of narrow exceptions.

Section 1983 is an important and valuable deterrent to officer malfeasance, and it offers critical redress for past offenses. *Collins*, 138 S. Ct. at 1680 n.6 (Thomas, J., dissenting). Binding case law told Officer Dawson to knock, and when no one answered, leave. *Jardines*, 133 S. Ct. at 1414. Qualified immunity should protect officers who follow clearly established law, not ones who push past what is clearly established to stretch boundaries and become ever more intrusive.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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