No. 19-1021

In The

Supreme Court of the United States

MICAH JESSOP, ET AL.,

Petitioners,

v.

CITY OF FRESNO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

As required by Supreme Court Rule 37.2(a), the Institute for Justice timely notified the parties of its intention to submit an amicus curiae brief in this case. Petitioners consented, but respondents withheld consent. Under Supreme Court Rule 37.2(b), the Institute for Justice respectfully moves this Court for leave to file the attached brief in support of petitioners.

This case presents the Court with the opportunity to reconsider the doctrine of qualified immunity. For nearly 200 years, the Court enforced a rule of strict liability against the unlawful acts of government officials. Through that historical rule, the Court ensured constitutional accountability and the separation of powers. But with its creation of qualified immunity in 1982, the Court converted liability from the general rule to the rare exception. The doctrine's development over the past several decades has proven qualified immunity to be a license to lawless conduct. As exemplified by the Ninth Circuit's decision below—sparing police officers who stole $225,000 from any liability—qualified immunity routinely shields both the plainly incompetent and those who knowingly violate the Constitution.

The Institute for Justice is a nonprofit public-interest law center committed to defending the essential foundations of a free society by securing greater protection for individual liberty. Central to that mission is promoting accountability for government

officials when they violate the Constitution, which the Institute for Justice accomplishes, in large part, through strategic litigation. But that litigation has become increasingly difficult in the face of qualified immunity, which the Institute for Justice seeks to address as part of its Project on Immunity and Accountability. Through the attached brief, the Institute for Justice offers the Court a historical and legal analysis of official liability in the United States beginning at the founding. That analysis is critical to a comprehensive understanding of the qualified immunity doctrine and its legal and practical failings.

Accordingly, the Institute for Justice respectfully requests that this Court grant its motion to file the attached brief as amicus curiae.

Respectfully submitted,

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AMICUS CURIAE BRIEF

The Institute for Justice respectfully submits this brief as amicus curiae in support of petitioners.

INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit public-interest law center committed to defending the essential foundations of a free society by securing greater protection for individual liberty. The availability of remedies for constitutional violations is central to that mission.[1]

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision below neatly illustrates how the judicially created doctrine of qualified immunity provides license to lawless conduct: Police officers accused of stealing more than $225,000 are immune from liability because the Ninth Circuit had never issued an opinion announcing that the outright theft of property by police is an unreasonable seizure that violates the Fourth Amendment. Unfortunately, the Ninth Circuit's decision is not an outlier. Decisions

[1] Both parties were timely notified of the Institute for Justice's intent to file this brief as amicus curiae. Petitioners consented, but respondents withheld consent. Neither party's counsel authored this brief in whole or in part, and no person or entity other than the Institute for Justice made a monetary contribution toward the preparation and submission of this brief.

shielding both the incompetent and predatory have become common in the era of qualified immunity. See, *e.g.*, pp. 18–20, *infra*. The time has come for this Court to reconsider that doctrine.

The current approach to official liability would have been unrecognizable to the founders. For the first two centuries of this nation's history, the Court applied strict liability against the unlawful acts of government officials. That standard ensured constitutional limits on governmental authority and the separation of powers. The Court addressed legality, and Congress addressed policy by adjusting incentives through indemnification.

The Court abandoned its historical role in two steps. First, in *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967), this Court announced that it would spare government officials from liability for their unlawful acts if they could show that they had acted reasonably and in good faith.[2] Then, in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), this Court created the doctrine of qualified immunity, which struck the requirement of good faith and converted liability from being the general rule to a limited exception. Under the doctrine, government officials—including those who act in bad faith—are immune from liability, unless their victims can show a violation of clearly established law.

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[2] The concepts of reasonableness and good faith have also been described as "objective" good faith and "subjective" good faith, respectively. See *Wood* v. *Strickland*, 420 U.S. 308, 321–322 (1975). This brief uses the former descriptors.

Since *Harlow*, this Court has expanded qualified immunity by restricting the definition of clearly established law. Now, government officials are immune from liability unless their opponents can cite a controlling judicial decision from the applicable jurisdiction proving that the legal question was "beyond debate" under the same "particularized" circumstances at the time of the unlawful act. See, *e.g.*, *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011); *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004). Furthermore, this Court has repeatedly admonished the circuits "not to define clearly established law at a high level of generality," *al-Kidd*, 563 U.S. at 742, and frequently applied summary reversal to decisions denying qualified immunity. See, *e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 82–88 (2018).

The decision below is the result. When this Court cabined liability as an exception and stripped the test of its good-faith component, the Court removed a major incentive that kept government officials within their constitutional limits. Now, even when government officials intentionally act in a way that "virtually every human society teaches * * * is morally wrong," Pet. App. 6a n.1, qualified immunity still spares them from liability.

Petitioners correctly point out that the Ninth Circuit's analysis ignores that the text, precedent, and history of the Fourth Amendment prohibit government theft. Pet. 13–17. No one seriously believes that theft by police officers is a reasonable seizure permitted by the Constitution. Police are tasked with preventing

and investigating theft; they put others in jail for it. Permitting them to commit it without consequence is grotesque.

The Ninth Circuit's desire to apply qualified immunity at all costs is, nevertheless, understandable given this Court's restriction of liability and aggressive policing of circuit decisions that deny immunity. Owing to those pressures, the decision below is just one of many recent decisions shielding bad-faith government actors from liability. Now officials who would have faced liability under the historical standard of strict liability, or even the defense of good faith, are granted immunity.

This Court should grant the petition and reconsider qualified immunity.

DISCUSSION

I. Between the founding and 1981, government officials who acted in bad faith were liable for their unlawful acts.

For the first two centuries of American history, we did not have qualified immunity or anything like it. Instead, this Court employed a rule of strict liability against government officials who acted unlawfully. Through that rule, this Court ensured constitutional accountability and the separation of powers. Although this Court abruptly departed from the historical rule when it created a general defense of good faith in 1967,

even under that more-forgiving standard, bad-faith actors—like police with a penchant for theft—were liable.

A. Government officials were strictly liable for their unlawful acts at the founding.

From its earliest decisions, this Court regarded "effective judicial redress for positive governmental wrongs" "as paramount and essential to American constitutional government." David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 27 (1972); see, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). For that reason, nineteenth century courts held public officials "strictly accountable for their acts." Engdahl, *supra*, at 77. Thus, if a public official violated the law, he was answerable in damages without exception for reasonableness or good faith.[3] That rule was harsh but served two vital purposes: it ensured government accountability, and it respected the separation of powers.

First, applying strict liability to government officials was an "instrument for enforcing certain legal rights and particularly constitutional limitations against the state." *Id.* at 19. In his *Commentaries on the Constitution*, Justice Story highlighted the role of courts in that process:

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[3] This analysis applies to executive officials. The rules for legislative and judicial officials developed separately. See Engdahl, *supra*, at 41–56 (1972).

> [T]he remedy for injuries [resulting from the invasion of rights by the government] lies against the immediate perpetrators, who may be sued, and cannot shelter themselves under any imagined immunity of the government from due responsibility. If, therefore, any agent of the government shall unjustly invade the property of a citizen under colour of a public authority, he must, like every other violator of the laws, respond in damages.

Joseph Story, *Commentaries on the Constitution* § 1671 (1833) (footnote omitted).

Second, the strict rule also honored the traditional balance of power between the judicial and legislative branches. Courts "simply addressed the issue of legality and left Congress in charge of calibrating the incentives of government officials," which it did "by indemnifying from any liability * * * those government officials who acted in good faith." 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, 1870 (2010). This Court affirmed that purpose in *The Apollon*:

> It may be fit and proper for the government * * * to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions,

> whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.

22 U.S. (1 Wheat.) 362, 366–367 (1824).

The historical rule of strict liability is perhaps best displayed in the famous example of Captain George Little's 1799 capture of the ship *The Flying-Fish*. Under orders from the President, Captain Little seized the Danish vessel as it was en route from a French port. But Captain Little's orders hinged on a statutory misconstruction and the seizure was, thus, unauthorized by law. The owner of the vessel sued for its return and damages from Captain Little. The federal district court ordered the vessel returned but declined to award damages. On appeal, the circuit court reversed and entered judgment for more than $8,500 against Captain Little (about $150,000 today). Engdahl, *supra*, at 14; Pfander & Hunt, *supra*, at 1877–1881.

This Court affirmed on certiorari, declaring:

> A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution.

Little v. *Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804).

Despite Chief Justice Marshall's "first bias" to excuse Captain Little from damages for his military obedience, this Court simply addressed legality. Because

the "instructions c[ould]not change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass," Captain Little was answerable in damages. *Id.* at 179. Congress later mitigated the harshness of the consequences for Captain Little, who acted in good faith, by passing private legislation to indemnify him from those damages. Pfander & Hunt, *supra*, at 1900–1903.[4]

Thus, the strict liability rule struck the intended balance: this Court enforced the law; the victim of an unlawful government act received suitable redress; and Congress indemnified the government official if his actions were justified.

B. The historical rule of strict liability was the law of the land in 1871 when Congress enacted Section 1983 and was continuously enforced well into the twentieth century.

The historical rule of strict liability continued in force throughout the nineteenth century, including when Congress enacted 42 U.S.C. 1983 in 1871. Designed to provide remedies for constitutional violations in the post-war South, Section 1983 grants a civil cause of action against any person who, under color of state

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[4] In a companion case, this Court similarly upheld the imposition of damages against Captain Alexander Murray for his unlawful seizure of the Danish vessel "the Charming Betsy," *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117 (1804), and Congress similarly indemnified Captain Murray for those damages, Pfander & Hunt, *supra*, at 1900–1902.

law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. 1983. Congress included no exceptions in the statutory text, and it was well-established that none existed outside the statute either.[5] The historical rule of strict liability prevailed.[6]

In *Poindexter* v. *Greenhow*, 114 U.S. 270, 297 (1885), for instance, this Court held a government official personally liable for acting under a Virginia law later declared unconstitutional. *Poindexter* rejected the official's plea for immunity, holding that to grant it

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[5] In some specialized areas of law, exceptions were made. For instance, citing its "conscientious discretion" when defining rules of capture in admiralty law, this Court declined to "introduce a rule harsh and severe in a case of first impression" where a lieutenant in the Navy had justifiably captured a Portuguese ship but questions remained over whether he was obligated to release the ship once he discovered that it was not involved in piracy. *The Marianna Flora*, 24 U.S. (1 Wheat.) 1, 54–56 (1825). Notably, *The Marianna Flora* did not announce or apply a general defense or immunity.

[6] See, *e.g.*, *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115, 137 (1851) ("Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed."); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 46 (1849) ("[I]f the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable."); *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 156–158 (1836); *Tracy* v. *Swartwout*, 35 U.S. (10 Pet.) 80, 93 (1836); *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331, 337 (1806); see also Joseph Story, *Commentaries on Agency*, § 320 (5th ed. 1857) (reasoning that it is not enough for government officials to simply act "bonâ fide, and to the best of their skill and judgment").

would "obliterate[] the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism * * * which enables the agent of the state to declare and decree that he is the state." *Id.* at 291. If "judicial tribunals are forbidden to visit penalties upon individual offenders" "principles of individual liberty and right [cannot] be maintained." *Ibid.*; see also *Belknap* v. *Schild*, 161 U.S. 10, 18 (1896) (rejecting an official's defense of reasonableness); *Bates* v. *Clark*, 95 U.S. 204, 209 (1877) (rejecting an official's defense of good faith).

This Court continued to apply the strict rule into the twentieth century, focusing on the question of individual rights.[7] In *Myers* v. *Anderson*, 238 U.S. 368 (1915), this Court affirmed a Section 1983 judgment against Maryland election officials who prevented three black men from voting under an unconstitutional statute. *Id.* at 377–378. The officers argued that they should not be held liable because they had believed, in good faith, that the statute was constitutional. See Baude, *supra*, at 57 (citing the officials' briefing). But this Court rejected that argument. *Myers*, 238 U.S. at 378. Instead, it affirmed the circuit court's holding—echoing *Little*—that anyone enforcing an unconstitutional law "does so at his known peril and is made

[7] See *Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 20–21 (1940) (collecting cases); *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 619–620 (1912).

liable to an action for damages." *Anderson* v. *Myers*, 182 F. 223, 230 (C.C.D. Md. 1910).

In sum, for the first three-quarters of this nation's existence, the Court diligently focused on determining whether individual rights were violated and, if so, ordering a remedy. See *The Apollon*, 22 U.S. at 367 ("[T]his Court can only look to * * * whether the laws have been violated."). Everything else was left for the political branches to address.

C. In 1967, this Court announced an exception to the historical rule, shielding government officials who acted in good faith.

The Court disclaimed the historical rule of strict liability and drastically changed the law in 1967 with the Warren Court's decision in *Pierson* v. *Ray*. *Pierson* addressed whether Mississippi police were liable under Section 1983 for having unreasonably seized a group of anti-segregationist ministers in violation of the Fourth Amendment. Although the officers acted under a statute, that statute was later ruled unconstitutional. 382 U.S. at 554–557.

Under the historical rule, the officers would have been personally liable. Engdahl, *supra*, at 54; *Myers*, 238 U.S. at 378–379; *Poindexter*, 114 U.S. at 291. But in *Pierson* they were not. Instead, this Court shielded the officers from liability under a newly announced "defense of good faith and probable cause." *Pierson*, 386 U.S. at 557.

The creation of a good-faith defense to liability represented a major shift in the jurisprudence. It meant that "the officer obedient to an invalid order or executing an invalid law [wa]s * * * protected from personal liability by his good faith," making "the law of personal official liability * * * radically different and more favorable to the officer * * * than nineteenth century lawyers ever conceived it to be." Engdahl, *supra*, at 55.

But the Court in *Pierson* seemingly envisioned only minor consequences from this shift. Indeed, the cases that followed emphasized that the requirement of good faith would not allow bad actors to go unpunished. *Wood*, 420 U.S. at 321. Government officials who acted in bad faith were always liable, and even government officials who acted in good faith were liable unless their actions were also reasonable.[8] Without both safeguards, constitutional guarantees would be a matter of judicial grace. As this Court explained, "[a]ny lesser standard would deny much of the promise of [Section] 1983." *Id.* at 322.

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[8] See also *Butz* v. *Economou*, 438 U.S. 478, 484 (1978); *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978); *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 (1975) ("[T]he relevant question for the jury is whether O'Connor 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of (Donaldson), or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to (Donaldson).' ") (citation omitted); *Scheuer* v. *Rhodes*, 416 U.S. 232, 247–248 (1974) ("It 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.").

Thus, under either the historical standard or the good-faith defense, police officers accused of stealing property rather than collecting it under a search warrant would have been liable for damages. Excusing them from accountability would have been unthinkable.

II. With the creation of qualified immunity in 1982, this Court erased the historical rule and shielded even bad-faith actors from the consequences of their lawless conduct.

With its decision in *Harlow* v. *Fitzgerald*, this Court created the doctrine of qualified immunity, which removed good faith from the analysis and converted official liability from the general rule to the rare exception. That standard led to the Ninth Circuit's decision below to shield bad-faith actors from liability.

A. By announcing the doctrine of qualified immunity, this Court acted as a policymaking body.

In an act of judicial policymaking, *Harlow* discarded the historical standards of liability and replaced them with qualified immunity in 1982. 457 U.S. at 813–814. No statutory enactment or constitutional amendment precipitated that radical shift. *Harlow* simply made a policy decision. Weighing the "competing values" of constitutional guarantees against litigation costs, *id.* at 813–816, *Harlow* concluded that it was too costly to require government officials to establish

good faith for their unlawful acts. So, the Court struck that requirement and converted liability from the rule to the exception, holding:

> [G]overnment officials * * * generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

Harlow worked a revolution in official liability for unlawful acts. The Court "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987). Instead of being solely concerned with the judicial enforcement of individual rights, the Court waded into policy by designing a test for "objective inquiry into the legal reasonableness of the official actions." *Ibid*.

Through *Harlow*, this Court erased two centuries of case law that had consistently applied a rule of general liability to government officials. In its place, *Harlow* enshrined a rule of general immunity.

B. This Court has expanded qualified immunity by repeatedly restricting the definition of clearly established law.

Since *Harlow*, the Court has increased the category of unlawful acts for which officials are immune by restricting the definition of "clearly established" law.

At first, plaintiffs had to show that the "contours" of a right were "sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Creighton*, 483 U.S. at 640 (citations omitted).

By the late 1990s, plaintiffs seeking to overcome qualified immunity did not merely have to show that a reasonable officer would have known the act was unlawful, but point to "controlling authority *in their jurisdiction*" or a "consensus of cases of persuasive authority." *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999) (emphasis added).

Soon, on-point authority became insufficient. By the 2000s, even when plaintiffs could point to controlling authority in their circuit, "[t]he inquiry [had to] be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (citation and quotation marks omitted).

Now, plaintiffs must show that it is "beyond debate" that a question of law is clearly established in the relevant circuit. *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 589 (2018) (citation omitted). Although this Court has stated that plaintiffs need not show that "the very action in question [has] previously been held unlawful," *Wilson*, 526 U.S. at 615, this Court has repeatedly cautioned the lower courts "not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742 (citations and quotation marks omitted). And today, "[t]he pages of the *United*

States Reports teem with warnings about the difficulty of placing a question beyond debate," *Morrow* v. *Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).[9]

As just one example, the Sixth Circuit recently held that allowing a police dog to bite a suspect did not violate clearly established law because the case cited by the plaintiff involved a suspect who had surrendered by lying on the ground with his hands to the side, whereas the plaintiff had surrendered by sitting on the ground with his hands raised. *Baxter* v. *Bracey*, 751 Fed. Appx. 869, 872 (6th Cir. 2018) (citing *Campbell* v. *City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2012)).

III. This case exposes the unsustainability of qualified immunity, which licenses lawless conduct.

The Court in *Harlow* knew its ruling would cause concern and promised that "[b]y defining the limits of qualified immunity essentially in objective terms, [the Court] provide[s] no license to lawless conduct." *Harlow*, 457 U.S. at 819. In *Malley* v. *Briggs*, it further clarified that qualified immunity's "ample protection" would not extend to "the plainly incompetent or those who knowingly violate the law." 475 U.S. 335, 341 (1986). Those assurances were hollow.

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[9] That difficulty was aggravated by this Court's announcement in *Pearson* v. *Callahan*, 555 U.S. 223, 227 (2009), that courts could apply qualified immunity without first considering the constitutionality of the underlying act.

The Ninth Circuit's decision below shows that qualified immunity permits brazen and lawless conduct. Police stand accused of stealing more than $225,000. Pet. App. 3a. Although such conduct constitutes bad faith, the only question permitted under the doctrine of qualified immunity is whether petitioners could point to controlling case law in the Ninth Circuit that specifically establishes that the "theft of [their] money and rare coins" violated the Fourth Amendment. Pet. App. 8a. The Ninth Circuit's application of qualified immunity shields both the plainly incompetent and those who knowingly violate the law.

Although, as petitioners correctly point out, the Ninth Circuit's analysis failed to consider the most basic principles of the Fourth Amendment, the court's reflexive application of qualified immunity is understandable given this Court's aggressive protection of the doctrine. Qualified immunity occupies an outsized proportion of this Court's docket, and this Court almost never grants certiorari to deny qualified immunity, but does frequently to apply it. See Baude*, supra*, at 82–88. Moreover, although summary reversal is an "extraordinary remedy" meant for only "manifestly incorrect" decisions, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting), this Court routinely applies that remedy to circuit court decisions that allow government officials to face liability for

unconstitutional acts.[10] As a result, circuit courts consider it their obligation to "think twice before denying qualified immunity," *Morrow*, 917 F.3d at 876, and decisions like the one below—though outrageous in their outcomes—are unsurprising.

Forty years on, qualified immunity routinely shields both the plainly incompetent and those who knowingly violate the law. In the last year alone, courts have granted qualified immunity to:

- Police officers who stole $225,000, Pet. App. 8a;
- A police officer who shot a ten-year-old child who was lying on the ground, while the officer repeatedly tried to shoot a non-threatening family dog, *Corbitt* v. *Vickers*, 929 F.3d 1304 (11th Cir. 2019);
- Prison officials who placed a prisoner alone for six days in an "extremely cold" cell without a toilet, water fountain, or bed, where raw sewage flooded up from a floor drain, *Taylor* v. *Stevens*, 946 F.3d 211, 218 (5th Cir. 2019);

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[10] See, *e.g.*, *City of Escondido* v. *Emmons*, 139 S. Ct. 500, 503–504 (2019) (summarily reversing the Ninth Circuit); *Kisela*, 138 S. Ct. at 1154–1155 (summarily reversing the Ninth Circuit); *White* v. *Pauly*, 137 S. Ct. 548, 553 (2017) (summarily reversing the Tenth Circuit); *Mullenix*, 136 S. Ct. at 312 (summarily reversing the Fifth Circuit); *Stanton* v. *Sims*, 571 U.S. 3, 11 (2013) (summarily reversing the Ninth Circuit).

- Police officers who fired numerous gas grenades into a woman's home, despite her provision of keys and permission to enter the home to look for a suspect who was not there, *West* v. *City of Caldwell*, 931 F.3d 978 (9th Cir. 2019);

- Medical board officials who searched a doctor's medical records without a warrant, *Zadeh* v. *Robinson*, 928 F.3d 457 (5th Cir. 2019);

- Police officers who shot and killed a mentally ill man who was dozens of feet away from the nearest person and turning to run from the officers, *Reich* v. *City of Elizabethtown*, 945 F.3d 968 (6th Cir. 2019);

- School officials who punished a high-school cheerleader for her off-campus speech, *Longoria* v. *San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258 (5th Cir. 2019);

- A police officer who picked up a mentally infirm man and, per an unwritten custom of dropping vagrants into other jurisdictions, drove the man to the county line and dropped him off along the highway at dusk, where he was later struck and killed by a motorist, *Keller* v. *Fleming*, No. 18-60081; ___ F.3d ___; 2020 WL 831757 (5th Cir. Feb. 20, 2020);

- A prison guard who sprayed an inmate with pepper spray for no reason, while the inmate was locked in his cell, *McCoy* v. *Alamu*, 950 F.3d 226 (5th Cir. 2020);
- A police officer who bodyslammed a non-threatening woman and broke her collarbone as she walked away from him, *Kelsay* v. *Ernst*, 933 F.3d 975 (8th Cir. 2019);
- County officials who held a fourteen-year-old child in pretrial solitary confinement for over a month, *J.H.* v. *Williamson Cty.*, No. 18-5874, ___ F.3d ___; 2020 WL 939197 (6th Cir. Feb. 27, 2020); and
- Police officers who allowed their dog to bite a suspect who had surrendered, *Baxter*, 751 Fed. Appx. at 870.

Our courts now permit these and many other governmental wrongs for which officials would have faced liability between 1789 and 1981.

In the face of growing criticism of the doctrine, including by members of this Court[11] and the courts

[11] See *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (joined by Justice Ginsburg); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871–1872 (2017) (Thomas, J., concurring); *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting) ("By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow."); *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (joined by Justice Thomas); *Wyatt* v. *Cole*, 504 U.S. 158, 170–171 (1992) (Kennedy, J., concurring); *Creighton*, 483 U.S. at 647 (Stevens, J., dissenting) (joined by Justices Brennan and Marshall).

below,[12] it is time for this Court to reconsider qualified immunity and the license to lawless conduct it provides.

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[12] See, *e.g.*, *McCoy*, 950 F.3d at 234–237 (Costa, J., dissenting); *Reich*, 945 F.3d at 989 n.1 (Nelson Moore, J., dissenting); *Zadeh*, 928 F.3d at 479–481 (Willett, J., concurring in part and dissenting in part); *Morrow*, 917 F.3d at 874 n.4; *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018); *Rodriguez* v. *Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018), vacated sub nom. *Swartz* v. *Rodriguez*, No. 18-309, ___ S. Ct. ___; 2020 WL 981778 (Mar. 2, 2020); *Spainhoward* v. *White Cty.*, No. 2:18-CV-00015, ___ F. Supp. 3d ___; 2019 WL 6468583, at *9 n.10 (M.D. Tenn. Feb. 1, 2019) (Crenshaw, J.); *Ventura* v. *Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) (Drozd, J.); *Manzanares* v. *Roosevelt Cty. Adult Detention Ctr.*, 331 F. Supp. 3d 1260, 1293–1294 n.10 (D.N.M. 2018) (Browning, J.); *Jordan* v. *Howard*, No. 3:18-CV-082, 2020 WL 803119, at *8 (S.D. Ohio Feb. 18, 2020) (Rose, J.); *Irish* v. *Fowler*, No. 1:15-CV-00503, ___ F. Supp. 3d ___; 2020 WL 535961, at *51 n.157 (D. Me. Feb. 3, 2020) (Woodcock, J.); *Russell* v. *Wayne Cty. Sch. Dist.*, No. 3:17-CV-154, 2019 WL 3877741, at *2 (S.D. Miss. Aug. 16, 2019) (Reeves, J.); *Shannon* v. *Cty. of Sacramento*, No. 2:15-CV-00967, 2019 WL 2715623, at *3 n.2 (E.D. Cal. June 28, 2019) (Mueller, J.); *Kong* v. *City of Burnsville*, No. 16-CV-03634, 2018 WL 6591229, at *17 n.17 (D. Minn. Dec. 14, 2018) (Richard Nelson, J.); *Thompson* v. *Clark*, No. 14-CV-7349, 2018 WL 3128975, at *11 (E.D.N.Y. June 26, 2018) (Weinstein, J.); *Wheatt* v. *City of E. Cleveland*, No. 1:17-CV-377, 2017 WL 6031816, at *1 n.7 (N.D. Ohio Dec. 6, 2017) (Gwin, J.).

CONCLUSION

This Court should grant the petition and reconsider the doctrine of qualified immunity.

Respectfully submitted,

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