No. 21-57

IN THE

Supreme Court of the United States

LEVI FRASIER,

Petitioner,

v.

CHRISTOPHER L. EVANS, ET AL.,

Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. By Expanding Qualified Immunity to Cover Knowing Violations of Constitutional Rights, the Decision Below Departs from this Court's Precedent and Pushes the Immunity Doctrine Even Further from Section 1983's Common Law Backdrop	5
II. The Decision Below Enables Abuses that the First and Fourteenth Amendments Were Adopted to Prohibit and Section 1983 Was Meant to Deter	15
CONCLUSION	22

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Creighton,
483 U.S. 635 (1987) 1, 6, 13, 14

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 5

Branzburg v. Hayes,
408 U.S. 665 (1972) 20

Bromage v. Prosser,
4 B. & C. 247 (1825) 12

Crawford-El v. Britton,
523 U.S. 574 (1998) 13

Crowell v. McFadon,
12 U.S. 94 (1814) 8

Dinsman v. Wilkes,
53 U.S. 390 (1851) 10

District of Columbia v. Wesby,
138 S. Ct. 577 (2018) 2, 12

Dynes v. Hoover,
61 U.S. 65 (1857) 7

Harlow v. Fitzgerald,
457 U.S. 800 (1982) .... *passim*

Hope v. Pelzer,
536 U.S. 730 (2002) 3, 4, 18

Houchins v. KQED, Inc.,
438 U.S. 1 (1978) 20

TABLE OF AUTHORITIES – cont'd

Page(s)

Houston v. Hill,
482 U.S. 451 (1987) 19, 20

Kendall v. Stokes,
44 U.S. 87 (1845) 9

Kisela v. Hughes,
138 S. Ct. 1148 (2018) 6

Lewis v. City of New Orleans,
415 U.S. 130 (1974) 20

Little v. Barreme,
6 U.S. 170 (1804) 7

Malley v. Briggs,
475 U.S. 335 (1986) .... *passim*

McDonald v. Chicago,
561 U.S. 742 (2010) 16

Monell v. Dep't of Social Services, 436
U.S. 658 (1978) 19

Murray v. The Charming Betsy,
6 U.S. 64 (1804) 7

New York Times Co. v. United States,
403 U.S. 713 (1971) 15

Otis v. Watkins,
13 U.S. 339 (1815) 8

Owen v. City of Independence,
445 U.S. 622 (1980) 18

TABLE OF AUTHORITIES – cont'd

Page(s)

Plumhoff v. Rickard,
572 U.S. 765 (2014) 6

Reed v. Conway,
20 Mo. 22 (1854) 11

Roth v. United States,
354 U.S. 476 (1957) 15

Sands v. Knox,
7 U.S. 499 (1806) 7

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) 20

South v. State of Maryland for use of Pottle,
59 U.S. 396 (1855) 10

Stewart v. Southard,
17 Ohio 402 (1848) 11

Taylor v. Riojas,
141 S. Ct. 52 (2020) 4

Tracy v. Swartwout,
35 U.S. 80 (1836) 7

Timbs v. Indiana,
139 S. Ct. 682 (2019) 16

United States v. Lanier,
520 U.S. 259 (1997) 3

Waldron v. Berry,
51 N.H. 136 (1871) 11

TABLE OF AUTHORITIES – cont'd

Page(s)

Wilkes v. Dinsman,
48 U.S. 89 (1849) 9, 10

Wilson v. Garcia,
471 U.S. 261 (1985) 17

Wise v. Withers,
7 U.S. 331 (1806) 7

Wyatt v. Cole,
504 U.S. 158 (1992) 12

Legislative Materials and Constitutional Provisions

42 U.S.C. § 1983 1

An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes,
ch. 22, 17 Stat. 13 (1871) 17

1 Annals of Cong. 451 (1789) 15

Cong. Globe, 38th Cong., 1st Sess.
(1864) 16

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(1871) 17, 18

Cong. Globe, 42d Cong., 1st Sess. App.
(1871) 18

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Page(s)

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U.S. Const. amend. I 15

Books, Articles, and Other Authorities

Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. Ill. L. Rev. 815 (2012) 15

Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* (1889) 11, 12

Br. for Constitutional Accountability Center as *Amicus Curiae* Supporting Pet'r, *Cates v. Stroud*, No. 20-1438 (May 14, 2021) 5

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Thomas M. Cooley, *A Treatise on the Law of Torts* (1879) 11, 12

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Page(s)

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Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605 (2021)................ 13

J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 Notre Dame L. Rev. 1077 (1994) 16

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Departing from text, history, and the common law, this Court has held that government officers who violate constitutional rights cannot "be liable to the party injured," 42 U.S.C. § 1983, unless the rights in question were "clearly established" in the context of factually similar circumstances. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). That standard immunizes "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In this case, however, the court below took things even further—holding that police officers who "knowingly violate a plaintiff's rights" by engaging in conduct that they "actually knew from their

[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

training" was unconstitutional can be immune from suit under Section 1983. Pet. App. 6a, 20a.

That holding is not an isolated aberration. As the court below stated: "It is now widely understood that a public official who knows he or she is violating the constitution nevertheless will be shielded by qualified immunity," so long as a hypothetical "reasonable public official" would "not have known that his or her actions violated clearly established law." *Id.* at 22a (quotation marks omitted).

Exacerbating the harms of its ruling, the court below also mangled the inquiry into whether a constitutional right is clearly established by judicial precedent. Applying the wrong standards to that inquiry, the court held that the right at issue here was not clearly established even though the courts of appeals agreed on its existence and this Court's decisions placed that conclusion "beyond debate." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quotation marks omitted).

By denying redress to victims of constitutional violations even when the perpetrators actually "knew . . . of the relevant legal standard," *Harlow*, 457 U.S. at 819, and by raising the bar for identifying clearly established rights higher than this Court has prescribed, the decision below expands the scope of qualified immunity far beyond the parameters this Court fashioned in *Harlow v. Fitzgerald*. Regardless of whether this Court is willing to revisit its own adoption of modern qualified immunity doctrine, it should rein in unwarranted expansions of that doctrine by the lower courts, beginning with the decision below.

When Petitioner Levi Frasier witnessed an altercation between Denver police officers and a drug suspect in a parking lot, he took out his tablet and began

video-recording the scene. Pet. App. 8a. Frasier's video captured one officer "hitting the suspect in the face six times in rapid succession," *id.*, and knocking a seven-and-a-half-month-pregnant woman—the suspect's girlfriend—off of her feet onto the pavement as she approached the tussle, *id.* at 9a. As Frasier tried to leave the scene, the officers "encircled" him and repeatedly demanded that he turn over the tablet until he acquiesced, fearing he would otherwise be sent to jail. *Id.* at 10a-11a. After the police searched his tablet—despite Frasier's protests that they could not do so without a warrant—the officers declared they could not find the video and let Frasier go. *Id.* at 11a-12a.

Frasier filed this lawsuit pursuant to Section 1983, asserting, as relevant here, that the officers violated his First Amendment right to freedom of speech, as incorporated against the states through the Fourteenth Amendment, by retaliating against him for filming them performing their duties in public. The undisputed record shows "that the officers actually knew from their training that [this] right existed." *Id.* at 17a. But rather than acknowledge that the officers had "'fair warning' that [their] conduct deprived [the] victim of a constitutional right," *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002) (quoting *United States v. Lanier*, 520 U.S. 259 (1997)), the court below dismissed the officers' awareness of this constitutional right as an "irrelevant" matter pertaining only to their "intent" or what they "subjectively" knew. Pet. App. 20a, 23a, 29a (quotation marks omitted).

Having concluded that the legal rules actually taught to police officers during their training are irrelevant, and that "[j]udicial decisions are the only valid interpretive source of the content of clearly established law," *id.* at 28a, the court below acknowledged that, at the time of the incident, every circuit to address the

question had recognized a First Amendment right to film police officers performing their duties in public. *Id.* at 35a-36a. Instead of identifying any disagreement about whether a right to record the police existed (there was none), the court below cited disagreements about "whether the right to record the police *was clearly established*." *Id.* at 36a (emphasis added) (quotation marks omitted). The court then granted qualified immunity to Respondents because "out-of-circuit authorities appear to be split *on the clearly-established-law question*." *Id.* at 37a (emphasis added).

Both of these rulings are deeply mistaken and expand qualified immunity beyond what this Court has countenanced. As this case illustrates, despite the careful limits and caveats this Court has included in its opinions, qualified immunity in the hands of the courts of appeals has too often become a license for impunity, allowing government officers to evade accountability even when they knowingly deprive individuals of their constitutional rights. The concept of "fair warning," *Hope*, 536 U.S. at 740, which was the very basis for modern qualified immunity doctrine, *see infra*, has been marginalized into irrelevance—relegated to only the most "extreme circumstances." Pet. App. 19a (quoting *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam)). And courts like the one below have refused to acknowledge that constitutional rights were "clearly established" at the time of an officer's violation despite a consensus among the courts of appeals on the precise issue and a body of case law from this Court that applies "with obvious clarity." *Taylor*, 141 S. Ct. at 54 (quotation marks omitted).

This Court should grant the petition for a writ of certiorari to reaffirm the important limits on qualified immunity that the decision below, and others like it, have disregarded.

ARGUMENT

I. By Expanding Qualified Immunity to Cover Knowing Violations of Constitutional Rights, the Decision Below Departs from this Court's Precedent and Pushes the Immunity Doctrine Even Further from Section 1983's Common Law Backdrop.

A. There is no basis in the text, history, or common law backdrop of Section 1983 for the modern formulation of qualified immunity this Court adopted in *Harlow v. Fitzgerald*. *See* Br. for Constitutional Accountability Center as *Amicus Curiae* Supporting Pet'r 6-13, *Cates v. Stroud*, No. 20-1438 (May 14, 2021). But as much as *Harlow* and the decisions following it departed from a proper interpretation of Section 1983, they at least recognized that qualified immunity does not shield "those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley*, 475 U.S. at 341). Because "a reasonably competent public official should know the law governing his conduct," he is subject to suit for violating the Constitution unless he "can prove that he *neither knew* nor should have known of the relevant legal standard." *Harlow*, 457 U.S. at 819 (emphasis added).

The decision below, however, casts aside even that minimal safeguard. According to this decision and others like it, officers who are specifically trained on the existence of a constitutional right may nevertheless violate that right with impunity—as long as a court later decides that judicial precedent did not establish the right with sufficient precision. *See* Pet. App. 31a-38a.

That holding misconstrues both the scope and reasoning of this Court's qualified immunity decisions. The purpose of limiting liability to violations of

"clearly established" rights "of which a reasonable person would have known," *Harlow*, 457 U.S. at 818, is not to give a windfall to officers who "actually knew from their training that the right existed" but chose to violate that right anyway. Pet. App. 17a; *see Harlow*, 457 U.S. at 819 ("we provide no license to lawless conduct"). Instead, this Court has reasoned that officials cannot fairly be expected "to know that the law forbade conduct not previously identified as unlawful." *Id.* at 818 (quotation marks omitted). The point of demanding that "the right's contours were sufficiently definite" is simply to ensure that "any reasonable official *in the defendant's shoes* would have understood that he was violating it." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (emphasis added) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014)); *see Anderson*, 483 U.S. at 640 ("the unlawfulness must be apparent").

In fashioning modern qualified immunity, this Court also sought to "permit the resolution of many insubstantial claims on summary judgment" by eschewing inquiries into "subjective good faith," which were often "regarded as inherently requiring resolution by a jury." *Harlow*, 457 U.S. at 818, 816. The goal was to ensure that "an allegation of malice is not sufficient to defeat immunity *if the defendant acted in an objectively reasonable manner*." *Malley*, 475 U.S. at 341 (emphasis added).

The decision below has no connection to these principles. Neither fairness to government officers nor a desire to weed out insubstantial claims provides any justification for immunizing officers who violate constitutional rights after having been specifically instructed on the existence of those rights. Moreover, shielding officers from liability when they knowingly violate the Constitution puts qualified immunity doctrine even more at odds with the common law

standards that were familiar to the lawmakers who enacted Section 1983.

B. This Court's early decisions reflect the bedrock rule, inherited from English common law, that government officers who deprive individuals of their legal rights may be held to account for damages in tort. Thus, an officer who wrongly seized a ship upon the orders of his superiors, which were based on a "misconstruction" of a federal statute, was "answerable in damages" to the ship's owner, because the mistaken orders could not "legalize an act which without those instructions would have been a plain trespass." *Little v. Barreme*, 6 U.S. 170, 178-79 (1804); *accord Tracy v. Swartwout*, 35 U.S. 80, 95 (1836). Likewise, an officer who misjudged the facts and wrongly concluded that there was probable cause to seize a ship was liable to the owner for compensatory damages, *Murray v. The Charming Betsy*, 6 U.S. 64, 122-26 (1804), although his "correct motives" in acting "according to the best of his judgment" shielded him from punitive damages, *id.* at 124; *accord Sands v. Knox*, 7 U.S. 499, 503 (1806). Similarly, an officer who seized an individual's property to satisfy a fine, based on the orders of a court that lacked jurisdiction over that individual, was liable in tort for trespass. *Wise v. Withers*, 7 U.S. 331, 335-37 (1806); *accord Dynes v. Hoover*, 61 U.S. 65, 80-81 (1857).

In short, whether their actions were based on a misunderstanding of the law, the facts, or their own jurisdiction, officers were strictly liable in tort if they violated an individual's common law rights. As this Court said: "It would be a most dangerous principle to establish, that the acts of a ministerial officer . . . injurious to private rights, and unsupported by law, should afford no ground for legal redress." *Tracy*, 35 U.S. at 95.

In some areas, however, it was recognized that the law "places a confidence in the opinion of the officer," *Crowell v. McFadon*, 12 U.S. 94, 98 (1814), and that, accordingly, the officer's exercise of the discretion afforded to him could not generally be an actionable legal violation—even if his decisions proved mistaken. But crucially, this doctrine did not protect officers who abused their power to willfully cause harm.

Customs collectors, for instance, were authorized by statute to temporarily detain vessels "whenever in their opinion" a vessel was attempting to evade embargo restrictions. *Id.* at 95. Because a collector was "bound to act according to his opinion," this Court held, "he cannot be punished for it . . . *when he honestly exercises it*." *Id.* at 98 (emphasis added). That caveat was important. Although a collector could not be liable for forming opinions "unadvisedly or without reasonable care and diligence," he must have "honestly entertained the opinion under which he acted." *Otis v. Watkins*, 13 U.S. 339, 355-56 (1815). Plaintiffs could therefore submit evidence "showing malice or other circumstances which may impeach the integrity of the transaction," in which case the question was "whether the Defendant really entertained such opinion." *Id.* at 356; *see id.* at 357 (opinion of Marshall, C.J.) ("if the opinion avowed was real, though mistaken, a detention under that opinion is lawful," but things would be different "[i]f it can be proved, either from the gross oppression of the case, or from other proper testimony, that the collector did not in fact entertain the opinion under which he professed to act"). Willful abuses of authority were not exempt from liability, even if the action in question would otherwise have been perfectly lawful.

Intentional subversion of the law remained unprotected even as the "discretionary authority" principle

was further developed in the mid–nineteenth century. For example, this Court held that the head of an executive department was not subject to damages for legal errors made in settling financial accounts with private contractors, but only because there was no evidence of any willful violation or abuse of his discretionary authority: "He committed an error . . . . But *as the case admits that he acted from a sense of public duty and without malice*, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him." *Kendall v. Stokes*, 44 U.S. 87, 98-99 (1845) (emphasis added); *see id.* at 97-98 ("a public officer, *acting to the best of his judgment and from a sense of duty*, in a matter of account with an individual," could not be "held liable to an action for an error of judgment" (emphasis added)); *id.* at 98 (distinguishing a case in which the conduct for which the defendant was held liable was "wilful, and with knowledge").

These principles were reiterated in *Wilkes v. Dinsman*, 48 U.S. 89 (1849), where a marine sued his commanding officer for unlawfully detaining him after his enlistment allegedly expired. This Court explained that while the commanding officer "is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, *or inflicts private injury either from malice, cruelty, or any species of oppression*." *Id.* at 123 (emphasis added). "In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error." *Id.* at 131.

When the same case later returned to this Court, it reaffirmed that so long as the defendant "acted honestly and from a sense of duty, and with a single eye to the welfare of the service in which he was engaged, the

law protects him." *Dinsman v. Wilkes*, 53 U.S. 390, 404 (1851). But "if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action." *Id.* Reversing a verdict for the defendant because the jury instructions failed to heed these principles, this Court explained that "the fact to be ascertained in this case is whether, in the exercise of that discretion and judgment with which the law clothed him," the officer "abused the power confided to him to the injury of the plaintiff." *Id.*[2]

Likewise, when a sheriff was sued for neglecting his duties and thereby allowing the plaintiff to be injured by a mob, this Court addressed the requirements for holding a sheriff liable when "he acted *quasi* judicially . . . . rather than [in] a ministerial capacity." *South v. State of Maryland for use of Pottle*, 59 U.S. 396, 403 (1855); *see Wilkes*, 48 U.S. at 129 (explaining that when an officer "is intrusted with discretion over the subject-matter," his position, "in many respects, becomes *quasi* judicial"). Recognizing once again that officers were not exempt from liability for knowing and willful inflictions of harm—even when acting within the bounds of their discretionary authority—this Court explained that the sheriff could be "held liable to a civil action for acts not simply ministerial" if the plaintiff proved, among other things, that "the act was done maliciously." *South*, 59 U.S. at 403.

State court decisions also taught that government officers were liable in tort for willfully committed

[2] Notably, "[t]his [was] not a case where the punishment alleged to have been inflicted was forbidden by law, or beyond the power which the law confided to [the officer]. For, in such a case he would be liable whatever were his motives." *Id.* at 404.

harms, even in areas where their discretionary choices were otherwise shielded from scrutiny. *See, e.g.*, *Waldron v. Berry*, 51 N.H. 136, 142 (1871) ("An officer, acting within the scope of his authority, is only responsible for an injury resulting from a corrupt motive." (quoting *Stewart v. Southard*, 17 Ohio 402 (1848))); *Reed v. Conway*, 20 Mo. 22, 43-44 (1854) ("From a careful examination of authorities . . . both in the English and American courts, the doctrine that a ministerial officer, acting in a matter before him with discretionary power . . . is not responsible to any one receiving an injury from such act, *unless the officer act maliciously and wilfully wrong*, is most clearly established and maintained." (emphasis added)). So did prominent treatises. *See* Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* 365-66 (1889) (even where the law gives an officer "the duty of looking into facts, and acting upon them" with "a discretion" that is "*quasi* judicial," the officer is "responsible to one injured by his wrongful doing" if his act is "malicious"); Thomas M. Cooley, *A Treatise on the Law of Torts* 411 (1879) (citing the "many cases which hold . . . that the law will hold such officers liable if they act maliciously to the prejudice of individuals").

In sum, from the beginning of the Republic through the period of Section 1983's enactment, courts refused to shield government officers from liability for willful abuses or knowing violations of the law, even in those areas where officers could not generally be sued over discretionary choices made in furtherance of their duties. By discarding that principle, the decision below has strayed even further than *Harlow* from the common law of 1871.

C. Reaffirming liability under Section 1983 for officers "who knowingly violate the law," *Malley*, 475 U.S. at 341, would prevent qualified immunity from

drifting even further from the statute's text and common law backdrop. And contrary to the reasoning of the decision below, liability for knowing violations does not require "judicial inquiry into subjective motivation." *Wyatt v. Cole*, 504 U.S. 158, 165 (1992).

Significantly, the common law definition of "malice" did not focus exclusively or even primarily on a person's motives: "Malice, in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." Cooley, *supra*, at 209 n.3 (quoting *Bromage v. Prosser*, 4 B. & C. 247, 255 (1825) (Bayley, J.)); *see* Bishop, *supra*, at 92 (same). And while the common law did permit courts to probe an officer's subjective intent when determining whether his actions were malicious, *see supra*, this Court foreclosed that inquiry in *Harlow*, reasoning that "[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons," which could be "disruptive of effective government" and prevent "the resolution of many insubstantial claims on summary judgment," 457 U.S. at 817-18.

This Court need not disturb that rule in order to reaffirm that officers "who knowingly violate the law" are unprotected by qualified immunity. *Wesby*, 138 S. Ct. at 589 (quoting *Malley*, 475 U.S. at 341). An officer is presumed to "know the law governing his conduct." *Harlow*, 457 U.S. at 819. Indeed, that is the basis for holding officers liable for violating "clearly established statutory or constitutional rights of which *a reasonable person would have known*," *id.* at 818 (emphasis added), regardless of whether a particular officer was actually aware of that right. *See id.* at 819 (officers are liable if they "*should have known* of the relevant legal standard" (emphasis added)). Thus, if an officer's regulations or training materials specifically instruct that

a constitutional right exists, as here, the officer can be presumed to be aware of that right. In fact, it is far more realistic to assume that officers are familiar with their own regulations and training materials than with decisions of the federal courts—which officers learn about, if at all, from those very regulations and training materials. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 610 (2021). And the question of whether an officer's regulations or training materials provided notification about the existence of a constitutional right is an *objective* inquiry, having nothing to do with any officer's state of mind.

Moreover, even if officers could not be presumed familiar with their own regulations and training materials—making it necessary to show that an individual officer actually knew from those sources that a constitutional right existed—the question would still be an objective one, requiring no inquiry into subjective motivation. This Court has already said as much. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), for example, this Court described the question of whether an officer "knew or reasonably should have known" that his conduct was unconstitutional as an "objective" inquiry, differentiating this inquiry from the "subjective" question of whether an officer acted "with the malicious intention to cause a deprivation of constitutional rights." *Id.* at 587.

In a variety of other contexts, this Court has also made clear that inquiring into the information that was available to an officer is an objective matter, not to be confused with an attempt to assess an officer's subjective motivation or intent. In *Anderson v. Creighton*, 483 U.S. 635 (1987), for instance, this Court explained that an officer's "subjective beliefs about [a] search are irrelevant," but it distinguished those

subjective beliefs from the "objective (albeit fact-specific) question whether a reasonable officer could have believed [the] search to be lawful, in light of clearly established law *and the information the searching officers possessed*." *Id.* at 641 (emphasis added).

The court below misunderstood these concepts, confusing the question of what an officer *knows* with the question of what that officer's *motives* are. *See, e.g.*, Pet. App. 28a-29a. But rejecting immunity for officers who knowingly violate constitutional rights, as this Court's precedent demands, requires no inquiry into motive or subjective intent. Instead, the focus is on what information about constitutional rights had been made available to the officer and—at most—whether the officer was aware of that information.

Importantly, therefore, holding officers accountable for violating constitutional rights about which they have been instructed poses no risk of burdensome litigation. Examining the content of police regulations or training materials, and determining whether an officer was aware of them, is a focused and limited inquiry, nothing like an open-ended exploration of an officer's subjective motivations, for which "there often is no clear end to the relevant evidence." *Harlow*, 457 U.S. at 817. And questions about an officer's actual knowledge, if they are necessary at all, will be relevant only in those cases where regulations or training materials put an officer on notice about the existence of a constitutional right. A bare "allegation of malice," therefore, will remain insufficient "to defeat immunity if the defendant acted in an objectively reasonable manner." *Malley*, 475 U.S. at 341.

II. The Decision Below Enables Abuses that the First and Fourteenth Amendments Were Adopted to Prohibit and Section 1983 Was Meant to Deter.

The expansion of qualified immunity by the court below, in addition to deviating from this Court's precedent, enables government officers to retaliate against those who lawfully attempt to document and expose their misconduct. That result subverts core purposes of the First and Fourteenth Amendments, undermining the goals of the Congress that enacted Section 1983 to enforce those constitutional safeguards.

The First Amendment forbids "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). As reflected in James Madison's first draft of the speech and press clauses, the Framers viewed the people's "right to speak, to write, or to publish their sentiments" as "one of the great bulwarks of liberty." 1 Annals of Cong. 451 (1789).

The Framers' views reflected "developing ideas of popular sovereignty—in contrast to parliamentary sovereignty—[which] made it crucial for ordinary individuals to be able to criticize their government." Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. Ill. L. Rev. 815, 835 (2012). Indeed, "the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that [was] embarrassing to the powers-that-be," *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring), not

unlike modern video-recordings that document perceived police misconduct.

At our nation's Second Founding, the First Amendment took on newfound importance, as a new generation of Framers sought to ensure "that the new constitutional order would protect against the lynchings, murders, and prosecutions inflicted post hoc upon abolitionists and slaves in retaliation for their speech and expressive activities denouncing slavery or resisting the slave regime." William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 Tex. L. Rev. 1065, 1075 (2021). Before the Civil War, slave codes throughout the South expressly targeted freedom of speech. *Id.* at 1084. For example, Georgia's slave code outlawed "the assembling of negroes under pretense of divine worship," J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 Notre Dame L. Rev. 1077, 1108 (1994) (quoting statute), and Virginia prohibited preaching by free or enslaved African Americans altogether, *see* Henry Walcott Farnam, *Chapters in the History of Social Legislation in the United States* 194 (2000). On top of these legal measures, private mobs, often supported by Southern governments, "suppressed and retaliated against Black and antislavery speech through violence and other extralegal means." Carter, *supra*, at 1084-85. As one Senator explained, these retaliatory acts perpetuated slavery itself, as "[s]lavery cannot exist when its merits can be freely discussed." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864).

After the Civil War, with these abuses fresh in memory and with Southern states still refusing to respect individual liberties, Americans ratified the Fourteenth Amendment and "fundamentally altered our country's federal system," *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *McDonald v. Chicago*, 561

U.S. 742, 754 (2010)), adding to the Constitution a new guarantee of liberty meant to secure "the civil rights and privileges of all citizens in all parts of the republic," *Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. xxi (1866). Those rights and privileges included the freedom of speech. *See* Carter, *supra*, at 1087 ("The congressional Republicans who drafted the Reconstruction Amendments . . . were intimately familiar with the suppression of the constitutional right of free speech as a tool to maintain slavery and racial subjugation.").

But this turned out to be insufficient. Several years after the Fourteenth Amendment's ratification, Southern states were still "permit[ting] the rights of citizens to be systematically trampled upon." Cong. Globe, 42d Cong., 1st Sess. 375 (1871). Recognizing the need for some means of enforcing the rights newly guaranteed by the Constitution, Congress passed "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes," ch. 22, 17 Stat. 13 (1871), the first section of which is codified as 42 U.S.C. § 1983.

The immediate catalyst for this legislation was the support that Southern officials were lending to the Ku Klux Klan, *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985), which was violently retaliating against formerly enslaved people and their allies for exercising their rights to free speech and association. Congress learned, for example, that when a citizens' meeting was called "to protest against the outrages" of the Klan in Mississippi, Klan members sought revenge, and "[a]t their instigation warrants were issued for the arrest of peaceable and well-disposed negroes upon the charge of 'using seditious language.'" Cong. Globe, 42d Cong., 1st Sess. 321 (1871); *see also id.* at 155 (testimony describing attack in which the Klan "made all

the colored men promise they would never vote the Radical ticket again"); *id.* at 157 (testimony that Blacks "were killed because they were summoned as witnesses in the Federal courts"); *id.* at 321 (testimony that the Klan "wanted to run them all off because the principal part of them voted the Radical ticket"). As one Congressman put it, "our fellow-citizens are deprived of the enjoyment of the fundamental rights of citizens" because of "their opinions on questions of public interest." *Id.* at 332.

The remedy that Section 1983 created for these abuses was "intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). And the legislators who enacted Section 1983 understood that, as a "remedial" statute, it would be interpreted broadly to promote its goals: "the largest latitude consistent with the words employed is uniformly given in construing such statutes." Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871); *see id.* at App. 310.

The decision below is diametrically opposed to the vision of the Forty-Second Congress and the statute it enacted. With no conceivable law enforcement purpose, Respondents retaliated against a person for legally documenting their conduct in public—despite having been trained that the First Amendment entitles people to do just that.

All that is necessary to resolve this case, therefore, is a reaffirmation that officers who had "fair warning that [their] conduct deprived [the] victim of a constitutional right," *Hope*, 536 U.S. 739-40 (quotation marks omitted), but who nevertheless chose to "knowingly violate the law," *Malley*, 475 U.S. at 341, can be held accountable under Section 1983. There is no reason to

exclude an officer's regulations or training materials from that inquiry. On the contrary, considering such materials is vitally important. Here, for example, the district court held that the City and County of Denver could not be held liable for Respondents' actions under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), precisely because their training materials instructed Respondents that individuals have a constitutional right to record them performing their duties. Exempting municipalities from liability by allowing the consideration of such materials, while at the same time exempting individual officers from liability by excluding consideration of the same materials, would leave no one accountable for officers' constitutional violations—contrary to the purpose (and plain text) of Section 1983.

Separately, this Court could also provide critical guidance to the lower courts by reiterating the proper standards for assessing when a constitutional right has been "clearly established," *Harlow*, 457 U.S. at 818, by judicial precedent. Those standards were plainly met here, and the contrary reasoning of the decision below sets a dangerous precedent that further undermines Section 1983.

This Court has long held that expressive conduct critical of the police is protected by the First Amendment, *see* Pet. 26-31, including "verbal criticism and challenge directed at police officers" while they are performing their duties. *Houston v. Hill*, 482 U.S. 451, 461 (1987); *see id.* at 463 n.12 (tracing this principle to the common law). Even yelling "obscenities and threats" at an officer who is interacting with a third party has long been recognized as constitutionally protected activity, provided that these words do not "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 461-62 (quoting

Lewis v. City of New Orleans, 415 U.S. 130, 133 (1974)). As long as that line is not crossed, expression directed at police officers is "protected against censorship or punishment." *Id.* at 461; *see, e.g.*, *Lewis*, 415 U.S. at 132-33.

Likewise, this Court has also long recognized that the First Amendment protects the "right to gather news 'from any source by means within the law,'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972)), as well as "the creation and dissemination of information" more broadly, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

Because it is well established that the First Amendment allows individuals to gather information through lawful means, to disseminate that information, and to verbally confront police officers—even when doing so risks distracting the officers from performing their duties—it should be obvious to any reasonable officer that passively recording an officer's actions while silently standing out of the way is "protected against censorship or punishment." *Houston*, 482 U.S. at 461. Unsurprisingly, therefore, every circuit that had considered the matter when the events of this case occurred had ruled that filming police officers performing their duties in public is protected by the First Amendment. *See* Pet. App. 35a-36a. Such a robust consensus is enough to "clearly establish" a constitutional right under this Court's qualified immunity precedents.

Skirting that conclusion, the court below pointed to inconsistent results in other qualified immunity cases about "whether the right to record the police *was clearly established*." Pet. App. 36a (emphasis added) (quotation marks omitted). But that echo-chamber approach asks the wrong question, hindering

accountability and deterrence under Section 1983 in the process.

Indeed, one of the most pernicious aspects of the decision below is that it shields Respondents from accountability for violating the First Amendment as part of an apparent effort to destroy evidence of how they conducted a violent arrest. Qualified immunity frequently absolves police officers from facing liability under Section 1983 for excessive-force claims under the Fourth Amendment that arise from arrest scenarios like the one here. *See* Andrea Januta et al., *Taking the Measure of Qualified Immunity: How Reuters Analyzed the Data*, Reuters, Dec. 23, 2020, www.reuters.com/investigates/special-report/usa-police-immunity-methodology/ (cataloging the frequency with which courts grant qualified immunity in excessive force cases). Now, on top of that, officers like Respondents can try to squelch *other* means of accountability—such as disciplinary proceedings, policy reforms, and criminal prosecutions—by unlawfully attempting to suppress documentation of their actions with impunity. This Court should not tolerate that state of affairs, especially because it conflicts with this Court's decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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