No.

In the Supreme Court of the United States

JOSEPH A. ZADEH & JANE DOE,

Petitioners,

v.

MARI ROBINSON, SHARON PEASE & KARA KIRBY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

WILLIAM P. DEMOND
Demond Law, PLLC
1520 Rutland St.
Houston, TX 77008
(713) 701-5240

Counsel for Petitioners

QUESTION PRESENTED

Whether the Court should recalibrate or reverse the doctrine of qualified immunity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dr. Joseph A. Zadeh and Jane Doe 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-42a) upon rehearing is available at 928 F.3d 457. The Fifth Circuit's prior opinion (App., *infra*, 42a-69a), which was withdrawn on rehearing, is reported at 902 F.3d 483. The district court's decision granting, in part, the motion to dismiss (App., *infra*, 70a-102a) is unreported.

JURISDICTION

The judgment of the court of appeals was filed on July 2, 2019. Justice Alito extended the time to file this petition to November 27, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 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

The Court should recalibrate or reverse the doctrine of qualified immunity. Justices of this Court—and several judges on the lower courts—have under-

scored the compelling need to revisit qualified immunity. The doctrine has become nearly impenetrable armor, preventing citizens from vindicating their essential constitutional rights. Qualified immunity, moreover, lacks any statutory or common-law origin. It grew out of judicially expressed policy, but time has shown that it does not effectuate those policies.

This case presents a compelling opportunity for the Court to reevaluate qualified immunity. Here, respondents—administrative state officials of the Texas Medical Board—executed a no-notice administrative subpoena on the medical offices of petitioner, Dr. Zadeh. Working at the urging of the Drug Enforcement Administration, Board investigators demanded immediate production of significant quantities of confidential patient medical information, including intensely private patient records concerning mental health issues and domestic relationships. The Board obtained the information by threatening to revoke Dr. Zadeh's medical license.

The court of appeals unanimously held—as the district court did before it—that respondents violated Dr. Zadeh's constitutional rights. While administrative subpoenas may be appropriate in some closely regulated industries, it is far from clear that the medical profession is such an industry. Even if it is, an administrative search is allowable only if the authorizing statute provides clear notice of the kind of searches permissible and if the statute cabins the discretion of officials conducting the search. As all agree, the Texas laws authorizing administrative searches in these circumstances do neither.

But a split panel of the court of appeals held that this constitutional protection—stated plainly in this Court's precedents—was not sufficiently established so as to defeat a qualified immunity defense. The court of

appeals held that, unless the same theory of liability has been previously used with essentially identical facts, qualified immunity is an insuperable barrier to a lawsuit.

Judge Willett forcefully dissented. This case, he explained, "reaffirmed [his] broader conviction that the judge-made immunity regime ought not be immune from thoughtful reappraisal." App., *infra*, 27a. The Court should indeed revisit qualified immunity—and this is a prime case to do so.

This case is an especially attractive one for review given that the conduct at issue was not the product of any emergent situation. Rather, these administrative state officials formed a deliberate plan, they contemplated their options, and only then—with the benefit of unlimited time—did defendants take action.[1]

A. Legal Background

1. Section 1983 was originally enacted as part of the Civil Rights Act of 1871. As part of Congress's efforts to combat lawlessness during Reconstruction, Section 1983 provided individuals with a cause of action to sue state officials who violated their legal or constitutional rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983.

In *Pierson* v. *Ray*, 386 U.S. 547 (1967), fifteen white and black clergymen were arrested and charged

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[1] This petition is being filed together with a petition for certiorari in *Corbitt* v. *Vickers*, which also asks the Court to reconsider its qualified immunity jurisprudence. See 929 F.3d 1304 (11th Cir. 2019). The reasoning contained in that petition applies fully here. The Court may wish to grant both petitions together to explore all salient issues, or to grant one and hold the other.

with a misdemeanor when they attempted to use segregated facilities in Mississippi. *Id.* at 549. The clergymen then sued the officers for false arrest and imprisonment. *Id.* at 550. The Court concluded that, because "the defense of good faith and probable cause" applied to "the common-law action for false arrest and imprisonment," it was available as a defense to the Section 1983 suit. *Id.*at 557. Ultimately, the court reasoned that, in enacting Section 1983, Congress did not "abolish wholesale" then-existing "common-law immunities." *Id*. at 554.

Subsequently, in *Scheuer* v. *Rhodes*, 416 U.S. 232, 245-248 (1974), the Court drew on judicial and legislative immunity doctrines (*id*. at 239 n.4)—not doctrines that historically provided immunity to police officers. The Court noted that its decision was driven by "policy consideration[s]," notably the risk that officials may "fail to make decisions when they are needed" or may "not fully and faithfully perform the duties of their offices." *Id*. at 241-242. From there, the Court concluded that "[t]hese considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government." *Id*. at 247. The Court determined that this immunity required "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief." *Id*. at 247-248.

Qualified immunity fully emerged in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Again the Court focused on perceived policy concerns relating to litigation against public officials: "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id*. at 814. In light of these policies, the Court reversed the subjective good faith requirement it had adopted in *Scheuer* and other cases. *Id*. at 816-817.

The Court restated the immunity doctrine to "hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 818. In reaching this conclusion, the Court relied on neither statutory text nor common law.

2. The Fourth Amendment requires precompliance review of an administrative subpoena before a neutral decisionmaker. *See* v. *City of Seattle*, 387 U.S. 541 (1967). However, *New York* v. *Burger*, 482 U.S. 691, 721 n.7 (1987), created an exception for searches with respect to "closely regulated industries." The government may undertake a search, without precompliance review, where there exists a "'substantial' government interest" to regulate the business; the regulatory scheme requires warrantless searches to further such interest; and the regulatory framework incorporates a "constitutionally adequate substitute for a warrant." *Id*. at 702-703.

For an administrative scheme to sufficiently approximate a warrant, it "must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703. This serves, in part, a notice function—the law must be "'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.'" *Ibid*. (quoting *Donovan* v. *Dewey*, 452 U.S. 594, 600 (1981)).

B. Factual Background

Petitioner Dr. Joseph Zadeh is an internal medicine doctor, and he owns and operates a medical practice in a suburb of Dallas, Texas. App., *infra*, 2a. Petitioner Jane Doe is one of his patients. *Ibid*.

The Drug Enforcement Administration (DEA) investigated Dr. Zadeh's prescribing activities. App., *infra*, 2a. In October of 2013, a DEA investigator emailed a representative of the Texas Medical Board (Board), requesting assistance in developing a case against him. *Ibid*. The investigator wrote: "I'm at a point in the criminal case that I need to interview Dr. Zadeh and review his patient files." *Ibid*. The Board subsequently opened its own investigation into Zadeh. *Ibid*.

On October 22, 2013, two Board investigators—respondents Pease and Kirby—"served an administrative subpoena on Dr. Zadeh." App., *infra*, 3a. The subpoena instanter was signed by respondent Robinson, the Board's Executive Director. *Ibid*. In relevant part, it demanded "the immediate production of the medical records of sixteen of Dr. Zadeh's patients." *Ibid*. Petitioner Doe was one of those patients. *Id*. at 71a.

Because "Dr. Zadeh was not present when the investigators arrived," respondents handed the subpoena to his assistant. App., *infra*, 3a. While respondents initially waited in reception area as the assistant contacted Dr. Zadeh and two lawyers, they eventually demanded immediate compliance. *Ibid*. Respondents informed the assistant that "they would suspend Dr. Zadeh's license if the records they sought were not produced." *Ibid*. At that point, the assistant complied, leading respondents "into a conference room and delivering the requested records to them." *Ibid*.

Respondents remained in Dr. Zadeh's offices "for several hours," copying records. App., *infra*, 72a. "Za-

deh's lawyer eventually arrived and instructed the investigators to leave the premises." *Ibid*.

C. Proceedings Below

Dr. Zadeh and Jane Doe brought this Section 1983 suit, alleging, as relevant here, that respondents' actions violated their Fourth Amendment rights. App., *infra*, 3a-4a. Defendants moved to dismiss, asserting qualified immunity. *Id*. at 4a.

1. The district court held that, "as a general rule, when an agency intends to execute a search pursuant to the administrative search exception, it must provide an opportunity for precompliance judicial review." App., *infra*, 80a. But a "more relaxed standard" may apply to administrative searches of "closely regulated businesses." *Id*. at 81a (citing *City of Los Angeles, Calif*. v. *Patel*, 135 S. Ct. 2443, 2454 (2015)). Under *Burger*, the district court emphasized, an "agency can search a closely regulated business without providing an opportunity for precompliance judicial review, but only if the search is necessary to further a regulatory scheme that is informed by a substantial government interest." *Id*. at 80a. And that "regulatory scheme must provide 'a constitutionally adequate substitute for a warrant.'" *Ibid*. (quoting *Dewey*, 452 U.S. at 600).

In assessing whether the *Burger* exception applies, the court reasoned that the "medical profession" is not a "closely regulated business." App., *infra*, 81a. Given the lack of a "history of warrantless inspections" (*ibid*.), and the countervailing "long history of recognizing the need for privacy in the medical profession out of respect for doctor-patient confidentiality" (*id*. at 81a-82a), the court held that it "strains credibility to suggest that doctors and their patients have no reasonable expectation of privacy" (*id*. at 82a).

But *even if* the medical profession "were to be considered closely regulated," the district court found, "Plaintiffs' allegations, if proven, would still establish a Fourth Amendment violation." App., *infra*, 83a. That is because defendants' regulatory inspection scheme failed to meet the third prong of the *Burger* test: it failed to "perform the two basic functions of a warrant." *Id*. at 83a-84a. That included the lack of any limitation on the Board's discretionary authority. *Id*. at 87a.

At qualified immunity "step two," however, the district court found that the relevant rights were not sufficiently established at the time. App., *infra*, 92a-99a. The court concluded that, at the time of the conduct, it "was unclear whether the medical profession should be considered a closely regulated business." *Id*. at 98a. Further, the court held that was also "unclear to what degree, if at all, a regulatory scheme allowing for the warrantless inspection of a closely regulated business must limit the discretion of the inspecting officer." *Ibid*. The court concluded that, in light of circuit precedent, respondents "reasonably could have believed that a search conducted pursuant to a purely discretionary inspection scheme was legal." *Ibid*.

2. The Fifth Circuit affirmed. App., *infra*, 1a-26a.

At the outset, the court concluded that the warrantless search "was a violation of Dr. Zadeh's constitutional rights." App., *infra*, 14a. Performing a *Burger* analysis, the Fifth Circuit concluded that the "medical industry as a whole is not a closely regulated industry," in view of the heightened expectations of privacy in medical contexts. *Id*. at 11a. The court, however, noted that pain management clinics may be treated uniquely, and it did not determine whether such clinics qualify as closely regulated industries. *Ibid*.

The court nonetheless held that, even assuming that petitioners' practice is a pain management clinic, the warrantless search was unconstitutional. App., *infra*, 14a. The statute authorizing the Board to search provided merely that it may examine "'the documents of a physician practicing at the clinic, as necessary to ensure compliance with this chapter.'" *Id*. at 13a (quoting Tex. Occ. Code § 168.052(a)). Regulations provide that the Board may "'conduct inspections to enforce these rules, including inspections of a pain management clinic and of documents of a physician's practice." *Ibid*. (quoting 35 Tex. Reg. 1925, 1925-1926 (2010)).

This authority, the court found, was "purely discretionary"—and thus outside the requirements of *Burger*. App., *infra*, 14a. Indeed, "there is no identifiable limit on whose records can properly be subpoenaed." *Id*. at 13a. And there is no limitation on "how the clinics inspected are chosen." *Id*. at 14a. The court emphasized that "these requirements suffered from the same fatal * * * flaw" as that at issue in *Burger*. *Ibid*.

And yet, the majority reasoned, this constitutional violation was insufficient to overcome qualified immunity because petitioners' constitutional rights were not "clearly established" at the time. App., *infra*, at 16a-20a. The court began by stating that the presumption is in favor of qualified immunity: "defendants are entitled to qualified immunity unless the constitutional requirements they violated were clearly established at the time of their actions." *Id*. at 14a.

The court then observed that the Constitution prohibits on-demand administrative searches absent statutory authorization providing for (and offering notice of) such searches. *Id*. at 14a-15a. But this right, the court held, was not sufficiently articulated to qualify as "clearly established." *Id*. at 16a-20a. The court emphasized that this requires prior legal authority address-

ing "*the particular circumstances*" faced by the defendant. *Id*. at 16a. As to one of the prior cases relied on by petitioners—*Beck* v. *Texas State Board of Dental Examiners*, 204 F.3d 629 (5th Cir. 2000)—the court found that *Beck* did not compel the conclusion "that the only sufficient substitute under *Burger* was a statute authorizing no-notice searches." App., *infra*, 17a.

3. Judge Willett first concurred *dubitante*, adding his voice to a "growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." App., *infra*, 68a-69a.

Upon rehearing, however, Judge Willett dissented in relevant part. App., *infra*, 26a-41a. Characterizing the majority's result as a decision of "violation-without-vindication," Judge Willett criticized the "judge-made immunity regime" of qualified immunity as one that "ought not be immune from thoughtful reappraisal." *Id.* at 27a. Though "[e]veryone agrees [Dr. Zadeh's] Fourth Amendment rights were violated," he wrote, such a constitutional violation "eludes vindication" "owing to a legal *deus ex machina*—the 'clearly established' prong of qualified-immunity analysis." *Id*. at 36a.

Judge Willett argued that the clearly established prong has become complex and unsatisfactory. It requires plaintiffs to cite "functionally identical precedent," and yet remains unclear as to *how* indistinguishable existing precedent must be to defeat qualified immunity. App., *infra*, 36a. Where like facts in like cases are unlikely, he argued, the clearly established standard has been left "neither clear nor established among our Nation's lower courts." *Id*. at 37a.

"To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably

unreasonable—as long as they were the *first* to behave badly." App., *infra*, at 36a. The officers here, Judge Willett wrote, might plausibly claim to be shielded by *Beck*'s narrow exception to the rule against warrantless searches, so long as Dr. Zadeh cannot cite caselaw placing the "legal question 'beyond debate' to 'every' reasonable officer." *Ibid*. This "'yes harm, no foul' imbalance leaves victims violated but not vindicated," wrongs "not righted," and "wrongdoers * * * not reproached." *Ibid*.

Judge Willett also commented on two particular features of the clearly established test.

First, he described the harm of "constitutional stagnation." App., *infra*, 37a. Because many courts grant immunity without first determining whether the challenged behavior violates the Constitution, he reasoned, courts are not "establishing law at all, much less *clearly* doing so." *Ibid*. Plaintiffs are left unable to point to factually analogous precedent precisely because fewer courts are producing precedent. See *Id*. at 37a-38a. ("Section 1983 meets Catch-22."). "Courts then rely on that judicial silence to conclude there's no equivalent case on the books." *Id*. at 38a. This reasoning, made possible by *Pearson* v. *Callahan*, 555 U.S. 223 (2009), Judge Willett argued, amounts to an "Escherian Stairwell" for qualified immunity doctrine. *Ibid*. "Heads government wins, tails plaintiff loses." *Ibid*.

Second, because constitutional litigation increasingly involves cutting-edge technologies, if courts continue to avoid the constitutional merits in cases raising novel issues, then "constitutional clarity * * * remains exasperatingly elusive." App., *infra*, at 38a. Without clear holdings at step-one of the qualified immunity analysis, the public will be left with "gauzy constitu-

tional guardrails as technological innovation outpaces legal adaptation." *Ibid*.

Additionally, Judge Willett argued that the majority erred in its appraisal of the case. Respondents' constitutional violation *did* violate "clearly established law, not a previously unknown right." App., *infra*, at 27a. It *is* a violation to conduct a warrantless search without precompliance review, Judge Willett emphasized. *Id*. at 28a. It is only where *Burger*'s test is satisfied that such an inspection does not violate the Fourth Amendment. *Id*. at 28a-29a. The statute at issue, however, failed long-established requirements—it neither authorized Board officials to search without notice, nor did it meaningfully limit officer discretion. *Id*. at 30a-33a. As a result, "[n]o exception applies. And it's only when an exception applies that the general rule doesn't." *Id*. at 35a.

REASONS FOR GRANTING THE PETITION

The Court should grant review. A chorus of voices has raised substantial questions regarding the scope and legal foundation of qualified immunity. This includes Judge Willet, who issued an extended dissent in this case. This issue is indeed important: Qualified immunity recurs with frequency, and it has severely inhibited the refinement of governing constitutional standards.

The "clearly established" analysis also suffers from lack of clarity, resulting in patchwork treatment across the circuits. And this is a particularly good case for review. As Judge Willett explained, any less aggressive qualified immunity doctrine would result in victory for petitioners.

Finally, review is warranted because qualified immunity has grown far too strong—yet it has no legitimate foundation. The doctrine sprung wholly as judi-

cial policy, without any constitutional, statutory, or common law origin. And time has shown that—even if those policy judgments could support the doctrine—qualified immunity does not accomplish these stated goals.

A. The Court should reexamine the qualified immunity doctrine.

The scope and viability of the prevailing qualified immunity doctrine requires careful evaluation—significant criticisms have surfaced, the doctrine presently leads to stagnation in the refinement of governing constitutional standards, and the issue arises with considerable frequency.

1. In recent years, criticism of prevailing qualified immunity doctrine has been widespread and sustained. Justice Thomas, for example, recently "note[d] [his] growing concern with [the Court's] qualified immunity jurisprudence." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). As the doctrine has evolved, the Court has "'completely reformulated qualified immunity along principles not at all embodied in the common law.'" *Id.* at 1871 (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987)). And, because the Court's "analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act," the Court no longer is "interpreting the intent of Congress in enacting the Act." *Ibid*. (quotation alteration omitted). Justice Thomas ultimately urged that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Id*. at 1872.

Justice Sotomayor has likewise expressed concerns regarding the current reaches of the doctrine. *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). Because "[n]early all of the Supreme

Court's qualified immunity cases come out the same way—by finding immunity for the officials," Justice Sotomayor cautioned that the current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers." *Ibid*. In the Fourth Amendment context, the result is to "gut[]" its "deterrent effect." *Ibid*. More broadly, this "sends an alarming signal to law enforcement officers and the public"—"It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Ibid*.

These concerns are broadly recognized. See *Morrow* v. *Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.) ("Some—including Justice Thomas—have queried whether the Supreme Court's post-*Pierson* qualified-immunity cases are 'consistent with the common-law rules prevailing [when [Section] 1983 was enacted] in 1871.'"); *Rodriguez* v. *Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.) ("Some argue that the 'clearly established' prong of the analysis lacks a solid legal foundation."); *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.) ("Scholars have criticized [the qualified immunity] standard."); *Ventura* v. *Rutledge*, 2019 WL 3219252, at *10 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete re-examination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Thompson* v. *Clark*, 2018 WL 3128975, at *10 (E.D.N.Y. 2018) (Weinstein, J.) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny.").

In critiquing prevailing doctrine, Judge James Browning supplied a district court perspective: "Factually identical or highly similar factual cases are not * * * the way the real world works. Cases differ. Many

cases have so many facts that are unlikely to ever occur again in a significantly similar way." *Quintana* v. *Santa Fe Cty. Bd. of Comm'rs*, 2019 WL 452755, at *37 n.33 (D.N.M. 2019). In Judge Browning's view, the current "obsession with the clearly established prong" improperly "assumes that officers are routinely reading Supreme Court and [circuit court] opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work." *Ibid*. That is not how police operate: "in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles." *Ibid*. In requiring a "highly factually analogous case," this Court's jurisprudence "has either lost sight of reasonable officer's experience or it is using that language to mask an intent to create 'an absolute shield for law enforcement officers.'" *Ibid*.

Until this Court examines it, the qualified immunity doctrine will continue to face criticism. See, *e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 46-49 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1800 (2018); and Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 11-12 (2017).

2. The current state of qualified immunity jurisprudence leaves significant violations of constitutional rights without vindication. "This current 'yes harm, no foul' imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached." App., *infra,* 36a (Willett, J.).

And, given the frequent use of qualified immunity, courts fail to refine the contours of constitutional rights—perpetually locking in the cycle of immunity.

This now occurs frequently, with courts "avoid[ing] scrutinizing the alleged offense by skipping to the simpler second prong." App., *infra,* 37a (Willett, J.). See also *Sims* v. *City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (noting that the case was the "fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation."); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37-38 (2015) (finding a post-*Pearson* decrease in the willingness of circuit courts to decide constitutional questions). This result, when compounded with lower court's restrictive reading of the "clearly established" standard, has produced an "Escherian Stairwell" in which "[p]laintiffs must produce precedent even as fewer courts are producing precedent." App., *infra,* 38a (Willett, J.).

3. Review is also warranted because these questions recur with enormous frequency. A Westlaw search found around 6,000 federal opinions mentioning qualified immunity in 2018 alone. And, each year, tens of thousands of lawsuits are filed that may implicate qualified immunity. See Civil Federal Judicial Caseload Statistics, tbl. C-2 (Mar. 31, 2018) (identifying that, for 12 months ending in March 2018, 15,020 "other civil rights" lawsuits, 20,673 prisoner civil rights cases, and 10,947 prison condition cases were filed—virtually all of which could involve a qualified immunity defense).

B. The "clearly established" doctrine has created a patchwork of conflicting circuit approaches.

As we just described, the need to reevaluate the qualified immunity doctrine is reason enough to grant the petition. Beyond that, there is a persistent disa-

greement among the courts of appeals regarding the degree of factual similarity required from precedent for official conduct to violate "clearly established law."

1. The **Fifth Circuit**—as reflected in its decision here and elsewhere—takes an outlier approach, requiring a very substantial degree of factual similarity with past precedent. As we illustrated, the Court here searched for governing precedent that had addressed materially identical facts. App., *infra*, 16a-18a. In the absence of case law addressing the same factual scenario, the court concluded that statements of governing rules—with obvious application to respondents' conduct—could not satisfy the "clearly established" requirements.

Morrow v. *Meachum*, 917 F.3d 870 (5th Cir. 2019), involved an excessive force claim against a police officer who used his police car to strike a fleeing motorcyclist, killing him. *Id*. at 873-874. In so holding, the Fifth Circuit set aside the many cases cited by appellants from other jurisdictions forming a "consensus" that a "rolling block" was a violation of clearly established rights where a fleeing driver "pose[s] no immediate danger." *Id*. at 879-880. Instead, the court determined that precedent did not "*foreclose* using deadly force to end police chases." *Id*. at 877.

This understanding of "clearly established" is oft-applied in the Fifth Circuit. See, *e.g.*, *McLin* v. *Ard*, 866 F.3d 682, 696 (5th Cir. 2017) (To defeat qualified immunity, the court "must be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity.") (quoting *Morgan* v. *Swanson*, 659 F.3d 359, 371-372 (5th Cir. 2011)). And the Court routinely distinguishes past precedent based on distinctions that are often relatively thin. See, *e.g.*, *Cleveland* v. *Bell*, 938 F.3d 672, 677

(5th Cir. 2019); *Marks* v. *Hudson*, 933 F.3d 481, 486 (5th Cir. 2019).

2. Other circuits, however, have taken more flexible approaches regarding appropriate mechanisms to satisfy the "clearly established" inquiry.

First, the plurality of circuits reason directly from this Court's holding in *Hope* v. *Pelzer*, 536 U.S. 730 (2002), that "fair notice" to officers can exist absent particular precedent addressing the specific facts of the violation in question. *Id*. at 742.

The **Eighth Circuit**, in *Mountain Pure* v. *Roberts*, 814 F.3d 928 (8th Cir. 2016), for instance, even in affirming a finding of qualified immunity, held that courts should use a "flexible standard, requiring some, but not precise factual correspondence with precedent." *Id*. at 932 (quotation omitted). The Eighth Circuit has continued to apply this rule, including to find violations of clearly established law even in the absence of precedent directly on point.

In *Z.J.* v. *Kansas City Bd. of Police Comm'nrs*, 931 F.3d 672 (8th Cir. 2019), the court found the use of flash-bang grenades by a SWAT team to enter a home with unknown occupants so "unreasonable" (*id*. at 683) that it violated clearly established Fourth Amendment law, even absent specific factual similarity from precedent (*id*. at 684, 689). The court applied its rule that "[a]n officer may have fair notice based on the fact his conduct is obviously unlawful, even in the absence of a case addressing the particular violation." *Id*. at 685.

The **Third Circuit** similarly does "not require a case directly mirroring the facts at hand." *Kane* v. *Barger*, 902 F.3d 185, 195 (3d Cir. 2018) (quotation and alteration omitted). Sufficiently analogous—but not identical—precedent may suffice to place officials "'on notice that their conduct violates established law even

in novel factual circumstances.'" *Ibid*. (quoting *Hope*, 536 U.S. at 741).

The **Ninth Circuit** also does not require "a prior identical action to conclude that the right is clearly established." *Ioane* v. *Hodges*, 939 F.3d 945, 956 (9th Cir. 2018). So too in the **Fourth Circuit**, where, "[i]n the absence of 'directly on-point, binding authority,' courts may also consider whether "the right was clearly established based on general constitutional principles or a consensus of persuasive authority." *Thompson* v. *Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) (quotation omitted).

Second, several circuits have adopted a two-track approach wherein some official actions implicate such "obvious" violations of constitutional rights that no degree of factual similarity from precedent is necessary.

In *Simon* v. *City of New York*, 893 F.3d 83, (2d Cir. 2018), for instance, the **Second Circuit** held that the unlawful detention of a material witness was a violation of clearly established law without "need[ing]" to "decide" whether out-of-circuit authorities "clearly foreshadow[ed]" the decision. *Id*. at 97. "This is one of the uncommon obvious cases," the court found, "in which the unlawfulness of the defendants' conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Ibid*. (citation omitted; alterations incorporated).

The **Seventh Circuit** also examines whether, "[i]f no existing precedent puts the conduct beyond debate," the defendant's "alleged conduct is so egregious that it is an obvious violation of a constitutional right." *Leiser* v. *Kloth*, 933 F.3d 696, 702 (7th Cir. 2019). Likewise, the **Tenth Circuit** applies a "sliding scale" approach such that, the more "obviously egregious" the official conduct in light of "prevailing constitutional princi-

ples," the less factual specificity required from precedent. *A.M.* v. *Holmes*, 830 F.3d 1123, 1135-1136 (10th Cir. 2016).

Altogether, the Fifth Circuit has taken an outlier approach to qualified immunity—requiring an impossibly high level of factual similarity to past precedent before a constitutional violation can be deemed "clearly established." That is all the more reason why review is warranted, and why recalibration of the standards governing qualified immunity is necessary.

C. This is an excellent vehicle to reevaluate qualified immunity.

This case presents an attractive opportunity to reevaluate qualified immunity. All three judges of the court of appeals—like the district judge—agree that respondents violated petitioners' constitutional rights. App., *infra*, 14a ("To summarize, we have concluded there was a violation of Dr. Zadeh's constitutional rights."). The only question here was whether that right was sufficiently well established. On that issue, the court divided.

This is thus a suitable case to reverse qualified immunity in whole. If the defense is not cognizable in circumstances like those here, then there is no doubting that petitioners' claims may proceed.

What is more, this case provides occasion for the Court to, in the alternative, recalibrate the standard for assessing whether a particular right is "clearly established." If less particularity is required than what was mandated below, petitioners' claims may proceed—just as the dissent would have held.

In fact, the disagreement between the majority and the dissent turned on the degree of precision required. Judge Willett found that it was sufficiently established that there is a "need for precompliance review of ad-

ministrative subpoenas." App., *infra*, 34a. That is, he explained, "controlling law." *Ibid*. Exceptions to clearly established rights should not form a basis for qualified immunity, as that makes the analysis "hyperspecific." *Id*. at 35a. Even if the contours of the exception had to be established, moreover, "[c]ontrolling law dictates that there must be statutory notice." *Ibid*. Since "the Texas laws don't provide notice for on-demand inspections," it was clearly established that there could be no recourse to an exception to the usual text. *Id*. at 36a.

But, for the majority, this analysis was not sufficiently specific. Looking at its past cases, because not one was on all-fours factually, the court concluded that not "all reasonable officers would have known" of the illegality of their conduct "until now." App., *infra*, 18a.

This case also features no urgent decision-making. The administrative state officials in this case were not faced with a split-second decision that forced them to act without deliberation. Rather, they had an opportunity to consider their course of action—and they chose to proceed just the same, in a way that violated petitioners' constitutional rights by searching intensely private papers outside of any judicial process. These circumstances render application of qualified immunity especially dubious. Immunity should be at its nadir when officials have more than ample time to contemplate the legality of their proposed conduct.

And the constitutional rights here are substantial. The Court has emphasized that physicians have an interest in "keeping their prescription decisions confidential." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 572 (2011). See also Health Insurance Portability and Accountability Act ("HIPAA"), 45 C.F.R. § 164.512. And, challenging the notion that warrantless searches would advance the public interest, the Court has held that

medical patients have a "reasonable expectation of privacy" that their records will not be shared without their permission. *Ferguson* v. *City of Charleston*, 532 U.S. 67, 78 (2001).

D. Qualified immunity is inconsistent with the text and history of Section 1983.

Review is additionally warranted because qualified immunity, as currently formulated, bears no relation to either the text of Section 1983 or the common-law immunities from which it sprang. See *Ziglar*, 137 S. Ct. at 1869-1872 (Thomas, J., concurring); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018).

1. The current qualified immunity doctrine has no basis in the text of Section 1983. The Court has acknowledged this point time and again—Section 1983 "on its face admits of no immunities" (*Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976)), and "[Section 1983's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted" (*Owen* v. *City of Independence*, 445 U.S. 622, 635 (1980)).

Rather than growing out of any textual hook, qualified immunity was borne out of a putative "good faith" defense to a few specific torts. *Pierson* v. *Ray*, 386 U.S. 547, 554-556 (1967). It is now applied to all Section 1983 claims. But scholarship suggests that no such free-standing defense existed at common law. See Baude, *supra*, at 55-57. See also *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) ("some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine").

Indeed, the current doctrine bears no resemblance whatsoever to any common-law immunity defense. The modern test refers to whether the right in question was

clearly established. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). This reflects, the Court itself acknowledges, "principles not at all embodied in the common law" when Section 1983 was enacted. *Anderson*, 483 U.S. at 645. See also Baude, *supra*, at 60.

2. Rather than emanating from text or history, qualified immunity was informed by judge-made policy determinations. In particular, the court was concerned with the imposition of personal liability on public officials and the burden of litigation. See *Harlow*, 457 U.S. at 813-814 (addressing perceived social costs of claims against government officials). But, as Justice Thomas observed, these "qualified immunity precedents * * * represent precisely the sort of freewheeling policy choices that [the Court has] previously disclaimed the power to make." *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) (quotation and alteration omitted).

Beyond that, qualified immunity has proven not to accomplish the goals it seeks. As for officer liability, indemnification is the norm. One study found that officers in a sample of settlements for police misconduct only paid 0.02% of the damages paid to plaintiffs, demonstrating the strong protection already afforded by indemnification. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). And there is evidence that qualified immunity plays no meaningful role in alleviating litigation burdens. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 48-51 (2017). While justified solely by judicially identified policy, decades of experience have proven that those policies are not meaningfully advanced by the doctrine.

3. No factors counsel in favor of retaining qualified immunity in its current fashion. The Court has previously altered its judge-made rules regarding Section 1983, without serious hesitation. See, *e.g.*, *Pearson* v.

Callahan, 555 U.S. 223, 233-234 (2009) (overruling *Saucier* v. *Katz*, 533 U.S. 194 (2001)); *Harlow*, 457 U.S. at 816-818 (overruling subjective good-faith requirement identified in *Scheuer*, *Gomez*, and other authorities). Having been "tested by experience" (*Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-174 (1989)), existing doctrine has proven not just ineffective at accomplishing its stated ends, but affirmatively detrimental to litigants and the law alike.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

WILLIAM P. DEMOND
Demond Law, PLLC
1520 Rutland St.
Houston, TX 77008
(713) 701-5240

Counsel for Petitioners