No. _____

In the
Supreme Court of the United States

NOBLE COOPER; NORMAN COOPER, Estate of; JENNIFER COOPER; NATHAN COOPER; CARLY LOPEZ, Individually and as Next Friend of NASON COOPER and NEVON COOPER, Minors; NASON COOPER, a Minor; NEVON COOPER, a Minor,
Petitioners,

v.

OFFICER OLIVER FLAIG; OFFICER ARNOLDO SANCHEZ,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

EDWARD L. PIÑA
Counsel of Record
MATTHEW N. GOSSEN
Edward L. Pina & Associates, P.C.
8118 Datapoint Drive
San Antonio, Texas 78229
(210) 614-6400
epina@arielhouse.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Norman Cooper, a 33-year-old black father, was killed in his parents' home by officers Flaig and Sanchez after they tased him nine times in a three-minute period. Norman was experiencing an acute mental health episode and under the influence of drugs but was unarmed, respectful, and never attempted to make physical contact with anyone.

Norman's wife and family filed this suit for violations of his constitutional rights resulting in his death. The district court denied the officers' qualified immunity as to the excessive force claims and set the case for trial. The officers then filed an interlocutory appeal with the Fifth Circuit. The Fifth Circuit reversed and rendered determining that the petitioners could not show that the law was *so clear* that *no* reasonable officer would have used the same extreme force.

Qualified immunity often leads to confounding decisions that defy our most basic notions of justice. There is no accountability. The people's fundamental rights are eroded. Like Norman Cooper, too many lives have been unnecessarily lost.

The question presented is:

Should the Court eliminate or significantly revise the judicially created doctrine of qualified immunity to protect *the people's* core constitutional rights and assure accountability of *the people's* public officials?

PARTIES TO THE PROCEEDING

Noble Cooper, individually and as administrator of the Estate of Norman Cooper, deceased, Estate of Norman Cooper, Jennifer Cooper, Nathan Cooper, Carly Lopez, individually, and as next friend of Nason Cooper and Nevon Cooper, minors, and Nason Cooper, a minor, and Nevon Cooper, a minor, are petitioners here and were plaintiffs-appellees below.

Petitioners are not corporations as defined by Rule 29.6.

Edward L. Piña is lead counsel of record for petitioners here and Edward L. Piña and Matthew N. Gossen were counsel for plaintiffs-appellees below. Matthew N. Gossen will be submitting his application for admission to the Supreme Court Bar near the time of the filing of this petition.

Officer Oliver Flaig and Officer Arnoldo Sanchez are respondents here and were defendants-appellants below.

City of San Antonio and Interim Police Chief, Anthony Trevino, were defendants at the district court, but are no longer parties to these proceedings.

Nathan Mark Ralls is counsel of record for respondents here and was counsel for defendants-appellants below.

STATEMENT OF RELATED PROCEEDINGS

• Cooper, et al. v. Flaig, et al., No. 18-50499 (5th Cir.) (per curiam opinion issued and judgment, reversing and rendering, entered Oct. 8, 2019; mandate issued Oct. 30, 2019).

• Cooper, et al. v. City of San Antonio, et al., No. 5:16-CV-77-DAE (W.D. of Texas – San Antonio Division) (memorandum of decision issued May 15, 2018; final judgment entered Oct. 30, 2019).

There are no additional proceedings in any court that are directly related to this case.

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Petitioners, Noble Cooper, individually and as administrator of the Estate of Norman Cooper, deceased, Estate of Norman Cooper, Jennifer Cooper, Nathan Cooper, Carly Lopez, individually, and as next friend of Nason Cooper and Nevon Cooper, minors, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit (App., *infra*, 1a-8a) is available at 779 Fed. Appx. 269*; 2019 U.S. App. Lexis 30447 **; 2019 WL 5063307. The district court's decision granting, in part and denying in part, the motion for summary judgment (App., *infra*, 9a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals was filed on October 8, 2019. Justice Alito extended the time to file this petition to February 5, 2020. The Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S. Code § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress***.

STATEMENT

This petition for certiorari will illustrate that review is warranted because the judicially created doctrine of qualified immunity has expanded to the point that it nullifies the remedial purpose of Section 1983. There is no basis in the text or the legislative history of the statute supporting current qualified immunity jurisprudence. Moreover, the empirical data examining the policy assumptions on which it rests shows them to be unsupported and contraindicated. It is, respectfully submitted that qualified immunity should be reexamined and refocused on the remedial intent of the statute.

A. Factual Background

On April 19, 2015, Norman Cooper, a black father and volunteer youth football coach, was killed at the age of 33 by respondent officers Oliver Flaig and Arnoldo Sanchez who tased him nine times without justification. ROA.1155 (at p. 39), ROA.1398-1399, ROA.1423; App., *infra*, 70a.

The events leading to Norman's death began when his younger brother, Nathan Cooper, noticed that Norman was acting strangely. App., *infra*, 72a-73a. Nathan was in San Antonio and staying at the home owned by their parents, Reverends Noble Cooper and Jennifer Cooper. App., *infra*, 72a.

Norman Cooper arrived at the Cooper home and Nathan let him in. App., *infra*, 72a. Nathan immediately observed that Norman was animated and disoriented. He began preaching gospel to Nathan, singing hymns and appeared to be under the influence of drugs or mentally ill. *Id.* at 72a-73a.

Respondent Flaig arrived first and without announcement entered the Cooper residence. App., *infra*, 73a-74a. Flaig observed that Norman had taken off his shirt. ROA.1224 (at p. 51). Flaig also noted that Norman was sweaty, animated, praying, and acting strange. ROA.1225 (at p. 54), ROA.1226 (at pp. 60-61).

Flaig talked to Norman but observed that Norman did not appear to comprehend what Flaig was saying. App., *infra*, 74a; ROA.1227 (at pp. 62-63). Norman was at all times respectful to the officers. App., *infra*, 74a.

After just a few minutes, Flaig became aggressive and started screaming at Norman and Nathan. App., *infra*, 74a. At this time respondent Sanchez arrived at the Cooper residence. *Ibid.* The record shows that Norman never made any threats or attempted any physical contact with Flaig, Sanchez, or Nathan. *Id.* at 76a-77a; ROA.1226 (at pp. 60-61), ROA.1291 (p. 54).

Flaig then escorted Norman upstairs to Norman's small bedroom to obtain Norman's ID. App., *infra*, 74a. When they entered the room, Norman picked up the landline house phone and called his mother, Jennifer Cooper. ROA.1253 (at p. 166). Jennifer answered and Norman put the call on speaker mode allowing Jennifer to hear the entire episode that ended with her son's death. *Ibid*; ROA.1345 (at p. 68).

Sanchez and Nathan remained downstairs while Flaig and Norman went upstairs to obtain Norman's ID. App., *infra*, 74a-75a. Sanchez then went upstairs and Nathan called his father to inform him of the situation. *Ibid.*

Norman continued to recite gospel and told Flaig and Sanchez that all he wanted was to "help Nathan." ROA.840. Flaig and Sanchez elected to conduct an emergency detention because they thought Norman was exhibiting symptoms consistent with mental illness or drug use. *Ibid*; ROA.759, ROA.1163 (at pp.72-73), ROA1226 (at pp. 60-61), ROA.1230 (at pp. 76-77), ROA.1298 (at p. 85). Flaig told Norman to turn around and put his hands behind his back but Norman continued to preach the gospel. ROA.840. Flaig and Sanchez then cornered Norman in the small room and moved to handcuff him. *Id.* at 840-841. Flaig and Sanchez backed away and then Norman picked up a laptop computer and began explaining what was displayed on the screen. *Ibid.* Flaig and Sanchez then brandished their Tasers [in probe mode] and fired, striking Norman, causing him to fall over a desk and onto the floor. ROA.841, ROA.1300 (at pp. 92-93); App., *infra*, 70a.

Nathan—still on the phone with his father—could hear Jennifer through his father's phone, yelling for Nathan to tell the officers to stop "tasing my baby." App., *infra*, 75a. Jennifer instructed Nathan to tell the officers to stop tasing Norman. *Ibid.* Nathan ran upstairs and heard Norman screaming "Ahh!" and "Thank you Jesus!" in response to the Taser shocks.

App., *infra*, 75a. As Nathan made it to the top of the stairs, he heard one or two more Taser discharges. *Ibid.*

Entering the room, Nathan saw multiple Taser wires connected to Norman's *back* and body with Norman on the floor, face down, with his hands cuffed behind his back. App., *infra*, 75a; ROA.1176 (at pp. 123-125), ROA.1177 (at pp. 126-127). Further, Nathan observed at least one of the connected wires still vibrating, discharging electricity into Norman. *Ibid.* Sanchez was kneeling on Norman, using the weight of his body to apply pressure to Norman's back. *Ibid.* Nathan never observed his brother resisting in any way. Norman appeared unconscious because he was not moving. App., *infra*, 75a.

As Nathan stood witness to the final minutes of his brother's life, Flaig and Sanchez did not check Norman's pulse, roll Norman onto his side, nor make any effort to help Norman despite clear signs of respiratory distress. App., *infra*, 76a. In fact, the officers were laughing. *Ibid.* Nathan then watched Norman struggle to take a tortured gasp of air, his last. *Ibid.*

Flaig and Sanchez tased Norman nine times, delivering fifty seconds of electricity into Norman's body in just over three minutes. App., *infra*, 70a; ROA.1398-99. This included *simultaneous* Taser activations by Flaig and Sanchez as well as tasing Norman on his back *after* he was face down on the floor with his hands cuffed behind his back. *Ibid*; ROA.1176 (at pp. 123-125), ROA.1177 (at pp. 126-127).

The Bexar County Medical Examiner found the manner and cause of Norman's death to be homicide. ROA.1429-1430,1436. Petitioners' expert cardiologist concluded that the use of Tasers and other force and weight employed by Flaig and Sanchez were a direct and proximate cause of Norman's premature death. ROA.1422-1423, ROA.1426-1430.

Petitioners filed suit against the respondent officers for excessive force and deliberate indifference to Norman's serious medical needs pursuant to 42 U.S.C. § 1983 for violations of the Norman's Fourth and Fourteenth Amendment rights.

B. Proceedings Below

The district court denied the officers' motions for summary judgment on excessive force claims determining that the officers were not entitled to qualified immunity. App., *infra*, 2a. Respondents filed an interlocutory appeal to the Fifth Circuit challenging the district court's decision.

The Fifth Circuit reversed and rendered in favor of the respondent officers. App., *infra*, 2a. The panel found that because of "unsettlement in the law… the court cannot find as a matter of law that the Officers' use of force was 'objectively reasonable in light of clearly established law[.]'" *Id.* at 3a. Further, the Fifth Circuit held "Appellees [Petitioners herein] cannot point to any factually analogous case that would establish that Flaig and Sanchez's use of force was unreasonable." *Id.* at 5a. The Fifth Circuit also found "it was reasonable for Flaig and Sanchez to suspect Norman had committed a crime such as burglary or

trespass[,]" which was contrary to the plaintiffs' evidence and also contrary to the officers' deposition testimony. *Id.* at 6a.

The Fifth Circuit usurped the fact-finding role of the district court and effectively shifted the burden of proof to the plaintiffs to disprove qualified immunity by viewing the facts in the light most favorable *to* the officers. This is contrary to this Court's ruling in *Tolan v. Cotton*, 572 U.S. 650 (2014) and *Johnson v. Jones*, 515 U.S. 304 (1995). The Fifth Circuit's approach is also inconsistent with other circuits. *Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892 (4th Cir. 2016); *Walczyk v. Rio*, 496 F.3d 139 (2d Cir. 2007). Moreover, the Fifth Circuit's insistence on factually identical circumstances in previous cases where the conduct was found to be a constitutional violation has left victims of comparable—but not identical—constitutional injuries without remedy. *Tolan*, 572 U.S. at 656-657, 659; *see also Brosseau v. Haugen*, 543 U.S. 194, 195 (2004) (clearly established law "in light of the specific context of the case" and constructing "facts… in a light most favorable to non-movants").

REASONS FOR GRANTING THE PETITION

The assumptive policy considerations underlying the qualified immunity doctrine lack any empirical foundation and its perplexing application routinely leads to absurdly unjust results.

The Court should grant review to consider eliminating or substantially revising the doctrine of qualified immunity to allow Section 1983 to realize its remedial purpose.

Qualified Immunity Should Be Re-examined And Refocused In A Manner That Protects The Constitutionally Guaranteed Rights of Citizens And Encourages Accountability Of Public Officials.

42 U.S.C. § 1983 was passed in the aftermath of the Civil War. It became law on April 20, 1871 as § 1 of the Ku Klux Klan Act. 17 Stat. 13. The statute was rarely used until the 1940s when it was employed to challenge Jim Crow laws in the South. In 1951, this Court in *Tenny v. Brandhove* began laying the groundwork for what has now become qualified immunity. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

A. Judicial development and creation of qualified immunity.

1. *Tenney* involved the application of legislative immunity from liability for a claim under § 1983 brought by plaintiff Brandhove against a committee of the California Legislature and some of its members. *Tenney*, 341 U.S. at 369, 372. In granting immunity, the Court stated that, "[w]e only considered the scope

of the privilege as applied to the facts of the present case." *Id.* at 378. Nonetheless, the Court's holding was interpreted as a broad rule requiring legislative immunity unless it was "obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Ibid.*

In *Tenney*, the concurrence and dissent raised concerns about the consequences of shielding governmental officials from their unconstitutional conduct that deprives citizens of fundamental rights. *Tenney*, 341 U.S. at 380-383. Specifically, Mr. Justice Douglas aptly warned that the Court was granting immunity to legislators who violate constitutional rights frustrating the purpose of § 1983 which was "to secure federal rights against invasion by officers and agents of the states." *Id.* at 383 (Douglas, J., dissenting). In retrospect, *Tenney* set the foundation for the, sweeping, government-always-wins, immunity regime that exists today.

2. In 1967, this Court issued the next major decision on qualified immunity by instituting its precursor, the good faith and probable cause defense. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). *Pierson* involved black and white Episcopal clergymen participating in a prayer pilgrimage to promote racial equality. *Id.* at 552. The clergymen were arrested in Mississippi for entering a white only waiting room at a bus terminal. *Id.* at 552-553.

The clergymen filed a § 1983 lawsuit against the arresting officers and the municipal judge for violations of their constitutional rights and for false arrest and imprisonment. *Pierson*, 386 U.S. at 550. The Court held

that the judge was entitled to absolute immunity and that the defense of good faith and probable cause was available to the arresting officers. *Id.* at 553, 557.

The Court explained that § 1983 claims are to be read against the background of tort liability. *Pierson*, 386 U.S. at 556-557. The Court reasoned that the common law elements of false arrest included the defense of good faith and probable cause. *Ibid.* In contrast to qualified immunity, the *Pierson* Court held that an arresting officer's good-faith was a defense for jury consideration but not an immunity from a lawsuit itself. *Id.* at 557. *Pierson* ignored and directly contradicted an earlier decision in which the Court rejected the availability of a good-faith defense. *Myers v. Anderson*, 238 U.S. 368, 378 (1915).

Pierson justified a good-faith defense to § 1983 claims on the premise that the § 1983 claim at issue, did, in fact, have a corresponding common-law tort for which the defense was available. *Pierson*, 386 U.S. at 557. The Court did not consider *Myers* nor the strict rule of personal public official liability that prevailed when § 1983 became law. *Myers*, 238 U.S. at 378; David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 19 (1972).

As to the judge's absolute immunity, the Court's decision was based on the presumption "that Congress would have specifically so provided had it wished to abolish the doctrine [judicial immunity]." *Pierson*, 386 U.S. at 554-555. This is important because such flawed assumptions are what the Court has repeatedly utilized in their drive to immunize public officials from liability for unconstitutional conduct.

3. The next major decision regarding qualified immunity was *Scheuer v. Rhodes*, 416 U.S. 232 (1974). *Scheuer* arose from the shooting deaths of students by members of the Ohio National Guard at Kent State University. *Scheuer*, 416 U.S. at 234-235. The claimants brought § 1983 claims against members of the Ohio National Guard and other state officials. *Id.* at 234. The trial court dismissed the complaints based on a lack of subject matter jurisdiction. *Ibid.* The appellate court affirmed and held—in the alternative—that the common-law doctrine of absolute executive immunity prevented the claims. *Id.* at 234-235, 238.

The Court reversed, determining that the Eleventh Amendment did not shield the officials from § 1983 claims and explained why the officials were not entitled to the executive immunity. *Scheuer*, 416 U.S. at 238-249 (citing *Ex Parte Young*, 209 U.S. 123 (1908).

Scheuer also broadened the good-faith defense, ruling that "[i]t is the *existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief*, that affords a basis for *qualified immunity* of executive officers for acts performed in the course of official conduct." *Scheuer*, 416 U.S. at 247-248 (Italics added).

The Court supported its decision on a policy *assumption* that governmental officials would be deterred from executing their duties unless they *all* enjoy some immunity, whether absolute or *qualified*. *Scheuer*, 416 U.S. at 241-242 (Emphasis added). Further, the holding stated, "[t]he concept of immunity assumes this and goes on to assume that it is better to

risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242.

Interestingly, the Court noted that the concept of official immunity, whether absolute or qualified, developed from the same considerations as sovereign immunity in England, a doctrine of oppression that was a significant catalyst that lead to the American Revolution. *Scheuer*, 416 U.S. at 239-240. The Court referenced numerous cases, none of which reviewed any empirical data supporting these assumptive policy considerations. *Scheuer*, 416 U.S. at 239-240 n.4, 5.

In sum, *Scheuer* expanded the good-faith defense, referring to it as "a qualified immunity." Moreover, the Court made clear that *all* officials are entitled to some immunity. This determination was predicated exclusively on *assumptive* policy considerations without empirical support.

4. The following year, the Court further enhanced the good faith *defense*—now consistently identifying it as an *immunity* as opposed to a traditional merits defense—in applying it to board members of a school district. *Wood v. Strickland*, 420 U.S. 308, 315, 318 (1975). *Wood* concerned the expulsion of high school students who had been accused of spiking the punch bowl at an extracurricular activity. *Wood*, 420 U.S. at 309-311. Two of the students filed a lawsuit under § 1983, alleging violation of their due process rights against school board members, administrators, and the school district. *Id.* at 309-310. The board members asserted that they were entitled to absolute immunity. *Id.* at 313-314.

The Court denied the board members absolute immunity but did extend a qualified good-faith immunity. *Wood*, 420 U.S. at 318. Specifically holding, that in the context of school discipline, board members would not be immune from a § 1983 claim if they knew or reasonably should have known that their action would violate the student's constitutional rights, or if the action was taken with malice, causing a constitutional injury. *Id.* at 322. The Court concluded that the test for determining the applicability of immunity contained both objective and subjective elements. *Id.* at 321.

As in *Tenney*, *Pierson,* and *Scheuer*, the *Wood* Court did not support its reasoning with empirical data but instead perpetuated their assumption regarding the inhibiting effects of § 1983 claims. *See Wood*, 420 U.S. at 319-320. The Court provided an additional policy justification, noting that the overwhelming majority of school board members are elected and receive little to no compensation. *Wood*, 420 U.S. at 320 n. 11. Significantly, the Court was persuaded by policy considerations that the members were accountable to the voters *and* the time they expended in their official capacity was voluntary.

5. In the following years, the Court issued a number of opinions essentially reiterating the same qualified good-faith immunity test (and absolute immunity) created by *Tenney*, *Pierson, Scheuer*, and *Wood*, applying it to various types of state and federal public officials in differing situations. *See, e.g.*, *Imbler v. Pachtman,* 424 U.S. 409 (1976) (absolute immunity for state prosecutors); *Procunier v. Navarette*, 434 U.S. 555

(1978) (qualified immunity for state prison administrators); *Butz v. Economou*, 438 U.S. 478 (1978) (qualified immunity, in general, for federal executive branch officials; and absolute immunity for federal hearing examiners, administrative judges, and federal officials who perform functions analogous to a prosecutor).

In 1982, the Court formally established the contemporary doctrine of qualified immunity applied today, becoming the standard-bearer for the deprivation of civil rights and the unaccountability of public officials. *See, generally, Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The *Harlow* case involved a § 1983 lawsuit alleging that former President Richard M. Nixon[1] and two senior Presidential aides conspired to violate respondent Fitzgerald's constitutional and statutory rights through an unlawful and retaliatory termination of Fitzgerald from the Air Force. *Harlow*, 457 U.S. at 802-806. The petitioners' claimed that they were entitled to absolute immunity or, in the alternative, qualified immunity. *Id.* at 802, 813. The Court concluded that executive branch officials, including Presidential aides and advisors, are generally entitled to qualified immunity. *Harlow*, 457 U.S. at 809.

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[1] The *Harlow* petitioners appealed independently of President Nixon. *Harlow*, 457 U.S. at 806.

Most importantly, the *Harlow* Court substantially expanded qualified immunity. *Harlow*, 457 U.S. at 818. The holding stated, "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." *Ibid.* (Citations omitted). The Court further instructed that the qualified immunity analysis should focus on the objective reasonableness of an official's conduct in relation to clearly established law, eliminating any subjective analysis. *Harlow*, 457 U.S. at 818. *Harlow* also requires that courts consider the applicable law and whether that law was clearly established at the time of the alleged unconstitutional conduct. *Ibid.*

The *Harlow* Court seemed to indicate that this new, clearly established analysis should typically result in qualified immunity failing except in extraordinary situations, "if the official pleading the defense claims *extraordinary* circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." *Harlow*, 457 U.S. at 819. (Italics added). At the same time, the Court directed that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.* at 818.

The only support for the new application of qualified immunity was, again, based on assumptive public policy considerations. The *Harlow* Court based this new and expanded immunity standard on the premise that the good-faith defense's subjective analysis

allowed insubstantial § 1983 lawsuits to be heard by a jury. *Harlow*, 457 U.S. at 815-816. The Court's primary concern focused on the Harlow petitioners' assertion that they had been subjected to eight years of frivolous discovery. *Id.* at 805, 816-818. The opinion held that this new qualified immunity was to preclude public officials from being subjected to the litigation process in full until the threshold question of qualified immunity was decided. *Id.* at 817-818.

Justification for eliminating any subjective analysis and instituting a broad shield from liability was expressed in an assumptive and conclusory fashion. *Harlow*, 457 U.S. at 816-818. The Court stated—without citation to supportive data—"the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816.

With regard to the Court's presumption in *Harlow* that discovery interferes with official duties, *Harlow* specifically dealt with very high-level governmental officials, Presidential aides and advisors. In reality, there are few § 1983 claims against Presidential aides but there are literally thousands of egregious cases against abusive police officers.

Three years later, in *Mitchell v. Forsyth,* the Court ruled that the trial court's denial of petitioner's claim of qualified immunity—to the extent it turned on an issue of law—was an appealable final decision notwithstanding the absence of a final judgment. This opened the proverbial flood gates to interlocutory appeals for all public officials. *Mitchell v. Forsyth*, 472

U.S. 511 (1985). This was quickly weaponized against civil rights claimants.

6. The Court continued strengthening qualified immunity when it eliminated the required sequence of qualified immunity analysis and left it to the reviewing court's discretion. *Pearson v. Callahan*, 555 U.S. 223, 227, 236-237 (2009). This change was based on the belief that the mandated sequence established in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), was often of little value, wasted judicial resources, increased litigation expenses, and could result in poor decision-making by the lower courts. *See id.* at 236-240.

Ultimately, the *Pearson* change to the *Saucier* qualified immunity analysis resulted in the exact, harmful stagnation of constitutional law that the *Saucier* analysis sought to avoid. Judge Don R. Willett of the Fifth Circuit recently provided an apt explanation of this perverse state of qualified immunity:

> "Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability." *Zadeh v. Robinson*, 928 F.3d 457,479-480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

7. Although *Pearson* was a major contributor to the judicially created immunity regime, the case solidifying qualified immunity into the currently impervious shield was *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). *Ashcroft* altered the clearly established prong of the qualified immunity analysis, "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*." *Ashcroft*, 563 U.S. at 741 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) and *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (Italics added).

As Judge Willett opined, '*beyond debate'* made it practically impossible for a citizen, injured by unconstitutional conduct of a public official, to establish that a right was clearly established when courts frequently skip evaluating the constitutional violation. *See Zadeh*, 928 F.3d at 478-481 (Willett, J., concurring in part and dissenting in part) ("In day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts.").

Ashcroft furthered the Court's *sub silentio* attack on constitutionally injured citizens in a seemingly subtle replacement of just one word, "every" for "a" in citing partial language from *Anderson v. Creighton*: "[a] Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that **every** 'reasonable official would [have understood] that what he is doing violates that right.'" *Ashcroft*, 563 U.S. at 741 (citing and quoting *Anderson*, 483 U.S. at 640) (Emphasis added).

It is not difficult to see how this subtle substitution of words would have a significant impact as the defendant official will always be able to obtain an expert in the official's field that will testify that the alleged conduct was reasonable no matter how sinister that conduct actually was. The message it sends to our police is that virtually *any* death at the hands of police will be justified so long as the officer recites the mere incantation, "that they were in fear for their own safety," no matter how implausible that fear is. The Court has never provided any explanation for the change in wording. Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 Minn. L. Rev. Headnotes 62, 65 (2016) (citing Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 Touro L. Rev. 633, 656 (2013)).

Mere substitution of "every" for "a" left zero doubt that for a citizen injured by the unconstitutional act of a public official, vindication of the constitutional wrong would be unattainable. *See Zadeh*, 928 F.3d at 478-479 (Willett, J., concurring in part and dissenting in part) ("Everyone agrees his Fourth Amendment rights were violated. But owing to a legal *deus ex machina*—the 'clearly established' prong of qualified-immunity analysis—the violation eludes vindication.").

B. Qualified immunity lacks statutory support and is contrary to governmental immunity principles of the Founding Era.

Are the Court's statutory and common-law justifications for creating qualified immunity actually supported?

1. The Court has consistently held that the paramount rule of "[s]tatutory interpretation, as we [Supreme Court of the United States] always say, begins with the text[.]" *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). The Court has frequently concluded that the text of § 1983 does not support any immunities. *Imbler*, 424 U.S. at 417 ("The statute thus creates a species of tort liability that on its face admits of no immunities"); *Owen v. Independence*, 445 U.S. 622, 635 (1980) ("Its [§ 1983] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted."); *Malley v. Briggs*, 475 U.S. 335, 342 (1986) ("the statute on its face does not provide for any immunities"). "Rather, the Act imposes liability upon '*every person*' who, under color of state law or custom, 'subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'" *Owen*, 445 U.S. at 635 (quoting portions of 42 U.S.C. § 1983) (Italics in original).

The Court instead bases its creation of immunity upon a theory that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Pierson*, 386 U.S. at 554. And with regard to addressing judicial immunity and § 1983 liability, "[t]he immunity of judges for acts within the judicial role is equally well established, and we *presume* that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 554-555. (Citation omitted) (Italics added).

The evaluation of the legislative record detailed by the *Pierson* dissent, although discussing judicial immunity, is probative in understanding whether the Court's presumption is substantiated. As the *Pierson* dissent details, the legislative record reflects that imposition of liability on the judiciary was indeed discussed and certain members actually objected to judicial liability. *Pierson*, 386 U.S. at 561-563 (Douglas, J., dissenting) (quoting portions of Cong. Globe, 42d Cong., 1st Sess., 365-366; Cong. Globe, 42d Cong., 1st Sess., Appendix 217; Cong. Globe, 42d Cong., 1st Sess., 385). "Yet despite the repeated fears of its opponents, and the explicit recognition that the section would subject judges to suit, the section remained as it was proposed: it applied to 'any person.'" *Id.* at 563 (Citation omitted). The congressional record illustrates "that the words of the statute meant what they said and that judges would be liable." *Id.* at 561.

Additionally, while a court should be considerate of the common-law existing at the time of enactment, it is also true that "Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law." *Pierson*, 386 U.S. at 561, n.1 (Douglas, J., dissenting) (citing, generally, Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950); Llewellyn, *The Common Law Tradition*, Appendix C (1960) ("Remedial statutes are to be liberally construed."). Further, the principles instructing liberal interpretation of remedial statutes are based precisely upon the fact that remedial legislation is actually intended to "remedy the defects of the pre-existing law." *Id.* at 561.

Finally, as recently reemphasized, the Court's responsibility is to apply the law as written by Congress and it is never the Court's "job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (citing *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."). Accordingly, basic rules of statutory interpretation reflect that § 1983's text as well as the background against which it was enacted, weighs heavily against any immunity.

2. The Court supports its creation and application of governmental immunities and earlier defenses on the assumption that analogous common law immunities and defenses were so well established at the time § 1983 was passed, that had Congress intended to abolish these immunities and defenses it would have explicitly done so. *Pierson*, 386 U.S. at 554-555. This evaluation is appropriate but whether the ultimate conclusion reached by the Court is correct rests upon the established common law in 1871. A review of governmental liability during America's early years and the Founding-era, illustrates that a strict rule of liability for public officials was, in fact, the standard and nothing close to the current immunity shield existed. *See* William Baude, *Is Qualified Immunity Unlawful?* 106 Cal. L. Rev. 45, 55-56 (2018) (citing Engdahl, *supra*, at 19).

This rule of strict liability was highlighted in early cases such as *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). *Murray* involved an American naval captain's seizure of a ship after recapturing it from a French privateer. *Id.* at 115-116. The captain asserted he should not be held liable because he was acting pursuant to a recently passed law and seized the vessel with probable cause. *Id.* at 117-118. The Court deemed that the captain had acted "upon correct motives" and "from a sense of duty." *Id.* at 124. Nevertheless, the naval captain was held liable for an unlawful seizure. *Id.* at 125-126.

Five days later, the Court issued a similar ruling in which another American naval captain seized a Danish ship coming from a French port pursuant to the President's instruction. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176-178 (1804). The Court observed the law only permitted seizure of ships bound to French ports. *Id.* at 177-178. The Court, although acknowledging its own bias in believing the naval captain was acting with "pure intention" pursuant to a Presidential Order, held that "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* at 179.

Another decision consistent with the strict rule of official liability arose during the Mexican War. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851). In *Mitchell*, an American army colonel, following an order from his superior, arrested a trader, seized his goods, and forced him, with his goods in tow, to accompany the American forces on a hazardous expedition. *Id.* at 129.

Eventually, the trader's goods were taken by Mexican authorities resulting in a total loss and the colonel was found liable. *Id.* at 130, 137.

The *Mitchell* Court opined that precluding liability for an unlawful act would rest upon the existence of an urgent necessity, a question for the jury who found a justifiable emergency did not exist. *Mitchell*, 54 U.S. at 137. The Court noted that although the campaign was "undertaken from high and patriotic motives[,]" any consideration of indemnification would be a question for Congress as the action was unlawful. *Id.* at 135.

The strict rule of liability of government officials continued in subsequent years as illustrated by *Beckwith v. Bean*, 98 U.S. 266 (1878) and *Poindexter v. Greenhow*, 114 U.S. 270 (1885). *Beckwith* dealt with assault and false imprisonment claims made by alleged deserters of the Union army against army officers. *Beckwith*, 98 U.S. at 266-268. The Court reversed the claimants' verdict as to exemplary damages because the jury was precluded from considering evidence of the army officers' good or bad motives, "not in justification, but in mitigation of damages" as compensatory damages "cannot be diminished by reason of good motives upon the part of the wrong-doer." *Id.* at 275-276.

Poindexter, involved a Virginia citizen's claim against a tax collector who refused valid, state-issued tax coupons and instead seized some of the plaintiff's property in satisfaction of the taxes due. *Poindexter*, 114 U.S. at 273-274. The Court reversed and rendered in favor of the plaintiff despite the tax collector acting pursuant to state statute. *Id.* at 274, 306. The holding

extolled the Constitution's paramount focus on the fundamental rights of the people and denounced the idea of official impunity:

> "Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it." *Id.* at 291.

The well-established rule of strict liability of public officials before and near the time of § 1983's enactment continued into the early twentieth century in *Myers v. Anderson*. *Myers*, 238 U.S. at 378. The plaintiffs in *Myers* were three black citizens of Maryland who attempted to register to vote but were denied by election officials. *Id.* at 377-378.

The election officials based their registration denial on state law that essentially prohibited African Americans from voting and because the officials were acting in good faith in accordance with the law, they were immune. *Myers*, 238 U.S. at 378-380. The Court held the officials liable, rejecting their immunity claims: "[t]he non-liability in any event of the election officers for their official conduct is seriously pressed in argument, and it is also urged that in any event there could not be liability[.]" *Id.* at 378-379, 382; *see also Anderson v. Myers*, 182 F. 223, 226 (C.C.D. Md. 1910) (Defendants' grounds for demurrer, ground number (3)).

As these cases demonstrate, the strict rule of liability for governmental officers was what was well established in America at common law when § 1983 was enacted.

3. Statutory construction and common law do not support the current qualified immunity doctrine nor a blanket good-faith defense. This should not come as a surprise because "there is a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part and dissenting in part) (Citations omitted).

Many members of the federal judiciary have joined their voice to this chorus. *Rodriguez v. Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018); *Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019); *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018); *Thompson v. Clark*, No. 14-CV-7349, 2018 U.S. Dist. LEXIS 105225, at *26-27 (E.D.N.Y. 2018).

Current and former members of the Court have also expressed doubt about current immunity jurisprudence. *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards."); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret[ing] the intent of Congress in enacting' the Act.") (Citations omitted).

Finally, legal scholars overwhelmingly support elimination, or significant revision of qualified immunity. *See, e.g., generally,* Baude, *supra*, 106 Cal. L. Rev. 45; Kinports, *supra*, 100 Minn. L. Rev. Headnotes 62; John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862 (2010).

At this point, the sound of the choir against the current immunity jurisprudence has become piercing, with merit as demonstrated. Former iterations of the Court created the doctrine of qualified immunity, therefore it's up to the current Court to address this serious issue to stop the continued erosion of the people's fundamental constitutional rights.

C. Public Policy, officer accountability, and implicit bias.

Beyond statutory construction and the standards of official liability at the time of § 1983's enactment, the Court also justified its creation of qualified immunity on assumptive public policy considerations. While these public policy considerations may have appeared intuitive, they do not survive empirical analysis.

1. Essentially, the primary public policy rationale for creating qualified immunity was that a public official could not effectively carry out their official duties if they were subjected to personal liability and the associated burdens of litigation for actions taken in their official capacity. *See, e.g., Harlow*, 457 U.S. at 806, 814, 817-818; *Scheuer*, 416 U.S. at 240; *Forrester v. White*, 484 U.S. 219, 223 (1988). Although this consideration was assumptive, the decades that have gone by have provided insight into the merits of the policy rationale. Professor Joanna C. Schwartz conducted a study which reviewed the indemnification practices, from 2006 to 2011, of law enforcement officers from more than eighty police departments, including twelve of the country's twenty largest police departments, encompassing approximately 20% of all law enforcement officers nationwide. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 889 (2014). Schwartz's study revealed that, despite the Court's policy concerns, the almost unanimous practice was for total and complete indemnification of the liable officer. Schwartz, 89 N.Y.U. L. Rev. at 890, 912-913. Officers, in the largest forty-four jurisdictions reviewed, did *not* contribute to 99.59% of the

settlements or judgments in which they were involved. *Ibid.* Further, in these largest departments, the total amount of actual officer contribution only constituted .02% of the total judgment and settlement amounts reviewed. *Ibid.* The comprehensive study also concluded that this near-absolute indemnification practice was also the standard in the thirty-seven small and mid-size departments reviewed, where *none* of the liable officers contributed at all. *Id.* at 915. Finally, Professor Schwartz concluded that based on the evidence available, almost all officers subject to a claim were provided *free* legal representation by their department, union, city, or county.[2] *Id.* at 915-916.

At least one member of the Court identified these indemnification practices over twenty years ago. *See Board of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting) (Providing examples of fifteen different states that had indemnification statutes at the time of the opinion in 1997).

Near-absolute indemnification practices have also become the standard for federal law enforcement officers. *See* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, at p. 6

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[2] This practice is well known to petitioners, here, as respondents, officers Flaig and Sanchez, without making a request, had a union-provided attorney waiting for them at police headquarters before their own arrival, within hours of killing Norman Cooper. ROA.1218 (at pp. 26-28), ROA.1283 (at pp. 22-23).

(February 27, 2019; last revised September 6, 2019)[3]; *see also* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 Geo. L.J. 65, 77-78. Federal officers are completely indemnified by the federal government over 95% of the time when there is a settlement or judgment against the officer and the total monetary contribution made by the officers constituted *less* than 1% of the total amounts paid out. *Id.* at pp. 5-6 (citing Schwartz, N.Y.U. L. Rev. at 913).

Based on the empirically substantiated practice of near-absolute indemnification of both state and federal officers, the Court's assumptive public policy rationale for the deterrent effects of official personal liability is unfounded.

As the Court has previously held, "The first consideration ['of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion'] is *simply not implicated* when the damages award comes not from the official's pocket, but from the public treasury." *Owen*, 445 U.S. at 654 (partially quoting *Scheuer*, 416 U.S. at 240) (Italics added). Further, the second public policy consideration—"the danger that the threat of such liability would deter his [public official's] willingness to execute his office with the decisiveness and the judgment required by the public good"—is *dependent on*

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[3] Stanford Law Review, Forthcoming; Northwestern Public Law Research Paper No. 19-05; UCLA School of Law, Public Law Research Paper No. 19-11. Available at: SSRN: https://ssrn.com/abstract=3343800 or http://dx.doi.org/10.2139/ssrn.3343800.

the existence of the first consideration, "of subjecting to liability an officer[.]" *Ibid.* (Italics added).

Another less cited assumptive policy consideration is that capable citizens "might be deterred from seeking office if heavy burdens upon *their private resources* from monetary liability were a likely prospect during their tenure." *Wood*, 420 U.S. at 320 (Italics added). Again, because this consideration is dependent on the existence of subjecting an official to personal liability, "[s]uch fears are *totally unwarranted*, of course, once the *threat of personal liability is eliminated*." *Owen*, 445 U.S. at 654 n.38 (Italics added).

Consistent with the Court's statutory construction and established common-law immunities assumptions, the assumptive public policy considerations are not supported.

2. Long ago the Court recognized that "[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted." *McDonald v. United States*, 335 U.S. 451, 456 (1948) (*McDonald* was a criminal case involving unlawfully seized evidence without a search warrant). The Court's statement actually speaks to a broader, though often ignored, truth; *power on its own cannot be trusted*. The Court has previously recognized, though with little emphasis, that one important aspect of 42 U.S.C. § 1983 is "the need to hold public officials accountable when they exercise power irresponsibly[.]" *Pearson*, 555 U.S. at 231; *see also Harlow*, 457 U.S. at 807.

The public has demonstrated their discontent with the current state of unjustified and avoidable deaths of citizens at the hands of those that are expected to protect and serve *all* citizens. These unnecessary deaths have resulted in large protests and civil disobedience. *See, e.g.*, Jasmine C. Lee et al., *At Least 88 Cities Have Had Protests in the Past 13 Days Over Police Killings of Blacks*, N.Y. Times (July 16, 2016)[4]. All governmental officials inherently derive their power from the people and not the other way around. The people's central complaint is an absence of accountability. This is especially true for the black community that is the most affected. *See, e.g.*, Pew Research Ctr., *Sharp Racial Divisions in Reactions to Brown, Garner Decisions*, p. 2 (2014).[5]

Law enforcement accountability has been perversely left up to law enforcement themselves. Unsurprisingly, self-policing the police, has largely been an act in futility as internal discipline is virtually illusory. "Even when individuals do report misconduct, there is a significant likelihood it will not be treated as a complaint and investigated." *See, e.g.*, U.S. Dep't of Justice, *Investigation of the Ferguson Police Department,* p. 83 (Mar. 4, 2015)[6]. As such, § 1983 is the only legitimate means available to address law

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[4] *Available at* https://www.nytimes.com/interactive/2016/07/16/us/protesting-police-shootings-of-blacks.html (subscription) or https://perma.cc/ES6C-XMWS.

[5] *Available at* http://www.pewresearch.org/wp-content/uploads/sites/4/2014/12/12-8-14-Police-Race-release.pdf.

[6] *Available at* https://perma.cc/XYQ8-7TB4.

enforcement accountability. But the Court's "one-sided approach to qualified immunity transforms the doctrine into an *absolute shield* for law enforcement officers, *gutting* the deterrent effect of the Fourth Amendment." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (Italics added).

Police officers, themselves, have demonstrated their own concerns with accountability. A 2017 Pew Research Center survey of more than 8,000 police officers, found that 72% of officers did not believe that fellow officers who engage in poor practices are held adequately accountable. *See* Rich Morin et al., Pew Research Ctr., *Behind the Badge*, p. 40 (2017)[7].

§ 1983 claims provide not only a means of accountability but are also crucial in providing information that assists the evolution of law enforcement in adopting training and policies that address unconstitutional and unacceptable conduct by officers. *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 844-845 (2012).

But lack of accountability is also creating a significant collateral effect, the people's understandable and growing belief they are actually less than a citizen in comparison to an officer. This belief is also harmful to police officers because "when a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of

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[7] *Available at* https://pewrsr.ch/2z2gGSn.

statelessness." Fred O. Smith, Jr., *Abstention in a Time of Ferguson*, 131 Harv. L. Rev. 2283, 2356 (2018) (Citations omitted). As an example, unlike the respondent officers who had an attorney waiting for them at police headquarters without even making a request, Nathan Cooper who had just witnessed his brother's death, requested an attorney but was told that he had to provide a statement without an attorney. ROA.1173 (pp. 111-112).

How vital is equal treatment and the public's trust of law enforcement or any public official? Mr. Chief Justice John G. Roberts, Jr. recently addressed this question: "As the New Year begins, and we turn to the tasks before us, we should each resolve to do our best to maintain the public's trust that we are faithfully discharging our solemn obligation to equal justice under law." Chief Justice John G. Roberts, Jr., *2019 Year-End Report on the Federal Judiciary*, p. 4 (December 31, 2019)[8].

3. Briefly, it is also important to address an uncomfortable and usually avoided subject when evaluating these important cases and doctrines that impact the people's fundamental constitutional rights, implicit bias.

In addressing these paramount issues of the people's rights, it is important for the Court, and the judiciary as a whole, to step back and look inside themselves to identify their own biases that may, unconsciously, be pivotal to their analysis and decisions

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[8] *Available at* https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf.

in § 1983 cases. For without identifying and acknowledging our own inherent biases how can we fairly and independently make decisions that have an exponential impact on the public.

For instance, recent, comprehensive analysis reflects that there is a significant divergence in the determination of constitutional claims and qualified immunity depending on whether a federal judge was appointed by a Democratic or Republican President. *See* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 Emory L.J. 55, 63-64 (2016).

Accordingly, the Court should strive to view this request for reconsideration of the qualified immunity doctrine through the proper lens, keeping close, Mr. Chief Judge John G. Roberts, Jr.'s 2019 year-end report, and grant this petition. *See* Roberts, *supra*, at p. 4.

CONCLUSION

The question therefore becomes, now that we know these policy considerations were based on invalid assumptions, what should the Court do with the qualified immunity jurisprudence it created? Simply following § 1983's text as written with consideration of the important rights it was intended to protect is the truest and most honest approach.

Alternatively, the Court may choose to overrule or modify *Mitchell v. Forsyth* to the extent it authorizes interlocutory appeals of police officers in excessive force cases. Fourth Amendment cases are fact intensive and therefore constitute a class of cases where early discovery should be encouraged *not* discouraged.

These and other potential solutions should be fully explored in merits briefing to remedy the current state of civil rights jurisprudence that currently works in derogation of the people's rights instead of protecting them.

The Court should grant the petition.

Respectfully submitted.

EDWARD L. PIÑA
Counsel of Record
MATTHEW N. GOSSEN
Edward L. Pina & Associates, P.C.
8118 Datapoint Drive
San Antonio, Texas 78229
(210) 614-6400
epina@arielhouse.com

Counsel for Petitioners