No. ____

IN THE

Supreme Court of the United States

JOSHUA BRENNAN,
Petitioner,

v.

JAMES DAWSON, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a police officer 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.

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Joshua Brennan, an individual. Petitioner was the plaintiff and appellant below.

The Respondents are James Dawson, in his Individual and Official Capacity as Deputy of Clare County; John Wilson, in his Official Capacity as Sheriff of Clare County; and Clare County, who were defendants and appellees below.

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INTRODUCTION

This case presents an extremely important question as to whether a police officer may escape liability under 42 U.S.C. § 1983 for violating a clearly-established right by claiming that the scope of a narrow exception to that right was not precisely defined.

As the law currently stands, police officers sued under 42 U.S.C. § 1983 for violating citizens' rights are entitled to qualified immunity if either (1) they did not violate any constitutional rights, or (2) those rights were not "clearly established" at the time of the violation. *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). For a right to be clearly established, the law must be sufficiently clear, at the time of the officer's alleged conduct, "that every reasonable official would understand that what he was doing was unlawful." *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 589 (2018). The right must be established with such a "high degree of specificity" that it "clearly prohibit[s] the officer's conduct in the particular circumstances before him." *Id.* at 590. Courts are encouraged to "think hard, and then think hard again" about engaging in the often-thorny issue of whether there was a constitutional violation. *Camreta* v. *Greene*, 563 U.S. 692, 707 (2011). And they are encouraged to consider only whether there was a clearly established right at the time of the officer's conduct. *See id.*

The net result of the Court's qualified immunity jurisprudence is that "[p]laintiffs must produce precedent even as fewer courts are producing [it]" because the lower courts are instead simply ruling that rights are not clearly established. *Zadeh* v. *Robinson*, 902 F.3d 483, 499 (5th Cir. 2018) (Willett,

J., concurring dubitante). This leaves "[i]mportant constitutional questions . . . unanswered precisely because those questions are yet unanswered." *Id.* One judge has described this current state of affairs as a "Catch-22" or "[a]n Escherian Stairwell" in which plaintiffs seeking to vindicate their constitutional rights are at a perennial disadvantage: "Heads defendants win, tails plaintiffs lose." *Id.*

In recent opinions, Justices Thomas and Sotomayor have criticized the broad scope of qualified immunity. Justice Thomas expressed concern about the lack of a historical basis for qualified immunity, and has called for the Court to reconsider its approach to qualified immunity in "an appropriate case." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment). Justice Sotomayor notes that qualified immunity does not adequately deter police misconduct. *See, e.g.*, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). Justices Thomas and Sotomayor are joined in their critiques of qualified immunity by an increasing group of judges, activists, and scholars who all recognize that the Court's current immunity doctrine is overbroad.

This case is an ideal vehicle to reign in the qualified immunity standard to (1) reflect the common-law roots of qualified immunity, (2) promote court-approved investigative methods and effectively deter constitutional violations, and (3) avoid reintroducing the subjective inquiry abandoned in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Clarifying that officers are not protected when they rely on unfounded extensions of existing exceptions to

specifically defined rights would restore the common-law good faith defense's focus on protecting reasonable officers that rely on presumptively valid law. This does not require a return to a subjective inquiry into the officer's state of mind. Rather, reasonable officers should be expected to follow guidance given by statutes and judicial decisions, especially in cases like this where there are clear limits on the approved investigative methods available to law enforcement. By protecting only those officers that reasonably rely on judicial direction—and denying immunity to officers that ignore the law and claim new exceptions *post hoc*—qualified immunity will be a more effective protection for officers who respect citizens' constitutional rights, rather than a safe harbor for those feign ignorance.

For these reasons and those that follow, the Court should grant the petition and reverse the judgment below.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua Brennan respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is currently unreported, but is reproduced at page 1a of the Appendix to this petition ("App."). The opinion of the District Court for the Eastern District of Michigan is unreported, but is reproduced at page App. 32a.

JURISDICTION

The judgment of the Sixth Circuit was entered on October 15, 2018. App. 2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statute is set forth in the appendix to this petition. App. 46a.

STATEMENT OF THE CASE

Factual Background. In February 2015, Petitioner Joshua Brennan was on misdemeanor probation. App. 3a. Brennan's probation agreement prohibited him from drinking alcohol and required him to submit to alcohol breath tests on demand. *Id.* However, the agreement did *not* require Brennan to submit to a warrantless search of his person or his home. *Id.* Defendant Deputy James Dawson arrived at Brennan's house after 8:00 PM on the night of February 21, 2015 to perform a breath test on Brennan. *Id.*

Dawson parked his police car in Brennan's driveway and, bringing his breathalyzer kit, knocked on Brennan's front door. App. 3a-4a. When no one came to the door, Dawson spent five minutes circling Mr. Brennan's entire house, knocking on every door and window. App. 4a. When this too failed to elicit a response, Dawson returned to his police car and turned on his lights and sirens in an attempt to get Brennan to come outside. *Id.* When this tactic also failed, Dawson called the police dispatcher to try and get Brennan's phone number. *Id.* While on the phone with the dispatcher, Dawson turned his lights and sirens back on. *Id.* He told the dispatcher that he had

the siren turned "on as loud as [it would] go." *Id.* Still, no one came to the door. *Id.*

Dawson was not deterred. He returned to Brennan's front door and wrapped yellow crime scene tape around a security camera that was aimed at the entranceway. *Id.* Dawson then circled Brennan's house five to ten more times, peering into and knocking on the windows as he passed them. *Id.* Still, no one came to the door. *Id.* Dawson then returned to his police car, still parked on Brennan's driveway. *Id.* He remained at the home, interacted with a neighbor, and in all, remained on Brennan's property for more than ninety minutes. App. 4a-5a. In all that time, he never left the property, nor sought a warrant. App. 5a. After more than an hour and a half, Brennan voluntarily exited his home. *Id.* He explained to Dawson that he had been unable to answer the door because he was sick. App. *Id.* Brennan took the breath test and got a 0.000, indicating there was no alcohol in his system. *Id.* Nonetheless, Dawson arrested Brennan for failing to submit to the breath test on demand. *Id.* When Brennan was arraigned for the probation violation, the state court dismissed the charge. *Id.*

Procedural Background. In January 2016, Brennan sued the defendants in the United States District Court for the Eastern District of Michigan. *Id.* Brennan alleged that Dawson violated his Fourth Amendment rights by exceeding his implied license to be on Brennan's property, unlawfully searching Brennan by performing the breath test, and illegally seizing Brennan by arresting him without a warrant or probable cause. App. 4a-5a. Brennan further

alleged that the other defendants failed to adequately train Dawson, and were therefore liable for his violations of Brennan's constitutional rights. App. 5a.

Defendants moved for summary judgment, arguing, among other things not relevant here, that they were entitled to qualified immunity because Dawson's actions did not amount to a constitutional violation, and because it did not violate clearly-established law. *Id.* The district court ruled that while it was "unclear" whether Dawson violated Brennan's Fourth Amendment protections in the curtilage of his home, Dawson was entitled to qualified immunity because "[a]t the time of the challenged conduct, the contours of [Brennan]'s Fourth Amendment rights were not sufficiently clear." App. 37a.

Brennan appealed the decision of the district court, arguing among other things that Dawson's actions violated Brennan's clearly-established rights against the warrantless invasion of his curtilage. App. 7a. In a divided opinion, the Sixth Circuit ruled that although Dawson's repeated, intrusive, and warrantless searches of the curtilage violated Brennan's Fourth Amendment rights, he was still entitled to qualified immunity because at the time of the violation, those rights were not clearly established. App. 12a, 17a-18a. The majority conceded that "this [was] a close question," but held that this Court's decision in *Florida* v. *Jardines*, 569 U.S. 1 (2013), which limited an officer's license to invade the curtilage of a home to that commonly exercised by girl scouts or trick-or-treaters, did not clearly establish the wrongfulness of Dawson's

conduct. App. 15a. This purportedly was so because *Jardines* did not clearly overrule a Sixth Circuit case, *Hardesty* v. *Hamburg Twp.*, 461 F.3d 646 (2006), which allowed officers who believed that someone was in the house to take "reasonable steps" to make contact with the person, by going to the back door and knocking on it. App. 17a-18a. Further, the majority said, because *Hardesty* controlled, Dawson was entitled to qualified immunity because it was not clearly unreasonable for him to repeatedly and invasively search the curtilage of Brennan's home without a warrant. App. 17a-18a. In dissent, Judge Karen Moore argued that *Jardines* clearly established that Dawson's conduct was unlawful. App. 29a.

REASONS FOR GRANTING THE WRIT

I. This Case Presents a Question of Exceptional Importance.

A. Three Current Justices of This Court Have Written or Joined Opinions Expressing Concerns About the Breadth of Qualified Immunity in the Last Four Years.

In the last four years, three current Justices of this Court have written or joined opinions questioning the broad scope of qualified immunity. The questioners recognized flaws falling into two broad categories: the fact that qualified immunity as has no basis in the common law at the time § 1983 was enacted in 1871, and the fact that the Court's qualified immunity jurisprudence does not adequately deter police misconduct.

In *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), Justice Thomas "[wrote] separately . . . to note [his] growing

concern with [the Court's] qualified immunity jurisprudence." *Id.* at 1870 (Thomas, J., concurring in part and concurring in the judgment). Specifically, Justice Thomas's concern was that the Court had "diverged from the historical inquiry" into whether "whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983"—an "inquiry demanded by the statute." *Id.* at 1871. Because "some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine," Justice Thomas stated that the Court, "[i]n an appropriate case, . . . should reconsider [its] qualified immunity jurisprudence." *Id.* at 1871-72 (citing William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018)).

In 2015, Justice Sotomayor dissented from the Court's decision in *Mullenix* v. *Luna*, 136 S. Ct. 305 (2015), to grant qualified immunity to a police officer who killed a suspect fleeing police custody by firing six shots at the suspect's car. Justice Sotomayor decried the Court's decision, stating that it fostered a "culture" of "'shoot first, think later' approach to policing" that "renders the protections of the Fourth Amendment hollow." *Id.* at 316 (Sotomayor, J., dissenting).

Justice Sotomayor revisited this criticism in her dissent—joined by Justice Ginsburg—in *Kisela* v. *Hughes*, 138 S. Ct. 1148 (2018). That case involved a police officer who, without warning, shot and seriously injured a woman who was calmly holding a knife in a non-threatening manner. *Id.* at 1155 (Sotomayor, J., dissenting). Justice Sotomayor dissented because in

her view, the majority "effectively treat[ed] qualified immunity as an absolute shield" to liability. *Id.* She reiterated her concern that qualified immunity had "transform[ed] . . . into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Id.* at 1162. Moreover, she noted that the majority's decision "sen[t] an alarming signal to law enforcement officers and the public" because it showed "officers that they [could] shoot first and ask questions later, and [showed] the public that palpably unreasonable conduct [would] go unpunished." *Id.*

Justice Breyer, writing for the Court more than two decades ago, limited the scope of qualified immunity in an opinion that expressed both concerns in *Richardson* v. *McKnight*, 521 U.S. 399 (1997). In that case Justice Breyer cited both a lack of common law immunity and the absence of any special policy concerns as justifications for denying qualified immunity to prison guards employed by a private prison company. *Id.* at 412. Specifically, Justice Breyer noted that because there was no analogous common law immunity, the guards were not entitled to qualified immunity because they failed to demonstrate that denying them immunity would (1) make them too timid to do their jobs effectively, (2) deter "talented candidates . . . from entering public service," or (3) severely distract the guards from performing their duties. *Id.* at 409-12 (quoting *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992)). Although *Richardson*, decided more than two decades ago, "answered the immunity question narrowly," *id.* at 413, its focus on historical common law immunities and the policy justifications undergirding § 1983

jurisprudence are reflected in Justice Thomas and Justice Sotomayor's more recent criticisms of the scope of qualified immunity.

This case illustrates both of those concerns. Dawson's immunity from suit in this case far exceeds any defense that would have been available to him when § 1983 was first enacted. The common law "good faith" defense only applied to explicit statements of law, such as statutes or orders from the Executive. *See Pierson* v. *Ray*, 386 U.S. 547, 556-57 (1967). Here, Dawson's immunity, based on an *extension* of Sixth Circuit case law, demonstrates that his qualified immunity offers far greater protection than the "good faith" immunity of his nineteenth-century contemporaries. Moreover, the Sixth Circuit's decision—which allows officers to dodge liability when a Sixth Circuit case conflicts with this Court's jurisprudence but has not been explicitly overruled—allows palpably unreasonable conduct to go uncompensated. Police officers therefore can escape lawsuits *even when they ignore caselaw from this Court*, provided defense counsel and lower court judges scour the *Federal Reporter* for cases from the lower courts that have been abrogated, but not explicitly overruled. Under such a system, officers have hardly any incentive whatsoever to avoid violating citizens' constitutional rights.

B. The Scope of Qualified Immunity Has Long Been Criticized by Judges, Activists, and Scholars of All Perspectives.

Criticisms of the scope of qualified immunity are not new—"Justices have been raising concerns about

qualified immunity for decades." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1798-99 (2018). The criticisms are not only decades old, they have also come from representatives of virtually every judicial, academic, and political philosophy. For example, Justice Kennedy criticized the departure from the common law immunities available at § 1983's genesis in his concurrence in *Wyatt* v. *Cole*, 504 U.S. 158 (1992). In that opinion, he wrote that the Court's "[qualified] immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in 'freewheeling policy choice[s].'" *Id.* at 1835 (Kennedy, J., concurring) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986)). Because a great many § 1983 suits could be resolved at the summary judgment stage, there was no longer a need for the expansive qualified immunity principles solely "justified by the special policy concerns arising from public officials' exposure to repeated suits" in cases such as *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). *Id.* at 171. Justice Kennedy's opinion partially inspired Justice Thomas's *Ziglar* concurrence. *Ziglar*, 138 S. Ct. at 1870-71.

The "growing, cross-ideological chorus" of criticisms of qualified immunity has reached lower court judges as well. *Zadeh* v. *Robinson*, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring dubitante). These judges have expressed frustration both at the scope of qualified immunity, and at the lack of guidance from this Court. In *Zadeh* v. *Robinson*, Fifth Circuit Judge Don Willett decried "the kudzu-like creep of the modern immunity regime," which he said "let[s] public officials duck consequences for bad

behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly." *Id.* at 498. "To some observers, qualified immunity smacks of unqualified impunity," Judge Willett noted, further arguing that lower courts are helpless to alter this perception because they are encouraged to avoid finding constitutional violations, in favor of simply ruling that a right was not clearly established. *Id.* at 498-99. "Heads defendants win, tails plaintiffs lose," because plaintiffs are required to "produce precedent even as fewer courts are producing [it]." *Id.* at 499. This "imbalance," Judge Willett wrote, "leaves victims violated but not vindicated; wrongs are not righted, wrongdoers are not reproached, and those wronged are not redressed." *Id.*

Judge Willett is joined in his criticism of the massive scope of qualified immunity by the late Judge Stephen Reinhardt of the Ninth Circuit. Similarly to Judge Willett, Judge Reinhardt wrote that "the law of qualified immunity . . . forecloses the development of constitutional law in areas where such development is most needed." Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1222 (2015). This has led, Judge Reinhardt wrote, "to the growing belief by members of minority groups that our legal system does not afford fair and equal treatment to all." *Id.* Worse still, Judge Reinhardt argued, while "the Court's approach to qualified immunity is [un]necessary to the welfare of law enforcement officers," lower courts are bound by it, creating "an

unnecessary and unjust process that values other concerns of far less importance over the constitutional rights of individuals." *Id.* at 1254.

It is not only appellate judges who have criticized the broad scope of qualified immunity. District court judges, too, have expressed their frustration and discomfort with the current state of the law. For example, in *Kong ex rel Kong* v. *City of Burnsville*, 2018 WL 6591229, at *17 (D. Minn. Dec. 14, 2018), Judge Susan Nelson acknowledged that qualified immunity's "clearly established" prong creates a "demanding standard" for plaintiffs to meet. "Indeed," she observed "the standard is so demanding that, in recent years, jurists and academics from across the ideological spectrum have called the historical and legal underpinnings of this 'clearly established' inquiry into question." *Id.* at *17 n.17. Judge Jack Weinstein had much harsher words: "The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress." *Thompson* v. *Clark*, 2018 WL 3128975, at *11 (E.D.N.Y. June 26, 2018).

It is not just judges of divergent political backgrounds that are opposed to the current scope of the immunity doctrine. A diverse array of civil society groups, such as the American Civil Liberties Union,[1]

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[1] Brief of the American Civil Liberties Union and the American Civil Liberties Union of the District of Columbia as *Amici Curiae* in Support of Respondents at 15, *District of Columbia* v. *Wesby*, 138 S. Ct. 577 (2018) (No. 15-1485) ("[T]he current standard provides far broader immunity than either Congress in 1871 or

the Cato Institute,[2] the National Association for the Advancement of Colored People Legal Defense Fund,[3] the American Constitution Society,[4] The Federalist Society,[5] and the American Bar Association[6] have all

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the Fourth Amendment's Framers would have envisioned or countenanced.").

[2] Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioner at 2, *Allah* v. *Milling*, No. 17-8654 (2018) ("Judges and scholars alike have . . . increasingly arrived at the conclusion that the contemporary doctrine of qualified immunity is unmoored from any lawful justification and in need of correction.").

[3] *LDF Statement on the Non-Indictment of Cleveland Police Officers in the Shooting Death of Tamir Rice*, LDF (Dec. 28, 2015), https://www.naacpldf.org/press-release/ldf-statement-on-the-non-indictment-of-cleveland-police-officers-in-the-shooting-death-of-tamir-rice/ ("We invite our civil rights colleagues to join us in re-examining the legal standards governing officer misconduct, including but not limited to the standards pertaining to use of force and qualified immunity.").

[4] Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, Am. Const. Soc. (Jan. 12, 2018), https://www.acslaw.org/acsblog/the-supreme-courts-quiet-assault-on-civil-rights/ ("Since *Monroe*, however, the Supreme Court has not been friendly to [§ 1983], consistently narrowing it and making it harder for individuals whose constitutional rights have been violated to prevail in lawsuits.").

[5] The Federalist Society, *Resolved: The Supreme Court Should Overrule Qualified Immunity*, YouTube (Jan. 3, 2019), https://www.youtube.com/watch?v=h7OC0hoLqjA ("There's not a lot of historical basis for the modern doctrine of qualified immunity.").

[6] Lynda G. Dodd, *Rethinking Qualified Immunity*, ABA (Feb. 7, 2018), https://www.americanbar.org/groups/litigation/committees/civil-rights/articles/2018/rethinking-qualified-immunity/ ("Almost all the . . . Court's recent qualified-immunity

criticized the scope of the Court's current immunity doctrine. Moreover, their criticisms are remarkably similar.

Scholars, too, have roundly criticized the breadth of qualified immunity for a variety of reasons. Some have followed the lead of William Baude, who argues that "the modern doctrine of qualified immunity" does not have "a legal basis," and concludes that because "qualified immunity is unlawful, it can be overruled." Baude, *supra*, at 48, 88. Other scholars focus not only on qualified immunity's lack of a historical basis, but also its "fail[ures] to achieve its intended policy aims," because it "does not shield individual officers from financial liability," "almost never shields government officials from costs and burdens associated with discovery and trial in filed cases," and "appears unnecessary to encourage vigorous enforcement of the law." *E.g.*, Schwartz, *supra*, at 1799-80. Finally, some commentators have observed that allowing judges the "discretion to decide whether to begin with the constitutional merits or the 'clearly established' question . . . has opened the door for strategic behavior by judges." Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 Notre Dame L. Rev. 1999, 2016 (2018). Even more worrying, it has exposed judges to the charge that they are politically motivated in deciding qualified immunity cases: "differences in approaches between Republican and

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opinions, including many summary reversals, have protected police officers when the lower courts denied qualified immunity.").

Democratic appointees on the federal bench have been documented."[7]

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The result in this case—Dawson escaping liability by grossly expanding Sixth Circuit caselaw that was clearly in conflict with this Court's rulings in cases such as *Jardines*—demonstrates how qualified immunity as it currently stands is far too broad. A police officer was allowed to escape liability for violating a citizen's Fourth Amendment rights because the Sixth Circuit had not yet overruled its clearly abrogated exception to the right against warrantless curtilage searches *and* the current "clearly-established" rule entitled the officer to stretch that exception well beyond its stated scope. In this case, as in countless others, "qualified immunity

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[7] *Id.*; *see also* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 Emory L.J. 55, 117 (2016); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 45–46 (2015). This is particularly concerning given how important it is that judges appear as neutral arbiters of the law, not political actors. *Cf. Gill* v. *Whitford*, 138 S. Ct. 1916, 1929 (2018) ("Our power as judges to 'say what the law is' rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); Brian Naylor & Nina Totenberg, *Chief Justice Roberts Issues Rare Rebuke to Trump; Trump Fires Back*, NPR: Politics (Nov. 21, 2018, 3:05 P.M.), https://www.npr.org/2018/11/21/670079601/chief-justice-roberts-issues-rare-rebuke-to-trump ("We do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.").

smacks of unqualified impunity." *Zadeh*, 902 F.3d at 498.

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

Petitioner Joshua Brennan indisputably had a clearly established right against a warrantless curtilage search of his home. *Collins*, 138 S. Ct. at 1670; *Jardines*, 569 U.S. at 8. But according to the Sixth Circuit, he did not have a clearly established right against a curtilage search involving "reasonable steps" to determine if someone was home based on the court's pre-*Jardines* decision in *Hardesty*. App. 17a. But the reasonable steps in *Hardesty* were to walk to the back and knock. *Hardesty*, 461 F.3d at 654. Neither the court nor the Respondents cited any case law justifying a reasonable officer expanding that exception to include circling the house several times while banging on doors and windows, App. 4a, then obscuring a security camera with police tape, *Id*., then circling the house another several times while again banging on doors and windows, *Id*., and all the while peering into those windows and otherwise causing a nuisance on the property, *Id*. The scope of qualified immunity cannot include immunizing an officer who uses a narrow exception to a clearly established right as an excuse to engage in conduct obviously well outside that exception. And this case provides the Court an opportunity to place an important limit on the scope of qualified immunity that does not allow exceptions to clearly established rights to swallow the rights themselves.

Though the language of § 1983 "admits of no immunities," *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976), this Court has interpreted the statute as governed by the common law of 1871, *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951). This Court re-emphasized the relevance of the common law to § 1983 in *Pierson* v. *Ray*, 386 U.S. 547, 554-55 (1967), and read the statute against "the background of tort liability" to extend the common-law defense of "good faith and probable cause" to officers sued under § 1983 for an unconstitutional arrest, *Id*. at 556-57. Under that common-law defense, officers were not liable for an arrest if they acted in good faith and with probable cause in making the arrest even if the statute under which the arrest was made was later held invalid. *Id*. at 550-51. This Court endorsed the idea that police officers were not charged with predicting the future of constitutional law and were entitled to act under a statute purporting to allow an arrest before that statute was held unconstitutional. *Id*. at 557.

The common-law "good faith" defense has since been modified and expanded into the current doctrine of qualified immunity. In *Scheuer* v. *Rhodes*, this Court extended qualified immunity to executive officers entertaining both a subjective good-faith belief in the legality of their actions as well as objective reasonable grounds for that belief. 416 U.S. 232, 247-48 (1974). And in *Wood* v. *Strickland*, the two-part test was clarified to deny immunity when an official "knew or reasonably should have known that the action he took . . . would violate the [Constitution]" or "if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." 420 U.S. 308, 322 (1975). The *Wood* test,

which contained both objective and subjective elements, expanded *Pierson*'s protection of an officer relying on a presumptively valid statute to officers operating in areas of constitutional uncertainty and was applied in various contexts until 1982. In *Harlow* v. *Fitzgerald*, this Court dropped the subjective prong of the *Wood* test in an effort to prevent "bare allegations of malice" and insubstantial claims from going to trial and subjecting officials to broad-reaching discovery. 457 U.S. 800, 815-16 (1982). Holding qualified immunity shielded officials insofar as they do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known," *Id*. at 818, this Court departed substantially from the *Wood* test and even more so from the common-law "good faith" defense.

That departure has been repeatedly affirmed and justified by the need to balance plaintiffs' interests in vindicating constitutional rights and officers' efficient performance of their public duties. *See Harlow*, 457 U.S. at 813 ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1866 (2017) ("The qualified immunity rule seeks a proper balance between two competing interests."). Eliminating the subjective inquiry of the *Wood* test has elevated the interest of public efficiency, reducing the likelihood that insubstantial claims survive summary judgment only because an official's subjective state of mind is a jury question. But it has also led to confusion concerning what is meant by "clearly established law."

As lower courts have struggled to determine when constitutional rights are clearly established, this Court has issued numerous decisions offering guidance on the question without resolving the confusion. Clearly established rights cannot be claims on general legal principles or a simple parroting of Bill of Rights language. *Brosseau* v. *Haugan*, 543 U.S. 194, 201 (2004); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987); *Mitchell* v. *Forsyth*, 472 U.S. 511, 531 (1985); *Davis* v. *Scherer*, 468 U.S. 183, 192-93 (1984). But plaintiffs also need not rely on a case holding the very action in question unlawful. *Ziglar*, 137 S. Ct. at 1866-67; *Anderson*, 483 U.S. at 640. Officers should be "on notice" that their conduct is unlawful. *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017); *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011); *Saucier* v. *Katz*, 533 U.S. 194, 206 (2001). But general statements of the law can give fair warning to officers that their conduct violates established law even in novel factual circumstances. *United States* v. *Lanier*, 520 U.S. 259, 271 (1997); *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002).

This case presents the ideal vehicle to reduce confusion regarding the "clearly established" inquiry and restore some character of the common-law "good faith" defense without returning to the subjective inquiries that prompted the decision in *Harlow*. The current formulation of the "clearly established" test departs substantially from its roots in the common-law good faith defense, and Justices of this Court have criticized that departure. Justice Kennedy stated that the current rule "diverged to a substantial degree from the historical standards." *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring). And Justice Thomas has sought an opportunity to restore

qualified immunity to its common-law underpinnings, saying, "Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1870-72. This is the appropriate case.

The common-law good faith defense imported into § 1983, at its core, protected officers who relied on concrete statements of the law that, after the officer's action, were invalidated. In *Pierson*, the officers relied on a statute that was valid at the time of the arrest, but was invalidated after the arrest occurred. 386 U.S. at 550-51. In a case decided just before passage of the Civil Rights Act of 1871, the Supreme Court of Illinois held that marshals ordered by the President to arrest a citizen of Illinois could present evidence of the order in defense against punitive damages even though the order of the President was held unconstitutional in that case. *Johnson* v. *Jones*, 44 Ill. 142, 165 (1867). As in *Pierson*, this statement of the common law protected officers who relied on concrete law—the Presidential order—that was invalidated after their action. The Supreme Court of Louisiana also endorsed the view that officers carrying a law "which had not been the subject of judicial investigation and decision" into effect were protected from liability even if subsequent investigation lead to the law's invalidation. *Dwight* v. *Rice*, 5 La. Ann. 580, 580-81 (1850). And the highest court in Kentucky refused to impose liability on a constable for relying on an execution issued by a Justice of the Peace, despite the court holding the

execution was issued unlawfully. *Rodman* v. *Harcourt*, 43 Ky. 224, 235-35 (1843).

In contrast, the officer in this case relied not on a law presumed to be valid but instead on an unreasonable expansion of an already-decided exception to a clearly established constitutional right. Dawson did not act with the support of a law or judicial decision later invalidated, nor did he act, as in *Wood*, where the state of the law was unclear or unaddressed. Instead, Dawson relied on the fact that judicial decisions from this Court and the Sixth Circuit clearly defining the limits of entries into the curtilage of a home had not yet expressly disapproved of his particular conduct. Reasonable officers rely on the law as stated by the judiciary and legislature and do not hypothesize new or broader exceptions to justify unreasonable conduct *post hoc*. Officers should not be protected when they rely on unfounded extensions of existing exceptions to specifically defined rights. Rather, this Court should hold that an officer is entitled to qualified immunity only when he acts within the boundaries of an already-enumerated exception to the right at issue or he acts in an area of the law the courts have not addressed. Dawson did neither.

Dawson violated Brennan's Fourth Amendment rights by entering his curtilage without a warrant and beyond the implied license to attempt to speak with a home's occupant. The right against intrusion into one's curtilage is a specific one, not so general as the right against unreasonable searches or even the special protection against home intrusions, *Kentucky* v. *King*, 563 U.S. 452, 474-75 (2011), and it has been

recognized at least since this Court's decision in *United States* v. *Dunn*, 480 U.S. 294, 300 (1987). And in 2015, when Dawson spent an hour and a half in Brennan's curtilage knocking on and peering in windows, disabling a security camera with crime-scene tape, and activating the lights and siren of his police car, the courts had already enumerated clearly the breadth of the curtilage right and its narrow exceptions. The test for determining what area constituted curtilage, *Dunn*, 480 U.S. at 301, and the level of protection afforded to curtilage, *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 235 (1986), were both clearly defined by this Court. The front porch was identified as a "classic exemplar" of curtilage, *Florida* v. *Jardines*, 569 U.S. 1, 7 (2013), and the area four to six feet from the home was definitively part of the curtilage, *Widgren* v. *Maple Grove Tp.*, 429 F.3d 575, 582 (6th Cir. 2005) (citing *Dunn*, 480 U.S. at 303). Additionally, this Court had enumerated a narrow exception to the prohibition on entry into the curtilage. In *Jardines*, this Court found an implied license permitting an officer "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave" in the same manner that would be expected of any stranger. 569 U.S. at 8. Compliance with this limited license "does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id.*

A reasonable officer could not rely on the law as it was in 2015 to justify Dawson's course of conduct. Dawson did far more than the implied license to approach, knock, and leave would allow. Dawson approached and knocked, but then he proceeded to

walk around the home knocking on and peering in windows, activate his overhead lights and siren, use crime scene tape to disable Brennan's home security camera, and make another five to ten trips around Brennan's house knocking on and looking in windows. R. at 3-4. The Sixth Circuit unanimously agreed that Dawson's conduct was unlawful. R. at 2. But despite holding that Dawson's conduct was "inconsistent with the limits of the implied license recognized in *Jardines*," R. at 10, the court granted Dawson qualified immunity, citing its now-overruled decision in *Hardesty* v. *Hamburg Twp.*, 461 F.3d 646 (6th Cir. 2006), *overruled by Morgan* v. *Fairfield County, Ohio*, 903 F.3d 553 (6th Cir. 2018), as muddying the "close question." R. at 13-14. *Hardesty*, decided before *Jardines*, held that officers could conduct a "knock and talk" investigative technique both at the front door and, if a front door attempt proved unsuccessful, by proceeding through the curtilage to the back door when circumstances indicate that someone is home. *Hardesty*, 461 F.3d at 654.

Thus, the Sixth Circuit held Dawson was acting as any reasonable officer would in hypothesizing about what the law should allow rather than following what the law definitively did allow, even though he failed even to follow the guidance offered in *Hardesty*, because Dawson's actions were not explicitly ruled out by a narrow circuit decision at conflict with an even narrower decision of this Court. This Court's expectations of a reasonable officer should not be so low. Officers should not be shielded from liability just because their particular violation of constitutional rights happens to be original. *Rice* v. *Burks*, 999 F.2d 1172 (5th Cir. 1993); *see also Zadeh* v. *Robinson*, 902

F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring dubitante). Qualified immunity should only be extended, as the common-law good faith defense was, to officers relying on presumptively valid law, not to officers that make up new exceptions—or unreasonably broaden old ones—as they go.

Unfortunately, the Sixth Circuit has not stood alone in extending qualified immunity to officers who ignore judicial direction because their specific conduct had not yet been addressed by a court. In *A.M.* v. *Holmes*, the Tenth Circuit granted qualified immunity to an officer that handcuffed and arrested a student for burping and other horseplay in school. 830 F.3d 1123 (10th Cir. 2016) *cert. denied, A.M. ex rel. F.M.* v. *Acosta*, 137 S. Ct. 2151 (2017). The court held the plaintiff did not get "over her clearly-established-law hurdle" by citing a case interpreting a statute closely related to the one under which the arrest was made. *Id*. at 1143. But as the dissent pointed out, the relevant language of the two statutes was identical, and the interpretation of the New Mexico Court of Appeals, confirmed by the holdings of other state courts addressing similar statutes, should have been "sufficient to alert any reasonable officer" of the proper scope of the statute. *Id*. at 1169-70 (Gorsuch, J., dissenting). Again, qualified immunity operated to protect an incompetent officer where a reasonable officer would have relied on the ample direction given him by the courts. Similarly, the Ninth Circuit extended protection to officers who exceeded the clear limits of the exception created in *Michigan* v. *Summers*, 452 U.S. 692 (1981), by arresting and holding in custody a compliant bystander while executing an arrest warrant. *Sharp*

v. *County of Orange*, 871 F.3d 901, 916 (9th Cir. 2017). As the dissent notes, officers should not be able to "commit a Fourth Amendment violation and hope that a court will create or extend an exception covering that violation." *Id.* at 925 n.3 (Smith, J., dissenting). Protecting officers who unreasonably hypothesize new exceptions "would lead to the conclusion that there can never be a clearly established violation . . . absent a factually analogous case." *Id.*

This case is the appropriate vehicle to effectuate a step back toward the common law. The Sixth Circuit held unequivocally that Dawson's conduct violated the Fourth Amendment. App. 2a. The only question was whether the unconstitutionality of that conduct was clearly established in February 2015. App. 12a. Applying the "good faith" notion that an officer is immune only when acting in reliance on presumptively valid law, Dawson would have been entitled to qualified immunity had he followed the clear directions of *Jardines*, exercising the implied license to approach, knock, and retreat only. And even if he may have even been justified in relying on *Hardesty*'s outdated permission to proceed to the back door to knock and talk before retreating, Dawson could not use that narrow exception as an excuse for all of his conduct within Brennan's curtilage. No reasonable officer could rely on the limited exception enumerated in *Hardesty*, which acknowledged, at most, a license to knock at the back door, to justify the immense and prolonged intrusion into Brennan's curtilage.

This case does not present the interests that can be balanced against vindicating constitutional rights,

such as where an officer lacked clear guidance from the courts or would be inhibited from the discharge of his duties because of an open legal question. *See Ziglar*, 137 S. Ct. at 1866. Dawson had clear courses of action presented to him by *Jardines*. Dawson could have limited his intrusion to knocking on the front door and, instead of lingering for an hour and a half, applied for a warrant. Dawson did not act in the face of an open question. He ignored the answers given by both this Court and the Sixth Circuit to pursue an unauthorized course of action. Denying qualified immunity to officers who ignore directions from the courts will not entail the social costs normally accompanying such a denial because officers have clearly delineated methods for discharging their duties in compliance with constitutional restraints.

To hold in this case that an officer is only entitled to qualified immunity when faced with an open question of law or when relying on presumptively valid direction from the legislature or courts would not upset the focus on the "objective legal reasonableness of the official's acts," *Ziglar*, 137 S. Ct. at 1866, nor would it require defining the right at too high a level of generality, *White*, 137 S. Ct. at 552. Rather, it would clarify that an objectively reasonable officer cannot ignore the limits and instruction given him in the law. When this Court issues unequivocal instructions on the manner in which officers may conduct themselves, reasonable officers can read and rely on those instructions. The limits imposed by *Jardines* are easily understood by reasonable officers and are in fact "generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Jardines*, 569 U.S. at 8. And the right at issue, the

right against unreasonable intrusion into one's curtilage, is specific and well-established. *Dunn*, 480 U.S. at 300.

Not only is this case a vehicle to restore the core character of the common-law approach while maintaining an objective inquiry, but it offers a narrow approach that would preserve protection for officers presented with open questions of law or competing instructions from the courts. Officers who face conflicting instructions from different courts of equal authority would be entitled to rely on either instruction and not be required to predict the decisions of this Court. *See Stanton* v. *Sims*, 571 U.S. 3, 6 (2013) (holding an officer faced with a sharp divide between courts nationwide on the question of whether an officer with probable cause to arrest for a misdemeanor may enter a home in hot pursuit without a warrant was entitled to qualified immunity). Officers presented with open questions of law, such as when this Court has specifically declined to address an issue, would also still be protected in using their discretion. *See Mitchell* v. *Forsyth*, 472 U.S. 511, 531 (1985) (holding that an officer presented with a question this Court carefully held open in *Katz* v. *United States*, 389 U.S. 347 (1967) was "not subject to suit when such questions are resolved against [him] only after [he has] acted").

This case also presents the ideal opportunity to clarify qualified immunity in a way that more robustly protects citizens' constitutional rights while simultaneously buttressing protection for reasonable officers. As members of this Court have noted, § 1983 serves as an effective deterrent of future Fourth

Amendment violations and as an important redress for past ones. *Collins* v. *Virginia*, 138 S. Ct. 1663, 1680 n.6 (2018) (Thomas, J., dissenting). But recent decisions seemingly expanding qualified immunity's application have "gutt[ed] the deterrent effect of the Fourth Amendment." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting). Instructing officers like Dawson who are presented with undoubtedly constitutional avenues for fulfilling their duties to follow those avenues would make § 1983 a more effective tool to prevent constitutional violations. Instead of continually testing, and usually overstepping, the limits of narrow exceptions to the Fourth Amendment, officers would instead be incentivized to follow the procedures already approved by the courts. Thus, citizens could expect officers more often to adhere to clearly constitutional investigative methods. Because of § 1983's importance as a deterrent to constitutional violations, qualified immunity must not protect officers who are willing to forego clearly constitutional investigative methods in favor of experimenting with more intrusive tactics.

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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