No. 20-1066

In the Supreme Court of the United States

Ashlyn Hoggard,

Petitioner,

v.

Ron Rhodes, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

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. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is the lack of legal justification for qualified immunity, the deleterious effect that qualified immunity has on the power of citizens to vindicate their constitutional rights, and the erosion of accountability that the doctrine encourages.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF THE ARGUMENT

Over the last half-century, the doctrine of qualified immunity has sharply diverged from the statutory and historical framework on which it is supposed to be based. The text of 42 U.S.C. § 1983 ("Section 1983") makes no mention of immunity, and the common law of 1871 did not include the sort of across-the-board defense for all public officials that characterizes qualified immunity today. Though recent scholarship indicates some disagreement over the scope of certain good-faith immunities at common law, there is no dispute that the "clearly established law" standard is without any historical basis. Contemporary qualified immunity doctrine is therefore unmoored from any lawful justification, and in need of correction.[2]

This petition, of course, does not expressly call for the reconsideration of qualified immunity itself. Rather, it raises important doctrinal questions about how lower courts should conceptualize and apply the "clearly established law" standard first articulated in

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[2] *See, e.g.*, *Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition."); *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"); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

Harlow v. Fitzgerald, 457 U.S. 800 (1982). The confusion and disagreement in the lower courts discussed in the petition is evidence that this standard is, by its nature, inherently amorphous and unworkable.

But, until and unless the "clearly established law" standard is itself abandoned, it is crucial that the Court clarify its contours and confine its scope. Specifically, the Court should grant the petition to make clear that the reasoning of prior judicial decisions can be considered when deciding whether a defendant had "fair notice" that their conduct was unlawful. And the Court should further elaborate on the basic principle affirmed in its recent decision in *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020)—that in cases with "particularly egregious facts," it is unnecessary to identify a prior case with similar facts to overcome qualified immunity.

ARGUMENT

I. MODERN QUALIFIED IMMUNIITY DOCTRINE IS UNTETHERED FROM ANY STATUTORY OR HISTORICAL JUSTIFICATION.

Notwithstanding that the petition does not explicitly call upon the Court to reconsider qualified immunity itself, the Court should still consider the questions presented with an eye toward the doctrine's fundamentally shaky legal foundations. To the extent there are ambiguities or uncertainties in the current case law (and there are), the Court should resolve those in a manner that avoids exacerbating a pre-existing legal error—which necessarily means, limiting the scope of qualified immunity as much as possible within the bounds of existing precedent.

A. The text of 42 U.S.C. § 1983 does not provide for any kind of immunity.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Yet few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. As currently codified, Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

42 U.S.C. § 1983 (emphases added).

Notably, "the statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language just says that any person acting under state authority who causes the violation of a protected right "shall be liable to the party injured."

This unqualified textual command makes sense in light of the statute's historical context. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, itself part of a "suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[3] This statutory purpose would have been undone by

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[3] Baude, *supra*, at 49.

modern qualified immunity jurisprudence. The Fourteenth Amendment itself had only been adopted three years earlier, in 1868, and the full implications of its broad provisions were not "clearly established law" by 1871. If Section 1983 had been understood to incorporate qualified immunity, then Congress's attempt to address rampant civil rights violations in the post-war South would have been toothless.

Of course, no law exists in a vacuum, and a statute will not be interpreted to extinguish by implication longstanding legal defenses available at common law. *See Forrester v. White*, 484 U.S. 219, 225-26 (1988). In the context of qualified immunity, the Court appropriately frames the issue as whether or not "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)). But the historical record shows that the common law of 1871 did not, in fact, provide for such immunities.

B. From the founding through the passage of Section 1983, courts recognized that good faith was not a general defense to constitutional torts.

The doctrine of qualified immunity is a kind of generalized good-faith defense for all public officials, as it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. But the relevant legal history does not justify importing any such defense into the operation of Section

1983; on the contrary, the sole historical defense against constitutional torts was *legality*.[4]

In the early years of the Republic, constitutional claims typically arose as part of suits to enforce general common-law rights. For example, an individual might sue a federal officer for trespass; the defendant would claim legal authorization as a federal officer; and the plaintiff would in turn claim the trespass was unconstitutional, thus defeating the officer's defense.[5] As many scholars over the years have demonstrated, these founding-era lawsuits did not permit a good-faith defense to constitutional violations.[6]

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[7] which involved a claim against an

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[4] *See* Baude, *supra*, at 55-58.

[5] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506-07 (1987). Of course, prior to the Fourteenth Amendment, "constitutional torts" were almost exclusively limited to federal officers.

[6] *See generally* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3-14, 16-17 (2017); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14-21 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414-22 (1986).

[7] *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863 (2010) ("No case better illustrates the standards to which federal government officers were held than *Little v. Barreme*.").

American naval captain who captured a Danish ship off the coast of France. Federal law authorized seizure only if a ship was going *to* a French port (which this ship was not), but President Adams had issued broader instructions to also seize ships coming *from* French ports. *Id.* at 178. The question was whether Captain Little's reliance on these instructions was a defense against liability for the unlawful seizure.

The *Little* Court seriously considered but ultimately rejected Captain Little's defense, which was based on the very rationales that would later come to support the doctrine of qualified immunity. Chief Justice Marshall explained that "the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages." *Id.* at 179. He noted that the captain had acted in good-faith reliance on the President's order, and that the ship had been "seized with pure intention." *Id.* Nevertheless, the Court held that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* In other words, the officer's only defense was legality, not good faith.

This "strict rule of personal official liability, even though its harshness to officials was quite clear,"[8] persisted through the nineteenth century. Its severity was mitigated somewhat by the prevalence of successful

[8] Engdahl, *supra*, at 19.

petitions to Congress for indemnification.[9] But on the judicial side, courts continued to hold public officials liable for unconstitutional conduct without regard to a good-faith defense. *See, e.g.*, *Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891) (Holmes, J.) (holding liable members of a town health board for mistakenly killing an animal they thought diseased, even when ordered to do so by government commissioners).

Most importantly, the Court originally rejected the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Supreme Court considered a suit against election officers that had refused to register black voters under a "grandfather clause" statute, in violation of the Fifteenth Amendment. *Id.* at 380. The defendants argued that they could not be liable for money damages under Section 1983, because they acted on a good-faith belief that the statute was constitutional.[10] The *Myers* Court noted that "[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in argument," but it ultimately rejected these arguments, noting that they were "disposed of by the ruling this day made in the *Guinn* Case [which held that such statutes were unconstitutional] and by the very terms of [Section 1983]." *Id.* at 378. In other words, the defendants

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[9] Pfander & Hunt, *supra*, at 1867 (noting that, in the early Republic and antebellum period, public officials secured indemnification from Congress in about sixty percent of cases).

[10] See Br. for Pls. in Error at 23-45, *Myers v. Anderson*, 238 U.S. 368 (1915) (Nos. 8-10).

were violating the plaintiffs' constitutional rights, so they were liable—period.

While the *Myers* Court did not elaborate much on this point, the lower court decision it affirmed was more explicit:

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910).

This forceful rejection of any general good-faith defense "is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983's enactment."[11]

C. The "clearly established law" standard is plainly at odds with any plausible reading of nineteenth-century common law.

The Court's primary rationale for qualified immunity is the purported existence of similar immunities that were well-established in the common law of 1871. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). But while there is some disagreement regarding the extent to which "good faith" was relevant in common-law suits, no possible reading

[11] Baude, *supra*, at 58 (citation omitted).

of that common law could justify qualified immunity as it exists today.

There is no dispute that nineteenth-century common law did account for "good faith" in many instances, but those defenses were generally incorporated into the elements of particular torts.[12] In other words, good faith might be relevant to the *merits*, but was not the sort of freestanding immunity for all public officials that characterizes the doctrine today.

For example, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826), held that a U.S. naval officer was not liable for capturing a Portuguese ship that had attacked his schooner under an honest but mistaken belief in self-defense. *Id.* at 39. The Court found that the officer "acted with honourable motives, and from a sense of duty to his government," *id.* at 52, and declined to "introduce a rule harsh and severe in a case of first impression," *id.* at 56. But the Court's exercise of "conscientious discretion" on this point was justified as a traditional component of admiralty jurisdiction over "marine torts." *Id.* at 54-55. In other words, the good faith of the officer was incorporated into the *substantive* rules of capture and adjudication, not treated as a separate and freestanding defense.

Similarly, as the Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." *Id.* at 556-57. But this defense was not a protection from liability for unlawful conduct. Rather, at common law, an officer who acted with good faith and probable cause

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[12] *See generally* Baude, *supra*, at 58-60.

simply did not commit the tort of false arrest in the first place (even if the suspect was innocent). *Id.*

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity.[13] *Pierson* involved a Section 1983 suit against police officers who arrested several people under an anti-loitering statute that the Court subsequently found unconstitutional. Based on the common-law elements of false arrest, the Court held that "the defense of good faith and probable cause . . . is also available to [police] in the action under [Section] 1983." *Id.* Critically, the Court extended this defense to include not just a good-faith belief in probable cause for the *arrest*, but a good-faith belief in the legality of the *statute* under which the arrest itself was made. *Id.* at 555.

Even this first extension of the good-faith aegis was questionable as a matter of constitutional and common-law history. Conceptually, there is a major difference between good faith as a factor that determines whether conduct was unlawful in the first place (as with false arrest), and good faith as a defense to liability for admittedly unlawful conduct (as with enforcing an unconstitutional statute). As discussed above, the baseline historical rule at the founding and in 1871 was strict liability for constitutional violations. *See Anderson*, 182 F. at 230 (anyone who enforces an unconstitutional statute "does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law").[14] And of course, the Court

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[13] Baude, *supra*, at 52.

[14] *See also* Engdahl, *supra*, at 18 (a public official "was required to judge at his peril whether his contemplated act

had *already* rejected incorporation of a good-faith defense into Section 1983 in the *Myers* case—which *Pierson* failed to mention, much less discuss.

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue—false arrest—admitted a good-faith defense at common law. But subsequent qualified immunity cases soon discarded even this loose tether to history. In 1974, the Court abandoned the analogy to common-law torts that permitted a good-faith defense. *See Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). And then, most importantly, in 1982 the Court disclaimed any reliance on the beliefs or intentions of the defendant at all, instead basing qualified immunity on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

A forthcoming article by Scott Keller does argue, in contrast to what he calls "the modern prevailing view among commentators," that executive officers in the mid-nineteenth century enjoyed a more general, free-standing immunity for discretionary acts, unless they acted with malice or bad faith.[15] But even if Keller is

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was actually authorized . . . [and] . . . whether . . . the state's authorization-in-fact . . . was constitutional"); Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927) ("Prior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts.").

[15] Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021), at 4.

correct about the general state of the common law,[16] there is strong reason to doubt whether Section 1983 itself was understood to incorporate any such immunity. After all, the defendants in *Myers v. Anderson* made *exactly* the sort of good-faith, lack-of-malice argument Keller says was well established at common law —but the Court refused to apply any such defense to Section 1983. *Myers*, 238 U.S. at 378. Moreover, Keller himself acknowledges that the contemporary "clearly established law" standard is at odds even with his historical interpretation because "qualified immunity at common law could be overridden by showing an officer's subjective improper purpose."[17]

The Court's qualified immunity jurisprudence has therefore diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support, and the relevant history establishes a baseline of strict liability for constitutional violations, where "good faith" was a defense only to some common-law torts. Yet qualified immunity functions today as an

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[16] Will Baude has already posted an article responding to Scott Keller's forthcoming piece, in which he argues that Keller's sources at most establish a common-law basis for "quasi-judicial immunity," which only protected quasi-judicial acts like election administration and tax assessment, not ordinary acts of law enforcement, and which was only a legal defense, not an immunity from suit. Therefore, the historical "immunity" Keller identifies has very little in common with modern qualified immunity. William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?* (December 9, 2020), SSRN, https://papers.ssrn.com/ sol3/papers.cfm?abstract_id=3746068.

[17] Keller, *supra*, at 1.

across-the-board defense, based on a "clearly established law" standard that was unheard of before the late twentieth century. In short, the doctrine has become exactly what the Court assiduously sought to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

II. THE COURT SHOULD GRANT THE PETITION TO CLARIFY AND CONFINE THE SCOPE OF QUALIFIED IMMUNITY.

Although the petition does not call for the reconsideration of qualified immunity entirely, it does present the Court with a valuable opportunity to clarify its case law and to rein in the most problematic excesses of the doctrine. Specifically, the Court should make clear to lower courts that the reasoning of prior judicial decisions is relevant to determining whether an officer was on "fair notice," and that overcoming qualified immunity does not require plaintiffs to first find a case with a virtually identical factual scenario.

Even taking the doctrine itself as a given, the Court's qualified immunity jurisprudence has not exactly been a model of clarity. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the 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 it 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 in *Harlow* has proven 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 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.

The most concerning issue in the lower courts is that, despite this Court's statements to the contrary,

many judges have effectively adopted the rule of granting immunity because there is no case exactly on point, no matter how egregiously unlawful the violation. *See Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) ("To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly.").

The following cases illustrate just how demanding the application of "clearly established law" has become in the lower courts, effectively requiring a level of particularity that no plaintiff could feasibly meet:

- In *Allah v. Milling*, 876 F.3d 48 (2d 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. The decision to place him in solitary was all due to 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." *Id.* at 58. But the court still held that the guards were entitled to immunity because "Defendants were following an established DOC practice," and "[n]o prior decision of the Supreme Court or of this Court . . . has assessed the constitutionality of *that particular practice*." *Id.* at 59 (emphasis added).

- In *Latits v. Philips*, 878 F.3d 541 (6th Cir. 2017), the Sixth Circuit granted immunity to an officer who rammed a fleeing suspect's car off the road, ran up to his car, and shot him three times in the chest, killing him. The court held that the officer violated the man's Fourth Amendment rights, and it acknowledged that several prior cases had clearly established that "'shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat.'" *Id.* at 552-53 (quoting *Hermiz v. City of Southfield*, 484 F. App'x 13, 17 (6th Cir. 2012)). Nevertheless, the majority found these prior cases "distinguishable" because they "involved officers confronting a car in a parking lot and shooting the non-violent driver as he attempted to *initiate* flight," whereas here "Phillips shot Latits after Latits led three police officers on a car chase for several minutes." *Id.* at 553. The lone dissenting judge noted that "the degree of factual similarity that the majority's approach requires is probably impossible for any plaintiff to meet." *Id.* at 558 (Clay, J., concurring in part and dissenting in part).
- In *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018),[18] the Sixth Circuit granted immunity to two officers who deployed a police dog against a suspect that had surrendered by sitting on the ground with his hands in the air. A prior case had already held that an officer clearly violated the Fourth Amendment when he used a police dog without warning against an unarmed residential burglary suspect

[18] 140 S. Ct. 1862 (2020) (cert petition denied).

who was lying on the ground with his hands at his sides. *See Campbell v. City of Springsboro*, 700 F.3d 779, 789 (6th Cir. 2012). But the court found this prior case insufficient because "Baxter does not point us to any case law suggesting that *raising his hands, on its own*, is enough to put Harris on notice that a canine apprehension was unlawful." *Baxter*, 751 F. App'x at 872 (emphasis added). In other words, prior case law holding it unlawful to deploy police dogs against non-threatening suspects who surrendered by *laying on the ground* did not make clear that it was unlawful to deploy police dogs against non-threatening suspects who surrendered by *sitting on the ground with their hands up*.

- In *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019),[19] the Eleventh Circuit, over a dissent, granting immunity to an officer who shot a ten-year-old child lying on the ground, while repeatedly attempting to shoot a family dog that was not posing a threat to anyone. The majority granted immunity based on the "unique facts of this case," *id.* at 1316, and held that "[n]o case capable of clearly establishing the law for this case holds that a temporarily seized person—as was [the child] in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person," *id.* at 1319.

To be sure, this Court's recent decision in *Taylor v. Riojas*, 141 S. Ct. 52 (2020), constitutes an important first step in correcting this problematic trend. In that

[19] No. 19-679, 2020 U.S. LEXIS 3152 (June 15, 2020) (cert petition denied).

case, the Fifth Circuit upheld a grant of immunity to prison officials who subjected Trent Taylor to inhumane prison conditions— first keeping him for several days in a cell that was covered floor to ceiling with the feces of the previous occupant, and then in a cell kept at freezing temperatures, where a clogged drain on the floor caused raw sewage to flood the cell. *Taylor v. Stevens*, 94 F.3d 211, 218-19 (5th Cir. 2019). The lower court granted immunity because, while "the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end," it had not previously held that confinement in human waste for *six* days violated the Constitution. *Id.* at 222.

But this Court vacated and remanded, recognizing in a per curiam opinion that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." *Taylor*, 141 S. Ct. at 53. The Court thus appeared to reaffirm the principle articulated in *Hope v. Pelzer*, 536 U.S. 730, 745 (2002)—that in cases of "obvious" misconduct, factual similarity to prior cases is unnecessary.[20]

But this brief per curiam opinion will not be sufficient to resolve the persistent confusion in the lower courts over how the "clearly established law" standard should be applied. As the petition explains in detail, lower courts remain divided and confused on the con-

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[20] *See also McCoy v. Alamu*, No. 20-31, 2021 U.S. Lexis 768 (Feb. 22, 2021) (granting, vacating, and remanding for reconsideration in light of *Taylor v. Riojas*).

ceptual question of whether the reasoning of prior decisions, as opposed to only the explicit holding, can be considered in determining whether constitutional rights were "clearly established." *See* Pet. at 8-18. And even where "particularity" in prior cases is required, lower courts are also confused and divided on how *much* factual specificity is necessary. *See* Pet. at 19-21. The Court should grant cert to clarify these questions and curb the worst excesses of the qualified immunity doctrine.

CONCLUSION

For the foregoing reasons, and those described by the Petitioners, this Court should grant the petition.

Respectfully submitted,

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