No. 19-676

In the Supreme Court of the United States

JOSEPH A. ZADEH & JANE DOE, PETITIONERS

v.

MARI ROBINSON, SHARON PEASE & KARA KIRBY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In an effort to combat the nation's opioid crisis, and to protect patients from overzealous prescribers, Texas officials investigated and copied records from the office of Joseph Zadeh, a physician. Zadeh thereafter signed an agreed order restricting his prescription authority on the grounds that he was unlawfully operating a pain-management clinic.

Zadeh sued, arguing that the state officials' conduct violated his Fourth Amendment rights. The Fifth Circuit agreed. Nevertheless, the court declined to impose liability because no clearly established law placed the state officials' actions beyond debate. After all, Fourth Amendment doctrine is particularly murky when it comes to administrative searches of closely regulated businesses like Zadeh's.

Zadeh does not allege that the Fifth Circuit misapplied settled law. Instead, he asks this Court to undertake a wholesale reexamination of the doctrine of qualified immunity. Therefore, the questions presented are:

1. Whether the Court should reinterpret section 1983 and overturn thousands of cases across many decades holding that state officials are immune from suit and liability except where settled law clearly proscribes their conduct.

2. If so, whether the respondents acted "under color of" any Texas "statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983.

RELATED PROCEEDINGS

Zadeh v. Robinson, No. 1:15-CV-598-RP, U.S. District Court for the Western District of Texas. Judgment entered Feb. 17, 2017.

Zadeh v. Robinson, No. 17-50518, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 2, 2019.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners ask the Court to reconsider—or overrule outright—the longstanding doctrine of qualified immunity. The Court should decline that invitation. For many decades, this Court has consistently and correctly read section 1983 in light of the common-law background its text incorporates. An unbroken chain of decisions spanning nearly forty years confirms that liability does not attach unless settled law places the state actor's conduct beyond debate. In other words, the state actor must be plainly incompetent or knowingly violate the law. The Fifth Circuit faithfully applied that rule below, granting qualified immunity to officers who executed a subpoena

they reasonably believed was justified. There is no basis for this Court to intervene.

Unable to fault the decision below, Petitioners cherry-pick language from a handful of decisions to suggest that lower courts apply the qualified-immunity doctrine inconsistently. But their own brief demonstrates the opposite. Petitioners admit that there are thousands of qualified-immunity decisions each year; the fact that such a massive sample size produces only a few questionable outcomes is proof of success, not failure. And the Fifth Circuit does not depart from its sister circuits; all consistently apply the same test.

Even if Petitioners' stories of confusion and misalignment were true (and they are not), Petitioners barely acknowledge the insurmountable *stare decisis* hurdle that stands in the way of overruling such well-settled law. None of the *stare decisis* considerations permits this Court to undertake the overhaul Petitioners request.

There is no good reason to revisit qualified immunity. The petition should be denied.

STATEMENT

1. a. Texas, along with the rest of the nation, is in the grips of what the Centers for Disease Control has labeled an opioid epidemic. *See* Centers for Disease Control, "Understanding the Epidemic," https://www.cdc.gov/drugoverdose/epidemic/index.html. Opioid overdoses claim the lives of 130 Americans each day. *Id.* The epidemic "began with increased prescribing of opioids" by physicians in the 1990s. *Id.*

In 2015, more than two million Americans "had a substance use disorder involving prescription pain

relievers." Am. Soc'y of Addiction Medicine, *Opioid Addiction 2016 Facts & Figures* 1 (2016), https://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf. Opioid addiction is driving the overdose epidemic, "with 20,101 overdose deaths related to prescription pain relievers" in 2015 alone. *Id.*

Four of the top 25 cities for opioid abuse are in Texas. Dose of Reality: Prevent Prescription Painkiller Misuse in Texas, "Raising Awareness to Help Save Lives," http://doseofreality.texas.gov/. In 2013, the year the Texas Medical Board began the investigation at issue here, 70 opioid prescriptions were dispensed for every 100 people in Texas. Centers for Disease Control, "U.S. State Prescribing Rates, 2013," https://www.cdc.gov/drugoverdose/maps/rxstate2013.html.

Among the State's tools for addressing this crisis are the Board's administrative subpoena and inspection powers. These powers authorize the Board to obtain records and perform inspections of pain-management clinics (or clinics operating like pain-management clinics, *see* Tex. Occ. Code § 168.053) to ensure that those prescribing controlled substances to Texans follow the law.

b. Petitioner Dr. Joseph Zadeh, an internal medicine specialist, ran an unregistered pain-management clinic. After receiving a complaint about Zadeh from the federal Drug Enforcement Agency (DEA), the Board began to investigate whether Zadeh's prescription practices violated the Texas Medical Practices Act and its

implementing rules. *See* Pet. App. 2a, ROA.927-28; *see also* ROA.706 (Board complaint dated Mar. 12, 2015).[1]

On October 22, 2013, two Board investigators, Respondents Sharon Pease and Kara Kirby, accompanied by two DEA agents, arrived at Zadeh's office to serve an administrative subpoena for records. Pet. App. 3a. The subpoena bore the signature of Respondent Mari Robinson, executive director of the Board, and sought immediate compliance. ROA.977-78.

Zadeh's medical assistant informed the investigators that Zadeh was not available that day, as he was traveling. ROA.939. The assistant telephoned Zadeh and Zadeh's counsel for guidance. Pet. App. 3a. Following that conversation, the investigators stated that, if the assistant did not produce the records, the Board "would proceed in suspending Dr. Zadeh's license." ROA.939.

The assistant produced the records. ROA.940. The investigators remained onsite reviewing and copying the records until Zadeh's counsel arrived and asked them to leave. ROA.943.

2. Petitioners sued all Respondents in their individual capacities, and Robinson in her official capacity, for declaratory and monetary relief under 42 U.S.C. § 1983. They claimed violations of their Fourth Amendment, due process, and privacy rights. ROA.421, 511 n.1. Petitioners claimed that Respondents violated these rights in two ways: first, by executing the subpoena without an opportunity for precompliance review; second, by physi-

[1] "ROA" refers to the record on appeal before the Fifth Circuit.

cally searching the office beyond the scope of the subpoena. Pet. App. 82a-83a, 96a; ROA.1393-94.

After complex motions practice, the district court reached two conclusions relevant here. First, it concluded that Respondents Pease and Kirby were entitled to summary judgment on qualified immunity grounds in connection with their execution of the subpoena because no clearly established law prohibited their conduct. ROA.1402-05. Second, it determined that Respondent Robinson was entitled to summary judgment because no evidence supported either direct or supervisory liability. ROA.1398-1402.

3. Petitioners appealed to the Fifth Circuit, challenging the district court's qualified-immunity determination as to Pease and Kirby and the supervisory liability determination as to Robinson in her individual capacity. *See* Pet. App. 77a; ROA.1398-99.

The Fifth Circuit affirmed, both initially and on rehearing. Pet. App. 2a. The court concluded that Respondents violated Petitioners' Fourth Amendment right to an opportunity for precompliance review of the subpoena. Pet. App. 7a. The court further determined that the exception to that requirement for closely regulated industries did not apply. Pet. App. 11a. But the court held that clearly established law did not preclude Respondents from relying on the exception; therefore, Respondents were entitled to qualified immunity. Pet. App. 19a-20a.

Judge Willett initially agreed with those conclusions. Pet. App. 65a. On rehearing, however, he dissented from the conclusion that Respondents are entitled to qualified immunity. Pet. App. 26a.

4. Petitioners filed a petition for a writ of certiorari. They challenge only the grant of qualified immunity for Pease and Kirby regarding execution of the subpoena—claiming, for the first time, infirmities in qualified-immunity doctrine.[2]

REASONS FOR DENYING THE PETITION

In an unbroken chain of cases spanning nearly four decades, this Court has consistently reaffirmed the doctrine of qualified immunity. Thousands—if not tens of thousands—of judicial decisions have conferred qualified immunity on state actors consistent with this Court's longstanding pronouncement that section 1983 does not impose liability on state officials unless settled law places their conduct beyond debate.

Petitioners ask this Court to revisit or overrule that wall of authority. The Court should decline to do so for

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[2] Petitioners do not renew their challenge to dismissal of their claims for declaratory relief, *see* Pet. App. 22a, never challenged dismissal of their privacy and due process claims, *see* Pet. App. 99a-101a, and do not renew their challenge to dismissal of their Fourth Amendment claims based on pretext, *see* Pet. App. 20a.

Petitioners do not renew their challenge to dismissal of their claims against Robinson in her individual capacity based on supervisory liability, *see* Pet. App. 24a-26a, never challenged summary judgment in favor of Robinson in her individual capacity based on direct liability, *see* ROA.1398-99, and never challenged dismissal of their claims against Robinson in her official capacity, *see* ROA.1393. Accordingly, Petitioners have forfeited any challenge to the judgment in favor of Robinson.

Petitioners do not renew their challenge to summary judgment in favor of Pease and Kirby regarding the physical search.

at least three reasons. First, there is no disagreement among the courts below over how to apply this Court's precedents. Petitioners cherry-pick out-of-context language from a handful of opinions to paint a picture of confusion, but further examination of those few examples only proves that the current doctrine is generally applied correctly and consistently. Petitioners acknowledge that federal courts resolve thousands of qualified-immunity cases every year; a handful of errors in such a large sample size is no basis for a comprehensive overhaul. In fact, such a low error rate for such an enormous sample size is cause for confidence, not concern.

Second, no overhaul is warranted because the Court's current formulation of qualified immunity correctly interprets section 1983 in light of its underlying common-law principles. And even if there were some daylight between the original understanding of section 1983 and current doctrine, statutory *stare decisis* compels adherence to current law. There is no justification for the overhaul Petitioners request. That is especially so in this doctrinal area because it would make little sense to reevaluate section 1983 *immunity* without also reexamining section 1983 *liability* and the meaning of "under color of."

Third, the decision below correctly applies this Court's precedents. The panel majority held that no clearly established law prohibited the investigators from seeking immediate compliance with an administrative subpoena to investigate allegedly improper controlled-substance prescriptions. To reach a different result would require a comprehensive reformulation, not a minor adjustment, of qualified-immunity doctrine.

I. The Lower Courts Consistently and Correctly Apply this Court's Precedents.

Section 1983 imposes liability on state officials for the "deprivation of any rights" made "under color of any statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. The Court has long interpreted that statute to allow for liability only when a state official's conduct was clearly proscribed by settled law. That formulation of qualified immunity is applied consistently and correctly in thousands of cases across the federal courts every year. No circuit split exists. To the extent the doctrine produces an occasional wayward analysis across a sample size of thousands, that only counsels *against*, not *for*, review.

A. The Court has provided clear instructions on qualified immunity.

The Court has applied the same qualified-immunity standard for nearly forty years, since *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court provided in *Harlow* that qualified immunity turns on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Id.*; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). The clearly established law standard corresponds to principles of fair notice: Officials cannot "fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818.

The Court has applied the same standard, guided by the same principles, ever since. As the Court recently reiterated, in *District of Columbia v. Wesby*, officials are entitled to qualified immunity unless "every reasonable

official would interpret [precedent] to establish the particular rule the plaintiff seeks to apply," placing "the constitutionality of the officer's conduct 'beyond debate.'" 138 S. Ct. 577, 589-90 (2018) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011)). Properly applied, qualified immunity permits only claims against "plainly incompetent" officials or officials who "knowingly violate the law." *Id.* at 589 (quotations omitted).

It is well settled that identifying "clearly established" law generally requires "identify[ing] a case where an offic[ial] acting under similar circumstances . . . was held to have violated the [Constitution]." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam). The Court has consistently held that plaintiffs cannot make this showing "simply by alleging violation of extremely abstract rights," *id.*—for instance, "the right to be free from unreasonable searches and seizures," *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015)—because general rules do not adequately notify officials of how the law applies to the facts before them, *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

The Court has repeatedly reinforced these standards. *See City of Escondido v. Emmons*, 139 S. Ct. 500, 503-04 (2019) (per curiam) ("The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case. That is a problem under our precedents."); *White*, 137 S. Ct. at 551 ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases."); *see also Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) ("The Supreme Court reserves 'the extraordinary remedy of a summary reversal' for decisions that are

'manifestly incorrect.' Yet it routinely wields this remedy against denials of qualified immunity." (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (collecting cases)).

Even critics of qualified immunity acknowledge the doctrine's "unflinching" consistency. *Cole v. Carson*, 935 F.3d 444, 471, 473 (5th Cir. 2019) (en banc) (Willett, J., dissenting); *see* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 82-83 (2018) (noting 30 applications of the same doctrine over the last 35 years). *Compare Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring) (calling for the Court to "reconsider our qualified immunity jurisprudence"), *with Wesby*, 138 S. Ct. at 582 (Thomas, J.) (applying qualified immunity).

B. The claimed division of authority is illusory.

Petitioners accuse the Fifth Circuit of distorting this Court's precedents. Specifically, Petitioners claim that the Court applies an "outlier approach" that "requir[es] a very substantial degree of factual similarity" for clearly established law. Pet. 17. But the Fifth Circuit is no "outlier" at all; it correctly applied this Court's doctrine in this case, the same way other circuits do. Moreover, the Fifth Circuit, sitting en banc shortly after the panel decision in this case, eradicated any daylight that might have once existed between the Fifth Circuit and its sister circuits.

1. a. The decision below turns on this Court's pronouncements described above. The Fifth Circuit applied the standard provided by this Court and granted Respondents qualified immunity because no precedent

placed the Fourth Amendment issues related to the Board's subpoena "beyond debate."

Quoting *Wesby* and *Reichle*, the Fifth Circuit explained that Respondents "are entitled to qualified immunity 'unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time."'" Pet. App. 6a (quoting *Wesby*, 138 S. Ct. at 589 (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

Proceeding from that foundation, the decision below held first that this Court has clearly established a Fourth Amendment right to an opportunity for precompliance review of an administrative search in most—but not all—circumstances. Pet. App. 6a-7a. Among the instances in which the opportunity is not constitutionally required are those within the exception for closely regulated industries, when the regulatory regime provides an adequate warrant substitute in the form of notice and limited officer discretion. Pet. App. 7a-8a (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978), and *New York v. Burger*, 482 U.S. 691, 702-03 (1987)). Whether an industry is closely regulated involves a multi-factor balancing test, *Burger*, 482 U.S. at 702-03, which the decision below analyzed over several pages, Pet. App. 7a-11a. And whether there is an adequate warrant substitute involves a holistic evaluation of the regulatory regime authorizing the search, *Burger*, 482 U.S. at 702-03, which the decision below also analyzed over several pages, Pet. App. 12a-14a. These analyses led the Fifth Circuit to conclude that a Fourth Amendment violation occurred: The subpoena did not satisfy the exception under *Burger* because the

regulatory regime did not provide the requisite warrant substitute. Pet. App. 14a.

The same analyses, however, supported the Fifth Circuit's conclusion that no clearly established law proscribed Respondents' conduct. Pet. App. 15a-20a. The court framed the standard as "whether a reasonable person would have believed that his conduct conformed to the constitutional standard in light of the information available to him and the clearly established law." Pet. App. 15a (citation omitted). And ultimately, the court grounded its "clearly established" analysis in this Court's decision in *Wesby*: "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiffs seek to apply." 138 S. Ct. at 590; *see* Pet. App. 16a. That is, to be clearly established, "existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" Pet. App. 16a (quoting *Wesby*, 138 S. Ct. at 589 (quoting *al–Kidd*, 563 U.S. at 741)).

Applying *Wesby*, the Fifth Circuit found no "close congruence" between existing law and the facts of this case placing Respondents' conduct "beyond debate." Pet. App. 15a-16a (quoting *Wesby*, 138 S. Ct. at 589). To the contrary, the Fifth Circuit observed that existing Fifth Circuit law—cases holding that the requirements of notice and limited discretion were satisfied—established the opposite.

For example, *Beck v. Texas State Board of Dental Examiners* found the notice requirement satisfied in a statute that "explicitly permitted inspections without prior notice," but "did not say . . . that the *only* sufficient substitute under *Burger* was a statute authorizing no-

notice searches." Pet. App. 16a-17a (emphasis added) (citing 204 F.3d 629, 639 (5th Cir. 2000)). Therefore, the court here concluded, "some, even many, reasonable officers would believe" that in this case "the owner of the premises was charged with knowledge that a statute authorized the search." Pet. App. 18a. Indeed, the laws in this case are comparable to laws that provided adequate notice under *Burger* in other cases. *Compare* 22 Tex. Admin. Code § 195.3 (a)-(b) ("The board may conduct inspections to enforce these rules . . . . Unless it would jeopardize an ongoing investigation, the board shall provide at least five business days' notice before conducting an on-site inspection . . . ."), *with United States v. Fort*, 248 F.3d 475, 478 (5th Cir. 2001) ("An officer [of the department] 'may enter or detain on a highway or at a port of entry a motor vehicle that is subject to this chapter.'"), *and Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 200 (5th Cir. 2009) (faulting officials for going beyond the "periodic inspections" provided by the regulatory scheme, without implying the regulatory scheme provided inadequate notice of on-demand searches).

The court's cases on limited discretion similarly failed to place Respondents' conduct beyond debate. The court concluded that Respondents could have reasonably believed their discretion was adequately limited based on *Beck*'s finding that a statute "permitt[ing] the official to conduct inspections during 'reasonable times' after 'stating his purpose' and presenting his credentials to the owner" satisfies *Burger*. Pet. App. 16a-18a (citing 204 F.3d at 638-39). And the majority correctly accounted for other circuit decisions upholding administrative searches without clearly limiting official discretion in

choosing who is searched. Pet. App. 18a-19a (citing *Ellis v. Miss. Dep't of Health*, 344 F. App'x 43, 45-46 & nn.8-10 (5th Cir. 2009) (per curiam, unpublished); *Fort*, 248 F.3d at 482).[3]

In short, in light of the "intricacies of *New York v. Burger*, which permit warrantless searches when they satisfy a three-factor test," the court could not identify a case or series of cases that placed Respondents' conduct "beyond debate." Pet. App. 17a.

b. None of this Court's precedents required the Fifth Circuit to reach a different result. The Court has never set clear rules governing the relationship between the *Burger* exception and administrative subpoenas, and none of its decisions establishes that this search, pursuant to *both* a regulatory scheme and a subpoena,

[3] It appears Petitioners endorse (at 21) the dissent's proposed narrowing of qualified immunity: that "this court shouldn't determine whether exceptions to violations are clearly established"; that this case ought to be settled on the grounds that "[n]o exception applies"; "[a]nd it's only when an exception applies that the general rule doesn't." Pet. App. 34a-35a.

But that novel approach has never been endorsed by this Court or adopted anywhere. And it would make little sense to do so here, since Fourth Amendment cases are rife with exceptions to general rules. Violations are often *defined* by the lack of an applicable exception. So, violations are easily framed as a failure to comply with a general rule, a failure to satisfy an exception to that rule, or both. That is why the same qualified-immunity analysis applies whatever the framing of the Fourth Amendment issue. *See Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (granting qualified immunity for relying on the consent exception to the warrant requirement as applied in some, but not all, circuits).

provided no adequate warrant substitute under *Burger*. *See Burger* 482 U.S. at 708 (addressing no-warrant, no-subpoena demand to enter and inspect a junkyard); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 412-13 (1984) (addressing only the constitutionality of the official entering the premises to serve the subpoena). To be sure, the Court has assumed, without deciding, that a subpoena provides additional limits on official discretion, beyond those imposed by the regulatory scheme itself. *See v. City of Seattle*, 387 U.S. 541, 544 (1967) (finding analogous the "common investigative technique[s]" of subpoenas and inspections and observing broader inherent discretion in the latter); *accord City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452, 2454 (2015). But that "clearly establishes" nothing.

2. a. Petitioners claim that the decision below demonstrates an outlier view inconsistent with the approaches of other circuits. That argument misconstrues both the decision below and the approaches of other circuits, all of which apply the same general rule and exception this Court has fashioned. Indeed, Petitioners offer nothing to suggest that this case would have been decided differently in any other circuit.

Petitioners assert that two sets of circuits take a "more flexible" approach to clearly established law than the Fifth Circuit. Pet. 18-19. Petitioners' first set, consisting of the Third, Fourth, Eighth, and Ninth Circuits, requires "[s]ufficiently analogous—but not identical—precedent" under *Hope v. Pelzer*, 536 U.S. 730 (2002). Pet. 18-19 (quoting *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018); *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017); *Mountain Pure, LLC v. Roberts*, 814

F.3d 928, 932 (8th Cir. 2016); citing *Z.J. ex rel. Jones v. Kan. City Bd. of Police Comm'rs*, 931 F.3d 672, 683-89 (8th Cir. 2019); *Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018)).

Petitioners say that their second set—the Second, Seventh, and Tenth Circuits—requires no "factual similarity from precedent" for "obvious" constitutional violations. Pet. 19 (citing *Leiser v. Kloth*, 933 F.3d 696, 702 (7th Cir. 2019); *Simon v. City of New York*, 893 F.3d 83, 97 (2d Cir. 2018); *A.M. v. Holmes*, 830 F.3d 1123, 1135-36 (10th Cir. 2016)).

Petitioners allege that the Fifth Circuit differs from both of these approaches. According to Petitioners, the Fifth Circuit grants qualified immunity when "precedent does not '*foreclose*'" the challenged actions, relying on "relatively thin" distinctions in precedent. Pet. 17 (quoting *Morrow*, 917 F.3d at 877).

This attempt to distinguish the circuits, however, cherry-picks language to create the illusion of disagreement, where no meaningful disagreement actually exists. Indeed, what Petitioners describe as conflicting approaches are really just reflections of this Court's own pronouncements in *Wesby*. 138 S. Ct. at 589-91. *Wesby* requires a plaintiff to "identify a case where an officer acting under similar circumstances . . . was held to have violated the [Constitution]." *Id*. at 590. *Wesby* does not require "a case directly on point," but it does require a case—or, more likely, a "body of relevant case law"—placing the lawfulness of the particular conduct beyond debate. *Id.* And *Wesby* further recognizes that "there can be the rare 'obvious case,' where the unlawfulness of the offic[ial]'s conduct is sufficiently clear even though

existing precedent does not address similar circumstances." *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

That directive to plaintiffs—as *Wesby* put it, to produce a "body of relevant case law" placing the conduct beyond debate unless the violation is obvious—is the law in all circuits. Despite the petition's allusions to the contrary, the Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits all apply this framework. *See Vazquez v. County of Kern*, 949 F.3d 1153 (9th Cir. 2020); *Cole*, 935 F.3d at 453; *Kelsay v. Ernst*, 933 F.3d 975, 981-82 (8th Cir. 2019); *Leiser*, 933 F.3d at 702-03; *Colbruno v. Kessler*, 928 F.3d 1155, 1165 (10th Cir. 2019); *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 704 (4th Cir. 2018); *Kane*, 902 F.3d at 194-95 & n.44; *Simon*, 893 F.3d at 92. For good measure, the First, Sixth, Eleventh, and District of Columbia Circuits do, too. *See Gray v. Cummings*, 917 F.3d 1, 10 & n.4 (1st Cir. 2019); *Glasscox v. Argo, City of*, 903 F.3d 1207, 1218 (11th Cir. 2018); *Hedgpeth v. Rahim*, 893 F.3d 802, 809 (D.C. Cir. 2018); *Baynes v. Cleland*, 799 F.3d 600, 610-13 (6th Cir. 2015). There is no meaningful disagreement.

The Fourth Circuit perhaps best illustrates that the conflict Petitioners imagine does not exist. Petitioners quote that court's statement that law can be "clearly established based on general constitutional principles" as evidence of confusion. Pet. 19. But that language is just a restatement of *Wesby*'s rule that qualified immunity does not attach to obvious constitutional violations. *Thompson*, 878 F.3d at 98 (referencing both the general rule—the "[o]rdinar[y]" need to identify precedent—and the exception when a "general constitutional rule"

applies "with obvious clarity") (quoting *Hope*, 536 U.S. at 741). Petitioners make no effort to show how peripheral descriptions of the approach as "sliding scale" or "two-track" undermine this uniformity. Pet. 19.

Petitioners suggest that other circuits reach substantive results that differ from the Fifth Circuit's because of "relatively thin" distinctions drawn by the latter, relying on *Cleveland v. Bell*, 938 F.3d 672, 677 (5th Cir. 2019), and *Marks v. Hudson*, 933 F.3d 481, 486 (5th Cir. 2019). Pet. 17-18. This too is an empty gesture. The *Cleveland* court found no clearly established law permitting liability for deliberate indifference on a record reflecting multiple attempts to provide the prisoner medical care. 938 F.3d at 677. The court considered two cases—rejecting the first because dismissing a claim about tuberculosis treatment as frivolous "does not clearly establish anything," and the second because of the "much different" record reflecting ignored requests for medical care. *Id.* (citing *McCormick v. Stalder*, 105 F.3d 1059, 1062 (5th Cir. 1997); *Fielder v. Bosshard*, 590 F.2d 105, 108 (5th Cir. 1979)). Petitioners provide nothing to support a conclusion that only a "thin" factual distinction lies between prison staff attempting multiple times to provide medical care and prison staff ignoring requests for medical care.[4]

b. Because there is no real disagreement among the circuits, it is no surprise that Petitioners fail to show that

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[4] Petitioners' invocation of *Marks* is especially inapt, since *Marks* concluded that "there was no constitutional violation," making the question of clearly established law irrelevant. 933 F.3d at 483.

their case would have come out differently anywhere else.

Indeed, the cases they cite all vary from this one in material ways. For example, *Z.J.*, *Ioane*, *Simon*, and *Mountain Pure* do not involve warrantless administrative searches. *A.M.* offers no analysis of the clearly established law of searches like this one. And *Leiser*, *Kane*, and *Thompson* do not involve the Fourth Amendment at all.

It is almost certain that the other circuits would reach the same conclusion the Fifth Circuit did here. The Second Circuit has applied the *Burger* exception to "[u]nannounced, on-site inspections" "related to patient care" in nursing homes, noting the "virtually non-existent" privacy expectations in regulatory compliance matters. *Blue v. Koren*, 72 F.3d 1075, 1081 (2d Cir. 1995). The Ninth Circuit has applied the "administrative search exception" to a medical board's inspection of a doctor's pharmaceutical and patient records because state law required "all records of manufacture and of sale, purchase or disposition of dangerous drugs" to "be maintained and open for inspection." *Costantini v. Med. Bd. of Cal.*, 34 F.3d 1071 (9th Cir. 1994) (unpublished); *see also United States v. Jamieson-McKames Pharm., Inc.*, 651 F.2d 532, 537 (8th Cir. 1981) (applying the *Burger* exception to a pharmaceutical distributor).

3. Even if the decision below contained language that could be read as inconsistent with the approaches of other circuits, that would provide no basis to label governing Fifth Circuit law an "outlier." Petitioners fail to disclose that mere weeks after the decision below issued, the en banc Fifth Circuit clarified its approach to

qualified immunity. In *Cole*, the en banc court made clear that qualified immunity does not require the identification of an identical case. 935 F.3d at 453. *Cole* did not "depend[] on the fact patterns of other cases," relying instead on the exception for "obvious" cases, to find that the officers violated clearly established law prohibiting deadly force against a suspect who "poses no immediate threat to the officer and no threat to others," and requiring advance warning of deadly force "where feasible." *Id.*

Cole confirms that the Fifth Circuit stands in line with other courts. There is no error or confusion for this Court to correct.

II. Qualified Immunity Is Consistent with Section 1983, and Nothing Justifies the Overhaul Petitioners Seek.

The Court's doctrine of qualified immunity is consistent with the text, context, and history of section 1983. And even if the Court had strayed from the statute, Petitioners offer no compelling basis to set aside decades of precedent and undermine tens of thousands of decisions.

A. Qualified immunity correctly interprets section 1983.

This Court has correctly interpreted section 1983 in light of the common-law and federalism principles that inform the statute's text, context, and history.

1. The Court's qualified-immunity jurisprudence remains faithful to the common-law background of section 1983, which protected societal values by limiting official liability for good faith, reasonable conduct. And it is proper to consider the statute's common-law background. *See* Bryan A. Garner & Antonin Scalia, *Reading*

Law 318-19 (2012); *cf. Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, No. 18-1171, 2020 WL 1325816, at *5 (U.S. Mar. 23, 2020) ("[W]e generally presume that Congress legislates against the backdrop of the common law.").

The common-law origins of the qualified-immunity defense have played the same critical role in the doctrine for over fifty years. *E.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) ("At common law, government actors were afforded certain protections from liability . . . ."); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (finding federal statutory immunity proper as "the officers had such a limited privilege under the common law"). This role is to protect values that are "important to 'society as a whole.'" *White*, 137 S. Ct. at 551 (first citing *Sheehan*, 135 S. Ct. at 1774 (collecting cases), then quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Specifically, the Court has explained that qualified immunity allows public officials to carry out their duties without being overly cautious for "fear of personal monetary liability and harassing litigation." *Ziglar*, 137 S. Ct. at 1866 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). Qualified immunity gives officials "breathing room" to do their jobs well, allowing for "reasonable but mistaken judgments about open legal questions." *Id.* (quoting *al–Kidd*, 563 U.S. at 743).

Accounting for qualified immunity's common-law principles is especially important given the common-law basis of the scope of section 1983 liability. The Court explained this symmetry best in *Pierson*. That decision recognized the defense as a common-law counterpart to the Court's previous interpretation of "under color of state

law," within the meaning of section 1983, to include conduct that violates state law. 386 U.S. at 554-57; *see Monroe v. Pape*, 365 U.S. 167, 187 (1961) (reading the statute "against the background of tort liability that makes a man responsible for the natural consequences of his actions"), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). If Petitioners want to revisit section 1983 *immunity*, they must also accede to a reevaluation of *liability*.

Petitioners take issue with the absence of explicit statutory text stating the current doctrine of qualified immunity. Pet. 23. But this Court has never required that explicit text in light of section 1983's drafting history and common-law background. *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism* 9-10, 108 Georgetown L.J. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544897. "[F]or good or ill, the 1800s Congresses did not always expressly enact defenses even when [they] wanted them"—at least, as the 1800s Court understood its contemporary coequal branch. *Id.* at 10. Whether the Court would recognize a common-law defense in a new statute passed today sheds no light on how the 1871 Congress that passed section 1983 expected the Court to interpret the statute. *Cf. Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (declining to discount previous decisions just because "we would decide a case differently now than we did then").

Petitioners claim that qualified immunity is inconsistent with the common-law background of section 1983. Pet. 22. But the common-law background includes ways that American law has limited liability for government

officials' reasonable mistakes "from the earliest days of the republic." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1864 (2018). Although "not every officer received immunity in every case," courts commonly applied good-faith principles to limit liability for official actions. *Id.* at 1865-66; *see, e.g.*, *Filarsky*, 566 U.S. at 388 (collecting nineteenth-century cases noting the "well settled" good-faith defense for individuals enforcing the law). As one treatise explained, courts applied a "legal presumption in favor of the validity of [the officer's] official acts," giving an officer "the most lenient consideration consistent with the law, when it is manifest that he has acted throughout with perfect good faith, and striven honestly to do his whole duty." William L. Murfee, *A Treatise on the Law of Sheriffs and Other Ministerial Officers* 495 (1884); *accord Wilkes v. Dinsman*, 48 U.S. 89, 89 (1849) ("[T]he acts of a public officer . . . are to be presumed legal till shown by others to be unjustifiable. It is not enough to show . . . an error in judgment . . . .").

The common-law defense contemplated, at least sometimes, the reasonableness of the conduct: "If an officer uses a reasonable and due discretion he cannot be made liable as for wrongful conversion . . . ." Murfee, *supra*, at 496; *see also* Nielson & Walker, *Qualified Defense*, *supra*, at 1867-68, 1898 n.90 (identifying reliance on "something at least akin to an objective standard") (citing *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)).

And, as good faith has "*both* an objective and a subjective aspect," the objectivity of modern qualified

immunity traces directly back to its common-law origins. *Harlow*, 457 U.S. at 815 (emphasis added).

2. The Court's current doctrine correctly reflects section 1983's federalism-promoting underpinnings. "Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 572 U.S. 844, 857-58 (2014); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). The Court "construes statutes narrowly when a broader construction would infringe on federalism interests." Nielson & Walker, *Federalism*, *supra*, at 29.

Had *Pierson* not recognized a common-law defense counterpart to *Monroe*'s common-law scope of liability, section 1983 liability would undoubtedly be broader. This liability implicates the functions and interests of States in their sovereign capacities. *See Wyatt v. Cole*, 504 U.S. 158, 167 (1992) ("Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."). The functions include "States' ability to enforce their laws without undue federal interference"; the interests include "hiring competent officers" and "preventing those officers from shirking their dut[ies] for fear of federal liability"—all of which the Court consistently considers in applying qualified immunity. Nielson & Walker, *Federalism*, *supra*, at 5; *see, e.g.*, *Filarsky*, 566 U.S. at 389-90.

B. *Stare decisis* compels adherence to the Court's qualified-immunity jurisprudence.

Even if current doctrine were unsound, Petitioners' request to overhaul or repeal it conflicts with settled principles of *stare decisis*. Petitioners face a particularly heavy burden because the doctrine they attack is grounded in a statute, not the Constitution. And the relief they seek would offend federalism principles and upset the strong reliance interests of States. Against that backdrop, Petitioners' broadside attack on deeply entrenched precedent requires extraordinary justification, far beyond anything Petitioners offer.

1. Because qualified-immunity doctrine arises in the course of interpreting statutory text, *stare decisis* "carries enhanced force." *Kimble*, 135 S. Ct. at 2409; *see also* Nielson & Walker, *Qualified Defense*, *supra*, at 1855 (observing that qualified immunity "is largely statutory in character").

There is good reason to give this Court's statutory decisions enhanced *stare decisis* protection. After all, "unlike in a constitutional case, critics of [the] ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble*, 135 S. Ct. at 2409. The Court has consistently left to congressional policymakers policy-oriented "[c]laims that a statutory precedent has 'serious and harmful consequences.'" *Id.* at 2414 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014)). Petitioners make just such a claim. Pet. 14.

The Court is particularly hesitant to uproot an interpretation that Congress has declined to correct over a

long period of years. *Kimble*, 135 S. Ct. at 2409-10 (declining to overrule a case that Congress left alone "for more than half a century"). The Court upholds statutory interpretations that are criticized as "unrealistic, inconsistent, or illogical"—even when the Court shares those views—based on consistent application in many cases over many years. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) ("It is an aberration that has been with us now for half a century[.]"). Petitioners make no claim of congressional intervention against the emergence and development of qualified immunity over the last half century. Modern qualified-immunity doctrine emerged nearly forty years ago, *see Harlow*, and traces back another ten years, *see Pierson*. Since then, "Congress's refusal to revisit § 1983 suggests Article I acquiescence." *Cole*, 935 F.3d at 472 n.11 (Willett, J., dissenting).

2. *Stare decisis* weighs particularly heavily in "cases involving property and contract rights" because "parties are especially likely to rely on such precedents when ordering their affairs." *Kimble*, 135 S. Ct. at 2410. These concerns are heightened for qualified immunity because the stakeholders are States: "[S]tate and local governments have structured their laws and contractual arrangements to indemnify their officers when sued in their individual capacities for official actions." Nielson & Walker, *Federalism*, *supra*, at 32. These arrangements reflect reliance interests of States and their employees in "avoid[ing] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky*, 566

U.S. at 389-90 (quoting *Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997)).

3. This Court has indicated that "growth [in] judicial doctrine or further action taken by Congress," *Kimble*, 135 S. Ct. at 2410, can support overhauling precedents. But that is not the case here, where the lack of congressional action in the face of tens of thousands of decisions indicates acquiescence. *See* pp. 25-26, *supra*.

Furthermore, this Court's own decisions counsel against change because the qualified-immunity doctrine is inextricably intertwined with other precedents broadening the scope of section 1983 liability. *See Kimble*, 135 S. Ct. at 2411 (the risk of "unsettl[ing] stable law" is particularly acute when the challenged "decision's close relation to a whole web of precedents means that reversing it could threaten others"). Qualified immunity is inseparable from the existing scope of section 1983 liability. *See Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting) ("We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented . . . ."); *see also* pp. 21-22, *supra*. For this reason, the qualified-immunity critiques that Petitioners present (at 13-16) cannot be addressed asymmetrically. Any reevaluation of qualified immunity must occur alongside reevaluation of section 1983. *Cole*, 935 F.3d at 477-78 (Ho & Oldham, JJ., dissenting) ("[I]t is better to leave things alone than to reconfigure established law in a one-sided manner.").

4. The other typical *stare decisis* factors counsel against revisiting the doctrine of qualified immunity. Petitioners fail to demonstrate that qualified immunity

"has proved unworkable." *Kimble*, 135 S. Ct. at 2411. There is no conflict in authority, semantic or substantive. *See* Part I.B, *supra*. And to the extent Petitioners offer an alternative basis to overrule qualified immunity based on its empirical assumptions, *see* Pet. 23, that is "just a different version of the argument that [qualified immunity] is wrong." *Kimble*, 135 S. Ct. at 2414.

III. The Judgment Below Is Correct.

In any event, there is no reason to take up this petition because the judgment below is correct. In order to prevail, Petitioners would have to establish in this Court that their Fourth Amendment rights were violated and that clearly established law placed Respondents' conduct "beyond debate." Because Petitioners cannot make either showing, there is no reason to grant the petition.

A. Respondents did not violate the Fourth Amendment.

In order to disturb the Fifth Circuit's judgment, the Court would need to find a Fourth Amendment violation. Respondents did not violate the Fourth Amendment, however, for two reasons. First, the *Burger* exception was satisfied because the medical profession is a closely regulated industry, and the regulatory regime and subpoena provided an adequate warrant substitute. Second, no opportunity for precompliance review was required because there was no immediate penalty for noncompliance—and in any event, a subpoena *is* an opportunity for precompliance review.

1. a. The medical profession is a closely regulated industry under *Burger*. The Fifth Circuit's erroneous

contrary conclusion did not infect the judgment because the court assumed part of the medical profession was closely regulated, ultimately grounding its finding of a Fourth Amendment violation in the warrant substitute requirement. Pet. App. 11a, 14a.

Burger defines "closely regulated" using a multi-factor evaluation of the "pervasiveness," "regularity," and "duration" of a regulatory scheme and the "owner's expectation of privacy." 482 U.S. at 701. As the Fifth Circuit acknowledged, the medical profession is "extensively regulated and has licensure requirements," federal regulations "exempt the Board from the privacy requirements of the Health Insurance Portability and Accountability Act" (HIPAA), and Texas law subjects the Board to confidentiality requirements. Pet. App. 9a, 11a (citing 45 C.F.R. § 164.512; Tex. Occ. Code §§ 159.002, 159.003(a)(5), 164.007(c)). An entire state agency is devoted to making and enforcing rules regulating the practice of medicine—rules that doctors agree to follow as a condition of licensure. *See, e.g.*, Tex. Health & Safety Code § 481.061 (requiring DEA registration to prescribe controlled substances); *id.* §§ 481.067, .075, .076 (providing law enforcement agencies, DEA, and Texas boards of pharmacy, medicine, and nursing with access to controlled-substance prescription information); Tex. Occ. Code § 162.105 (requiring training, protocols, registration, and inspections to use anesthesia in outpatient settings); 22 Tex. Admin. Code §§ 192.2, .4-.5 (same).

Warrantless administrative subpoenas of medical records have existed in Texas for almost 100 years. Act of May 19, 1953, 53d Leg., R.S., ch. 426, § 9, 1953 Tex. Gen. Laws 1029, 1036 (amending Vernon's Annotated

Revised Civil Statutes of the State of Texas, art. 4509 (1925)). And subpoenas seeking immediate compliance have been available for over 15 years—five times longer than the inspection scheme in *Burger*. *See* 22 Tex. Admin. Code § 179.4, eff. Nov. 30, 2003, 28 Tex. Reg. 10491, 10492 (2003).

Every Texas doctor knows that the Board must investigate complaints of regulatory violations without prior notice, if "notice would jeopardize [the] investigation." Tex. Occ. Code § 154.053. True, a medical *patient* has a "reasonable expectation of privacy" and can assume that records "will not be shared with nonmedical personnel without her consent." *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). But protections of patient privacy also accommodate the State's interest in protecting patients, doctors, and doctor-patient confidentiality. *See Blue*, 72 F.3d at 1081; *see also* 45 C.F.R. § 164.512 (exempting the Board from stringent HIPAA privacy requirements and authorizing the Board to obtain medical records without patient consent). Doctors do not have greater privacy interests in medical records than patients. *Burger* evaluates only the privacy interests of the doctors.

At minimum, this Court should confirm that the Fifth Circuit correctly assumed that the part of the medical profession related to controlled substances is closely regulated. But recognizing a new *Burger* category—the partially closely regulated industry, *see* Pet. App. 9a-10a—is unnecessary and unworkable. The practice of medicine is no less pervasively regulated because of the even more pervasive regulation of controlled substances. And doctors can start and stop prescribing controlled substances

at will, making that conduct an unreliable proxy for an industry. *Burger*'s warrant substitute requirement, not the closely regulated industry requirement, moderates concerns over the breadth of searches without an opportunity for precompliance review.

b. The limits imposed by the regulatory scheme, and by the subpoena, provided notice and limited official discretion. That is enough to satisfy *Burger*'s warrant requirement. Specifically, the subpoena authority, Tex. Occ. Code § 153.007, and the inspection authority, *id.* § 168.052, along with those statutes' implementing rules, 22 Tex. Admin. Code §§ 179.4(a), 195.3(b), notify doctors that they are subject to administrative searches and limit the discretion of the officials carrying them out.

Inspection authority exists only when a formal complaint is submitted, ROA.176-77, 180, or when a facility must register as a pain-management clinic based on the level of controlled-substance prescriptions, Tex. Occ. Code § 168.052. The text of the statute limits the information the Board may obtain. *Id.* § 153.007. The scope of each individual subpoena, and the fact that seeking immediate compliance is only proper in narrow circumstances, further limit official discretion. 22 Tex. Admin. Code §§ 179.4(a), 195.3(b). *Cf. Burger*, 482 U.S. at 711-12 (finding adequate a statute notifying "the operator of a vehicle dismantling business" of regular inspections, stating "who is authorized to conduct an inspection," and limiting inspections to "usual business hours," "vehicle-dismantling and related industries," and records, vehicles, or parts on site and subject to recordkeeping requirements); *See*, 387 U.S. at 544 ("The agency has the right to conduct all reasonable inspections of such

documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena.").

Doctors know about the Board's authority. Inspections and requests for records and documents—even those seeking immediate compliance—are not unduly intrusive or surprising. *Burger* requires reasonable notice and limits, not advance notice and limits on every discretionary aspect of a search. "[S]urprise is crucial if the regulatory scheme . . . is to function at all." *Burger*, 482 U.S. at 710.

2. The Fifth Circuit incorrectly assumed, to avoid conflict with an unpublished nonprecedential Fifth Circuit decision, that an opportunity for precompliance review was required in this case. Pet. App. 6a. No such opportunity was required. Alternatively, the subpoena itself satisfied that requirement.

a. No opportunity for precompliance review was required, first, because the subpoena was "jointly authorized" by Pease "and her supervisor, Belinda West," and jointly executed by Pease and Kirby. ROA.1399. The multi-person, multi-step process eliminates Fourth Amendment concerns raised by a request for documents, made and enforced at the whim of one official in the field. *Cf. See*, 387 U.S. at 544-45 (noting that when the agency itself issues a subpoena, there is no danger of a single official in the field making and enforcing the demand to search). This Court has required an opportunity for precompliance review *when there is no subpoena*, to ensure comparable Fourth Amendment protections whether the administrative search is carried out pursuant to a regulatory regime permitting no-notice inspections *or*

pursuant to a subpoena. *Patel*, 135 S. Ct. at 2453; *Burger*, 482 U.S. at 708; *See*, 387 U.S. at 544.

Second, any warning that the Board "would proceed in suspending Dr. Zadeh's license," ROA.939, states that existing proceedings against the doctor would continue. That does not demonstrate an immediate sanction for an employee's noncompliance, let alone a fine or criminal penalty. *Compare Patel*, 135 S. Ct. at 2452 (requiring an opportunity for precompliance review because "[a] hotel owner who refuses to give an officer access to his or her registry can be arrested on the spot"), *See*, 387 U.S. at 541-42 (disapproving a warehouse owner's criminal conviction and $100 fine for refusing a warrantless warehouse inspection), *and Camara v. Mun. Ct. of City & Cty. of S.F.*, 387 U.S. 523, 533 (1967) ("[B]road statutory safeguards are no substitute for individualized review, particularly when those safeguards may *only* be invoked at the risk of a *criminal* penalty.") (emphases added), *with* Tex. Occ. Code § 154.057(c) (stating that Board investigators "may not carry a firearm or exercise the powers of arrest").

b. In the alternative, *Patel* confirms that the requirement of an opportunity for precompliance review is *satisfied*—not *triggered*—by a subpoena. The Court observed that administrative subpoenas are "one way in which an opportunity for precompliance review can be made available," and indicated "that the searches authorized by [statute] would be constitutional if they were performed pursuant to an administrative subpoena." 135 S. Ct. at 2453-54.

B. No clearly established law placed Respondents' conduct "beyond debate."

Finally, for the reasons set out in Part I.B., *supra*, no decisions of this Court or the Fifth Circuit placed the alleged unlawfulness of Respondents' conduct beyond debate.

1. For the reasons discussed above, a reasonable state actor could have concluded that the medical profession is closely regulated—and nothing puts that conclusion beyond debate.

Multiple decisions compel that conclusion. For example, *Burger* phrases the test in general terms not obviously excluding the medical profession, evaluating the "pervasiveness," "regularity," and "duration" of regulation, and the owner's privacy expectations. 482 U.S. at 701. Likewise, the Court in *Colonnade Catering Corp. v. United States* found adequate regulatory duration in the liquor industry's history of no-warrant inspections as a condition of doing business. 397 U.S. 72, 77 (1970). A comparable history exists here. Tex. Occ. Code §§ 153.007, 154.053; 22 Tex. Admin. Code § 179.4 (conditioning medical license on regulations authorizing no-notice subpoenas, inspections, and investigations).

That conclusion would be especially reasonable in light of the Fifth Circuit cases treating other businesses as closely regulated. *See Ellis*, 344 F. App'x at 43 (childcare); *Club Retro*, 568 F.3d at 181 (liquor); *Fort*, 248 F.3d at 482 (commercial trucking); *Beck*, 204 F.3d at 638-39 (dentists); *United States v. Blocker*, 104 F.3d 720 (5th Cir. 1997) (per curiam) (insurance); *United States v. Thomas*, 973 F.2d 1152 (5th Cir. 1992) (salvage yards);

United States v. Schiffman, 572 F.2d 1137, 1140, 1142 (5th Cir. 1978) (pharmaceuticals); *Pollard v. Cockrell*, 578 F.2d 1002, 1014 (5th Cir. 1978) (massage). Indeed, it would be eminently reasonable for a state actor to conclude that, if massage parlors are closely regulated, so too are doctor's offices, pain-management clinics, or both. *See Pollard*, 578 F.2 at 1014.

2. There thus is no basis for Petitioners' suggestion that the Court could grant relief on grounds narrower than "revers[ing] qualified immunity in whole." Pet. 20. Indeed, because the law governing this area is exception filled and unusually murky, to deny qualified immunity here would require a complete overhaul of the doctrine. And that is exactly what *stare decisis* does not permit. *See* Part II.B, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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