No. 19-676

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

BRIEF OF CROSS-IDEOLOGICAL GROUPS DEDICATED TO ENSURING OFFICIAL ACCOUNTABILITY, RESTORING THE PUBLIC'S TRUST IN LAW ENFORCEMENT, AND PROMOTING THE RULE OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The following parties, who reflect a diverse set of ideological viewpoints and a shared commitment to ensuring the rule of law, and who are also listed in the Appendix, respectfully submit this brief as *amici curiae*.[1]

Alliance Defending Freedom (ADF) is a nonprofit, public-interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect First Amendment freedoms. Since its founding in 1994, ADF has played a key role in numerous cases before the United States Supreme Court, as well as in hundreds of other cases in state and federal courts.

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil-justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members frequently represent plaintiffs seeking legal recourse and accountability under 42 U.S.C § 1983.

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality

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[1] All parties received timely notice and have consented to the filing of this brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

embodied in the Constitution and the Nation's civil rights laws. Since its founding in 1920, the ACLU has appeared in numerous cases before this Court, both as counsel representing parties and as *amicus curiae*.

Americans for Prosperity Foundation (AFPF) is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF is interested in this case because it believes that victims of government misconduct should be able to vindicate their constitutional rights by holding the responsible officials accountable for their unlawful actions.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government.

The Due Process Institute is a nonprofit, bipartisan, public-interest organization that works to honor, preserve, and restore procedural fairness in the criminal-justice system through litigation, advocacy, and education.

The Law Enforcement Action Partnership (LEAP) is a nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal-justice professionals who seek to improve public safety, promote alternatives to arrest and incarceration, address the root causes of crime, and heal police-community relations through sensible changes to our criminal-justice system.

The Roderick & Solange MacArthur Justice Center (MJC) is a nonprofit, public-interest law firm founded

in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC attorneys have led civil-rights battles in areas that include police misconduct, the rights of the indigent in the criminal-justice system, compensation for the wrongfully convicted, and the treatment of incarcerated people.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights. LDF has a longstanding concern with the doctrine of qualified immunity, which denies redress to deserving civil rights plaintiffs and insulates government officials from the consequences of their unconstitutional behavior.

Public Justice is a national public-interest law organization that specializes in high-impact civil litigation, with a focus on fighting corporate and governmental misconduct. Public Justice has an established project devoted to access to justice, and it has long represented those whose rights have been violated by law-enforcement officers and other government officials.

The R Street Institute is a nonprofit, nonpartisan public-policy research organization whose mission is to engage in policy research and outreach to promote free markets and limited, effective government. The R Street Institute believes that qualified immunity as currently constituted has created a trust gap between officials and communities and does not represent the limited government the Constitution outlined.

Second Amendment Foundation (SAF) is a non-profit § 501(c)(3) educational foundation incorporated in 1974. With over 650,000 members and supporters throughout ever state of the Union, SAF seeks to preserve the Second Amendment's effectiveness through educational and legal-action programs.

The above-named *amici* reflect the growing cross-ideological consensus that this Court's qualified immunity doctrine under 42 U.S.C. § 1983 misunderstands that statute and its common-law backdrop, denies justice to victims of egregious constitutional violations, and fails to provide accountability for official wrongdoing. This unworkable doctrine has diminished the public's trust in government institutions, and it is time for this Court to revisit qualified immunity.

SUMMARY OF ARGUMENT

"The government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But as Chief Justice Marshall admonished, our government "will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* Few principles run as deep in the American legal tradition. Yet the doctrine of qualified immunity finds itself increasingly out of step with Chief Justice Marshall's formulation, and it does so at a perilous time.

Public trust in our government institutions has fallen to record lows. A rash of high-profile, sanction-free incidents of police misconduct has sent Americans to the streets in protest. Law-enforcement officers, in turn, report serious concerns about their ability to

safely and effectively discharge their duties without the confidence of those they must protect. *Amici* reflect an extensive cross-ideological and cross-professional consensus that this Court's qualified immunity case law undermines accountability, harming citizens and public officials alike. While law-enforcement officers are often the face of the public's lost trust, qualified immunity shields a wide range of official misconduct. The diversity of the signatories reflects how qualified immunity abets and exacerbates the violation of constitutional rights of every sort.

A civil action under 42 U.S.C. § 1983 is often the only way for a victim of official misconduct to vindicate these federally guaranteed rights. But qualified immunity often bars even those plaintiffs who can prove their case from remedying a wrong: harm, but no foul. Qualified immunity thus enables public officials who violate federal law to sidestep their legal obligations to the victims of their misconduct. In so doing, the doctrine corrodes the public's trust in those officials—law enforcement in particular—making on-the-ground policing more difficult and dangerous for all officers, including that vast majority who endeavor to uphold their constitutional obligations. And the doctrine's primary justification, to prevent public officials from paying their own judgments, has proven empirically unfounded as the widespread availability of indemnification already provides that protection.

Neither the text nor the history of Section 1983 compels this perverse outcome. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018). The text of Section 1983 says nothing about immunity, qualified or otherwise. The common law that existed when Congress passed Section 1983

as part of the 1871 Ku Klux Act did not provide for anything like the sweeping defense that qualified immunity has become. *Id.* at 55–61. Members of this Court have recognized as much. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute."); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards.").

This brief will not retread these textual and historical arguments, which are discussed at length in the petition and elsewhere. *See, e.g.*, Pet. 3–5, 22–24; Baude, *supra*. Instead, this brief recognizes that "[a]lthough [the Court] approach[es] the reconsideration of [its] decisions with the utmost caution, *stare decisis* is not an inexorable command," *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)), and thus engages the "real world implementation" of a doctrine that was already "wrong on its own terms when it was decided," *see id.* at 2097.

Qualified immunity denies justice to victims of unconstitutional misconduct. It harms the very public officials it seeks to protect. And the amorphous nature of the "clearly established law" test has precluded the doctrine from effecting the stability and predictability that normally justify respect for precedent. In short, our Nation's experience with qualified immunity "has made [the Court's] earlier error all the more egregious and harmful." *Id.*

ARGUMENT

I. QUALIFIED IMMUNITY REGULARLY DENIES JUSTICE TO THOSE DEPRIVED OF FEDERALLY GUARANTEED RIGHTS.

A. Official misconduct is a pressing public concern, and Section 1983 liability is often the law's only mechanism for remedying it.

Qualified immunity effectively insulates broad swathes of official misconduct from either judicial review or a damages remedy. That undermines both our government institutions and the people's trust in them. This Court should restore Section 1983 to its intended function.

Consider the context most often associated with how qualified immunity undermines the public's trust in government: police misconduct. Only a small percentage of law-enforcement officers each year are involved in a fatal confrontation. Gene Demby, *Some Key Facts We've Learned About Police Shootings Over the Past Year*, NPR (Apr. 13, 2015).[2] But that distinct minority of officers generates a staggering number of fatalities. From 2015 to 2017, law-enforcement officers fatally shot, on average, nearly a thousand Americans each year. Julie Tate et al., *Fatal Force*, Washington Post Database (last updated Mar. 31, 2019).[3] Tens of thousands more were wounded or injured over that short period, Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, Newsweek

[2] *Available at* https://n.pr/2IQ1RBV.

[3] *Available at* https://wapo.st/2KB6B3e.

(Apr. 19, 2017),[4] to say nothing of those who suffered injuries that did not result in obvious physical harm.

Citizens have documented these encounters like never before. "There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people." *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018). This new technology has generated powerful, and immediately accessible, evidence of police misconduct.

For example, a cell-phone camera livestreamed on Facebook the aftermath of a Minnesota officer shooting a motorist during a traffic stop for a broken taillight, after the motorist alerted the officer that he was lawfully carrying a firearm. ABC News, *Philando Castile Police Shooting Video Livestreamed on Facebook* YouTube (July 7, 2016).[5] A cell-phone camera catalogued two Baton Rouge officers who shot a father of five after they pinned him to the ground. ABC News, *Alton Sterling Shooting Cellphone Video*, YouTube (July 6, 2016).[6] A cell-phone camera recorded a Pittsburgh police officer shooting an unarmed teenager who ran when police stopped a vehicle suspected in another shooting. Guardian News, *Black Unarmed Teen Antwon Rose Shot In Pittsburgh*, YouTube (June 28, 2018).[7] And a cell-phone camera caught a Charleston officer shooting a man eight times in the back as he fled from a traffic stop, again

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[4] *Available at* https://bit.ly/2gTs1bo.

[5] *Available at* https://bit.ly/29K1koJ.

[6] *Available at* https://bit.ly/2lKODNH.

[7] *Available at* https://bit.ly/2KAocbM.

for a broken taillight. N.Y. Times, *Walter Scott Death: Video Shows Fatal North Charleston Police Shooting*, YouTube (Apr. 7, 2015).[8]

These four videos collectively have been viewed millions of times on YouTube alone.[9] All precipitated major protests and demonstrations. And they are but a few examples. *See* Wesley Lowery, *On Policing, the National Mood Turns Toward Reform*, Wash. Post (Dec. 13, 2015).[10] So it is little wonder that as word—and video—of police misconduct has spread, faith in law enforcement has fallen (no matter the actual overall rate of misconduct). In 2015, Gallup reported that trust in police officers had reached a twenty-two-year low. Jeffery M. Jones, *In U.S., Confidence in Police Lowest in 22 Years* (June 19, 2015).[11]

Worse still, law-enforcement officers are rarely held to account for such misconduct. "[A]mong the thousands of fatal shootings at the hands of police since 2005, only 54 officers have been [criminally] charged." Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, Wash. Post (Apr. 11, 2015).[12] Twenty-one of those officers—almost half—were not convicted. *Id.* Many more are never indicted in the

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[8] *Available at* https://bit.ly/1PkUn96.

[9] *Amici* invoke these examples only to demonstrate this recent phenomenon enabled by smart-phone technology; this brief takes no position on the ultimate propriety of any specific conduct in these cases and recognizes that not all police shootings are unlawful.

[10] *Available at* https://wapo.st/2IH8HK4.

[11] *Available at* https://bit.ly/2lQhCj3.

[12] *Available at* https://wapo.st/2Nd12GG.

first place. *See* Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. Times (Nov. 24, 2014)[13]; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case,* N.Y. Times (Dec. 3, 2014).[14] According to a 2017 Pew Research Center survey of more than 8,000 police officers themselves, 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable." Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017).[15]

Of course, qualified immunity shields more than just police misconduct from accountability. The doctrine applies to a wide array of public officials, from social workers to teachers to school administrators; it even applies to private individuals the government temporarily employs to carry out its work. *Filarsky v. Delia*, 566 U.S. 377, 388–89 (2012) ("[E]xamples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself.").

Because other means of oversight often fail or are otherwise unavailable, civil-damages liability is all the more important for holding public officials accountable. Section 1983 provides a straightforward solution to an undeniable problem. By its own terms, if any person, acting under the color of state law, unlawfully deprives another of his or her federally guaranteed rights, that person "shall be liable to the party injured." 42 U.S.C. § 1983.

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[13] *Available at* https://nyti.ms/2tL3L2b.

[14] *Available at* https://nyti.ms/2z0kbZl.

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

A robust civil remedy for the violation of federally guaranteed rights serves at least two purposes. First is the "importance of a damages remedy to protect the rights of citizens." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Second is "the need to hold public officials accountable when they exercise power irresponsibly." *Pearson*, 555 U.S. at 231.

B. Qualified immunity regularly excuses public officials for unconstitutional misconduct.

Qualified immunity breaks with the text and purposes of Section 1983 by allowing for the perverse-yet-all-too-common result in which a court recognizes that a victim's constitutional rights were violated while denying any redress. Application of the "clearly established law" standard announced in *Harlow*, 457 U.S. at 818, increasingly means that public officials—even those acting deliberately in bad faith—will escape liability for their misconduct, unless the relevant jurisdiction has already happened to consider and rule upon a case with functionally identical circumstances.

That is, under the same federal remedy statute applying the same federal standard, a resident of Texarkana who has her constitutional rights violated may be denied any meaningful relief depending on whether the wrongdoing occurred in Texas (the Fifth Circuit), Arkansas (the Eighth), or Oklahoma (the Tenth). These arbitrary geographical barriers to recovering damages for a violation of constitutional rights have no basis in Section 1983's text, history, or purpose, and produce inconsistent results across circuits that this Court can and should reconcile.

Consider the following sample of recent cases in which Section 1983 claimants prevailed on the merits,

only to have a court deny recovery because the adjudicated constitutional violation was deemed insufficiently "clearly established":

- In a decision that managed to be both per curiam and deeply divided, the Tenth Circuit effectively denied relief against deputy sheriffs who conducted an "early-morning, SWAT-style raid" in which a family with young children was detained for two-and-a-half hours in their house after a warrant-based search turned up empty. The source of the supposed probable cause: an investigation of "a small amount of wet vegetation" from the family's trash can (tea leaves purchased from a garden shop) that allegedly field-tested positive for marijuana. Struggling to apply the "clearly established law" standard, the panel generated three separate opinions, splintering on whether aspects of the unlawful investigation, basis for the warrant, and use of force in executing the warrant had been "clearly established." *Harte v. Bd. of Comm'rs of Cty. of Johnson*, 864 F.3d 1154 (10th Cir. 2017).
- The Second Circuit, over a dissent, reversed the denial of immunity to prison officials who had kept a man awaiting trial for drug charges in extreme solitary confinement conditions for seven months, all because of one instance of supposed "misconduct," when he asked to speak to a lieutenant about why he was not allowed to visit commissary. The majority agreed the prison guards violated the man's rights because his treatment was not "reasonably related to institutional security" and there was "no other legitimate governmental purpose justifying the

placement." *Allah v. Milling*, 876 F.3d 48, 58 (2d Cir. 2017). But the court still held the guards were entitled to immunity because there was no prior case concerning the "particular practice" employed by the prison. *Id.* at 59.

- Acknowledging that "false statements in a warrant affidavit are not to be condoned," the Fifth Circuit nonetheless reversed a district court's conclusion that a teacher arrested for allegedly falsifying student grades had shown a triable fact issue as to whether the investigating officer lied in his affidavit because it was not sufficiently established that "an officer who knowingly or recklessly included false statements on a warrant affidavit can be held liable for false arrest." *Arizmendi v. Gabbert*, 919 F.3d 891, 899, 904 (5th Cir. 2019).
- The Sixth Circuit affirmed the dismissal of claims against a child-protective-services caseworker whose false statements in support of a removal order resulted in minor children being taken from their families, separated, and denied visitation, even though the panel "entirely agree[d]" that "a social worker, like a police officer, cannot execute a removal order that would not have been issued but for known falsities that the social worker provided to the court to secure the order." *Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 685 (6th Cir. 2018).
- The Ninth Circuit, over a dissent, upheld a grant of qualified immunity to a police officer who, during a routine traffic stop, directed the vehicle's driver to sit on the officer's cruiser, pointed a gun at the driver's head, and

> threatened to kill him if he declined to surrender on weapons charges when the officer discovered a gun in the backseat. The majority reasoned that the unlawfulness of the officer's actions had not been clearly established under the circumstances, because the stop had occurred at night, the driver had a prior conviction for unlawful firearms possession, and the driver "stood six feet tall," "weighed two hundred and sixty-five pounds," and "was only 10-15 feet away" from the gun. *Thompson v. Rahr*, 885 F.3d 582, 588 (9th Cir. 2018).

For ordinary citizens and law-abiding public officers alike, these cases can hardly inspire confidence in our "government of laws." *Marbury*, 5 U.S. (1 Cranch) at 163.[16]

Qualified immunity also hampers Section 1983 as a tool of accountability by affording federal courts the discretion to avoid deciding whether alleged misconduct even violated federal rights in the first place, and to dispose of otherwise-winning claims solely on the ground that the violation was not "clearly established." *Pearson*, 555 U.S. at 236.

The *Pearson* escape hatch creates a vicious cycle. Violations must be clearly established to survive qualified immunity; but qualified immunity itself stunts the development of the law and prevents it from becoming clearly established. *See, e.g.*, *Sims v. City of*

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[16] *See also Jessop v. City of Fresno*, 918 F.3d 1031, 1035–37 (9th Cir. 2019) (granting immunity because, while "the theft" of "personal property by police officers sworn to uphold the law" may be "morally wrong," it was not clearly established that officers could not seize $151,380 in cash and $125,000 in rare coins but record only $50,000 in seized property on inventory sheet).

Madisonville, 894 F.3d 632, 638 (5th Cir. 2018) (per curiam) ("This is 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. . . . Continuing to resolve the question at the clearly established step means the law will never get established."). That some untold number of federal violations now passes through the federal courts without ever being acknowledged undercuts Section 1983's central accountability function.

Taken together, these features of qualified immunity effectively guarantee that, in all but the most extreme cases, the wronged will receive no remedy and the wrongdoers no rebuke. That gets things precisely backwards. Section 1983 should be interpreted to reflect its text and purpose, and courts should be suitably equipped to carry out their critical role in enforcing accountability for all public officials pursuant to Section 1983's command.

II. QUALIFIED IMMUNITY HARMS PUBLIC OFFICIALS BY ERODING PUBLIC TRUST AND UNDERMINING THE RULE OF LAW.

Qualified immunity harms not just the direct victims of official misconduct and their communities, but public officials themselves—especially those who work in law enforcement.

Policing is dangerous, difficult work. Without the trust of their communities, officers cannot safely and effectively carry out their responsibilities. "Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness." Inst. on Race and Justice, Northeastern

Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20–21 (2008).[17]

In other words, "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 statelessness." Fred O. Smith, *Abstention in a Time of Ferguson*, 131 Harv. L. Rev. 2283, 2356 (2018); *accord* U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 80 (Mar. 4, 2015) (A "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.").[18]

When properly trained and supervised, the vast majority of officers follow their constitutional obligations, and they will benefit if the legal system reliably holds rogue officers accountable for their misconduct. Indeed, "[g]iven the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated." Inst. on Race and Justice, *supra* at 21. Qualified immunity prevents law-enforcement officers from overcoming those negative perceptions about policing. It instead protects the minority of police who routinely

[17] *Available at* https://bit.ly/2KD0aws.

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

break the law and thereby erodes relationships between communities and law enforcement.

In a recent survey, a staggering nine in ten law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings. Pew Research Ctr., *supra* at 65. Eighty-six percent agreed that their jobs have become more difficult as a result. *Id.* at 80. Many looked to improved community relations for a solution, and more than half agreed "that today in policing it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public." *Id.* at 72. Responding officers also showed strong support for increased transparency and accountability, for example, by using body cameras, *id.* at 68, and—most importantly for these purposes—by holding wrongdoing officers more accountable for their actions, *id.* at 40.

Despite the growing recognition that qualified immunity harms the very officers it seeks to protect, this Court has asserted that qualified immunity prevents over-deterrence because "there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 814 (alterations and quotation marks omitted); *see also Forrester v. White*, 484 U.S. 219, 223 (1988) ("When officials are threatened with personal liability . . . they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the

objective and independent criteria that ought to guide their conduct.").

This concern is premised on the assumption that individual officers pay their own judgments. *See, e.g.*, Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 78 (1999). That assumption is empirically unfounded. The widespread availability of indemnification *already* protects individual public officials from ruinous judgments. For one example, a recent study shows that governments paid approximately 99.98 percent of the dollars recovered in lawsuits against police officers. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014).

Far from threatening individual officers with damages judgments, then, rethinking qualified immunity would simply ensure that victims whose rights are violated have a remedy. Departments facing more frequent judgments may also invest in better prophylactic training, hiring, disciplinary, and other salutary programs. Lawsuits can serve as "a valuable source of information about police-misconduct claims," and police departments that "use lawsuit data—with other information—to identify problem officers, units, and practices" are better equipped to "explore personnel, training, and policy issues that may have led to the

claims." Joanna C. Schwartz, *What Police Learn From Lawsuits*, 33 Cardozo L. Rev. 841, 844–45 (2012).

III. *STARE DECISIS* SHOULD NOT STOP THE COURT FROM REVISITING QUALIFIED IMMUNITY.

The legal and practical infirmities of qualified immunity have not gone unnoticed by members of this Court. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute."); *see also Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards.").

A growing chorus of lower-court judges has also recognized the serious legal and practical problems with qualified immunity. *See, e.g.*, *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) ("I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. Doctrinal reform is arduous, often-Sisyphean work . . . . But immunity ought not be immune from thoughtful reappraisal."); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 U.S. Dist. LEXIS 132455, *46 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in

contradiction to the plain language of the Fourth Amendment.").[19]

Unless and until these tensions are addressed, the Court will "continue to substitute [its] own policy preferences for the mandates of Congress." *Ziglar*, 137 S. Ct. at 1872. And if the Court is inclined to reconsider qualified immunity, there are several independent reasons why it would be appropriate to do so, notwithstanding the general principle of *stare decisis*.

A. The "clearly established law" standard is practically unworkable and fails to promote stability and predictability in the law.

Although *stare decisis* is a "vital rule of judicial self-government," it "does not matter for its own sake." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). Rather, it is important precisely "because it 'promotes the evenhanded, predictable, and consistent development of legal principles.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). The rule therefore

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[19] *See also Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, No. CIV 16-0765, 2018 U.S. Dist. LEXIS 147840, *57 n.10 (D. N.M. Aug. 30, 2018) ("The Court disagrees with the Supreme Court's approach [to qualified immunity]. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy."); *Thompson v. Clark*, No. 14-CV-7349, 2018 U.S. Dist. LEXIS 105225, *26 (E.D.N.Y. June 11, 2018) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny."); Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, Dissent (Fall 2017) (essay by judge on the U.S. District Court for the Eastern District of Wisconsin); Jon O. Newman, Opinion, *Here's a Better Way to Punish the Police: Sue Them for Money*, Wash. Post (June 23, 2016) (article by senior judge on the Second Circuit).

"allows [the Court] to revisit an earlier decision where experience with its application reveals that it is unworkable." *Id.* Qualified immunity—especially the "clearly established law" standard—is a textbook example of an unworkable doctrine that has utterly failed to provide the "stability, predictability, and respect for judicial authority" that comprise the traditional justifications for *stare decisis* in the first place. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court announced the rule that defendants are immune from liability under Section 1983 unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This test was intended to define qualified immunity in "objective terms," *id.* at 819, in that the defense would turn on the "objective" state of the law, rather than the "subjective good faith" of the defendant, *id.* at 816. But the "clearly established law" standard announced has proven hopelessly malleable and indefinite, because there is simply no objective way to define the level of generality at which it should be applied.

Since *Harlow* was decided, this Court has issued dozens of substantive qualified immunity decisions that attempt to hammer out a workable understanding of "clearly established law," but with little practical success. On the one hand, the Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and stated that "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552

(2017) (quoting *Anderson v. Creighton*, 483 U. S. 635, 640 (1987)). But on the other hand, it has said that its case law "does not require a case directly on point for a right to be clearly established," *Kisela*, 138 S. Ct. at 1152 (quoting *White*, 137 S. Ct. at 551), and that "'general statements of the law are not inherently incapable of giving fair and clear warning.'" *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

How to navigate between these abstract instructions? The Court's specific guidance has been no more concrete—it has stated simply that "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 742). The problem, of course, is that this instruction is circular—how to identify clearly established law depends on whether the illegality of the conduct was clearly established. It is therefore no surprise that judge and scholars alike repeatedly note how much confusion this standard has created. *See* Pet. at 16–20.

To the extent that judicial precedent fails to promote the goals of stability and predictability, *stare decisis* is entitled to proportionally less consideration. *See Johnson*, 135 S. Ct. at 2562. That is exactly the case with qualified immunity.

B. The Court has repeatedly rejected the idea that *stare decisis* precludes reconsideration of qualified immunity.

Qualified immunity is also not entitled to the "special force" that is traditionally accorded *stare decisis* in the realm of statutory precedent. *Hilton*, 502 U.S.

at 202. Although the doctrine is nominally derived from Section 1983, it is doubtful whether qualified immunity should even be characterized as "statutory interpretation." It is not, of course, an interpretation of any particular word or phrase in Section 1983. Rather, in practice, this Court has treated qualified immunity more like a species of federal common law. And in the realm of federal common law, *stare decisis* is less weighty, precisely because the Court is expected to "recogniz[e] and adapt[] to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

For example, in *Pierson v. Ray*, 386 U.S. 547 (1967), the Court created a good-faith defense to suits under Section 1983, after having previously rejected the existence of any such defenses in *Myers v. Anderson*, 238 U.S. 368 (1915). Then in *Harlow*, the Court replaced subjective good-faith assessment with the "clearly established law" standard. 457 U.S. at 818–19. And the Court created a mandatory sequencing standard in *Saucier v. Katz*, 533 U.S. 194 (2001)—requiring courts to first consider the merits and then consider qualified immunity—but then overruled *Saucier* in *Pearson v. Callahan*, 555 U.S. 223 (2009), which made that sequencing optional.

Indeed, the *Pearson* Court explicitly considered and rejected the argument that *stare decisis* should prevent the Court from reconsidering its qualified immunity jurisprudence. The Court noted that the *Saucier* standard was a "judge-made rule" that "implicates an important matter involving internal Judicial Branch operations," and that "experience has pointed up the precedent's shortcomings." *Id.* at 233–34. As this brief has endeavored to show, the same charges

could be laid against qualified immunity in general. It would be a strange principle of *stare decisis* that permitted modifications only as a one-way ratchet in favor of *greater* immunity (and against the grain of text and history to boot).

C. Qualified immunity abets the ongoing violation of citizens' constitutional rights.

As discussed at length above, qualified immunity is no mere technical error; rather, the practical effect of the doctrine is to all but eviscerate our best means of ensuring official accountability. This effect matters not just because of the grave consequences for citizens and public officials alike, but also because it further reinforces the idea that *stare decisis* should not preclude reconsideration of the doctrine.

As this Court has repeatedly recognized, *stare decisis* is at its weakest when adherence to past precedents would continue to subject citizens to ongoing, unconstitutional misconduct. *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013) ("The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections."); *Arizona v. Gant*, 556 U.S. 332, 348 (2009) ("We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice.").

While qualified immunity is not itself a constitutional rule, it has the effect of abetting constitutional violations, because it vitiates the very statute that was intended to secure and vindicate constitutional rights. The mere fact that some state officials may have come to view the protection of the doctrine as an entitlement "does not establish the sort of reliance interest that could outweigh the countervailing interest

that all individuals share in having their constitutional rights fully protected." *Gant*, 556 U.S. at 349.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant certiorari.

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