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

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. MODERN QUALIFIED IMMUNITY DOCTRINE IS UNTETHERED FROM ANY STATUTORY OR HISTORICAL JUSTIFICATION. 5

A. The text of Section 1983 does not provide for any kind of immunity 5

B. From the founding through the passage of Section 1983, courts recognized that good faith was not a general defense to constitutional torts. 7

C. The "clearly established law" standard is plainly at odds with any plausible reading of nineteenth-century common law. 11

II. THE COURT SHOULD GRANT THE PETITION TO CLARIFY THE SCOPE OF QUALIFIED IMMUNITY AND ENSURE PROTECTION OF CRUCIAL FIRST AMENDMENT RIGHTS. 15

A. Qualified immunity should not protect public officials who, by virtue of their own training, knowingly violate the law.. 16

B. The Court should grant the petition to ensure the uniform protection of the right to record the police in public.. 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

ACLU of Ill. v. Alvarez, F.3d 583 (7th Cir. 2012) 20

Anderson v. Creighton, 483 U.S. 635 (1987) 17, 18

Anderson v. Myers, 182 F. 223 (C.C.D. Md. 1910) ... 10, 13

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) 3, 17

Baxter v. Bracey, 140 S. Ct. 1862 (2020) 2

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 16

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 7

Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017) 20, 21

Filarsky v. Delia, 566 U.S. 377 (2012) 11

Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995) 20

Forrester v. White, 484 U.S. 219 (1988) 6

Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) 19, 20

Graham v. Connor, 490 U.S. 386 (1989) 19

Hope v. Pelzer, 536 U.S. 730 (2002) 17

Karns v. Shanahan, 879 F.3d 504 (3d Cir. 2018) 21

Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010) 21

Kisela v. Hughes, 138 S. Ct. 1148 (2018) 2, 17

Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) 8, 9

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

Manzanares v. Roosevelt Cty. Adult Det. Ctr., 331 F. Supp. 3d 1260 (D.N.M. 2018)................................ 18

Miller v. Horton, 26 N.E. 100 (Mass. 1891) 9

Mullenix v. Luna, 577 U.S. 7 (2015) 17

Myers v. Anderson, 238 U.S. 368 (1915) 9, 10, 14

Pearson v. Callahan, 555 U.S. 223 (2009) 21

Pierson v. Ray, 386 U.S. 547 (1967) 7, 12

Rehberg v. Paulk, 56 U.S. 356 (2012).......................... 3

Ross v. Blake, 136 S. Ct. 1850 (2016).......................... 5

Scheuer v. Rhodes, 416 U.S. 232 (1974).................... 13

Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000) 20

Szymecki v. Houck, 353 F. App'x 852 (4th Cir. 2009) 21

Tennessee v. Garner, 471 U.S. 1 (1985)..................... 19

The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826). 11, 12

Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017) 20

White v. Pauly, 137 S. Ct. 548 (2017)........................ 18

Wilson v. Layne, 526 U.S. 603 (1999)........................ 17

Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) 2, 3

Statutes

42 U.S.C. § 1983.. 2, 5

Other Authorities

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) 7

Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1986)8

David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972) 8, 9, 13

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 (2010) 8, 9

JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR (2017)... 8

Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).. 19

Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) 19

Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101 (2020) 18

Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018)..... 2

John Elder, *Man Dies After Medical Incident During Police Interaction*, Minneapolis Police (May 26, 2020), *available at* https://www.famous-trials.com/george-floyd/2720-originalmpd-statement-on-floyd-a-medical-incident 20

Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585 (1927) 13

Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) .. 14, 15

William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) .... passim

William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?* (December 9, 2020), SSRN, https://papers.ssrn.com/ sol3/papers. cfm?abstract_id=3746068 14

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.

[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 modern "clearly established law" standard lacks historical support. Contemporary qualified immunity doctrine is therefore unmoored from any lawful justification, and in need of correction.[2]

The petition does not expressly call for the reconsideration of the doctrine itself, but the decision below illustrates how the practical application of qualified immunity has become divorced even from this Court's own policy justifications for the doctrine. The respondent police officers knowingly violated Levi Frasier's

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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).

First Amendment rights by harassing, threatening, and illegally searching him, all because he recorded them making an arrest in public. Every court to address this question has held that citizens have a constitutional right to record the police in public, and the officers here had been explicitly trained on the existence of that right. But the lower court nevertheless held that these officers were entitled to qualified immunity, for the sole reason that the Tenth Circuit—unlike the First, Seventh, Ninth, and Eleventh Circuits—had not yet decided a case on exactly this question.

If the Tenth Circuit's understanding of qualified immunity is correct, then the doctrine is not just a "freewheeling policy choice"[3]—it is a freewheeling legal technicality, devoid even of rational policy justification. When the Court first articulated the "clearly established law" standard in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), its proffered policy rationale was to protect public officials who "neither knew nor should have known of the relevant legal standard." *Id.* at 819. Thus, the Court has repeatedly averred that qualified immunity does not protect those who "knowingly violated the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Yet that is exactly how the doctrine was applied in the decision below—the officers knowingly violated Frasier's First Amendment rights, but they received immunity anyway.

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[3] *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Rehberg v. Paulk*, 56 U.S. 356, 363 (2012)).

Until and unless the "clearly established law" standard itself is abandoned, it is crucial that the Court clarify how this standard should be applied when public officials have actual knowledge that they are violating someone's constitutional rights. As the petition explains in detail, lower courts are confused and divided on the extent to which official policy and training is relevant to the "clearly established law" inquiry, *see* Pet. at 12-14, and on how to interpret this Court's instruction that qualified immunity does not protect those who knowingly violate the law, *id.* at 20-23.

The Court should also grant the petition to unequivocally establish that there is, in fact, a First Amendment right to record the police in public. This is not an especially *difficult* question, as all six circuit courts to address it have uniformly held that such a right exists. But in light of qualified immunity, the obviousness of this right has, paradoxically, led it to be *less* well protected in lower courts.

In the absence of a circuit split, this Court has not addressed the right to record police on the merits. But without instruction from this Court, lower-court judges can—and often do—simply say that this right is not "clearly established" in *their* circuit, without even deciding the merits question for future cases. Affirming the existence of the right to record police nationwide is especially urgent today, given the central role that recording officers plays in uncovering and remedying police misconduct.

ARGUMENT

I. MODERN QUALIFIED IMMUNITY 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—that is, the creation of the doctrine itself—which necessarily means, limiting the scope of qualified immunity as much as possible within the bounds of existing precedent.

A. The text of Section 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."[4] This statutory purpose would have been undone by 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

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

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*.[5]

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.[6] As many scholars over the years have demonstrated,

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

[6] *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.

these founding-era lawsuits did not permit a good-faith defense to constitutional violations.[7]

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[8] which involved a claim against an 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

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[7] *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).

[8] *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*.").

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,"[9] persisted through the nineteenth century. Its severity was mitigated somewhat by the prevalence of successful petitions to Congress for indemnification.[10] 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

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

[10] 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).

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.[11] 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 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."[12]

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

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

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 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.[13] 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

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

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 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.[14] *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 com-

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

mon-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").[15] And of course, the Court 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

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

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 recent article by Scott Keller does argue, in contrast to what he calls "the prevailing view among modern commentators," that executive officers in the mid-nineteenth century enjoyed a more general, freestanding immunity for discretionary acts, unless they acted with malice or bad faith.[16] But even if Keller is correct about the general state of the common law,[17] 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

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[16] Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1334 (2021).

[17] Will Baude has posted a response to Scott Keller's 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. *See* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?* (December 9, 2020), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id =3746068.

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."[18]

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 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 THE SCOPE OF QUALIFIED IMMUNITY AND ENSURE PROTECTION OF CRUCIAL FIRST AMENDMENT RIGHTS.

Although the petition does not call for the reconsideration of qualified immunity entirely, it does present the Court with a valuable opportunity to clarify the application of the "clearly established law" standard to scenarios where public officials had actual knowledge they were violating people's rights based on their official training. The Court should also grant the petition

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[18] Keller, *supra*, at 1346.

to clearly establish nationwide that the First Amendment protects the right to record police in public.

A. Qualified immunity should not protect public officials who, by virtue of their own training, knowingly violate the law.

When the Court first articulated the "clearly established law" standard in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), its rationales were expressly based on policy concerns, not textual or historical analysis. *See id.* at 813 ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."). Indeed, *Harlow* itself involved a claim against federal officials under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and the Court simply announced in a footnote that it would be "untenable" for a different standard of immunity to apply in Section 1983 claims. *Harlow*, 457 U.S. at 818 n.30.

But even taking *Harlow*'s policy rationales as a given, there is no sensible reason for applying qualified immunity in a case such as this—where the defendants had actual knowledge that they were violating someone's constitutional rights based on their official training. *See* Pet. at 4-8. After all, *Harlow*'s immunity standard was intended to apply when "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." 457 U.S. at 818. Here, however, the officer respondents did not have to "anticipate" anything—they had known for years that citizens have a right to record them in public.

The Tenth Circuit dismissed the relevance of the officer respondents' actual knowledge by claiming that this "somewhat novel interpretation of *Harlow*" came from Justice Brennan's *concurrence* in *Harlow*, which was not binding on lower courts. Pet. App. 24a. But while Justice Brennan was perhaps more explicit in his concurrence than this Court has been, it has nevertheless been an axiom of qualified immunity since 1986 that the doctrine does not protect those who "knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). If that principle does not cover this case, it is hard to imagine what it could possibly mean.

The relevance of the officer respondents' actual knowledge is especially clear in a case such as this, where that knowledge was the product of their official training and department policy. As the petition explains in detail, many other lower courts have explicitly acknowledged that training materials and department policies are relevant in determining whether a right was "clearly established." *See* Pet. at 12-14. And those decisions accord with this Court's decisions in *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Wilson v. Layne*, 526 U.S. 603 (1999), both of which relied on non-judicial guidance in assessing the "clearly established law" inquiry. *See* Pet. at 16-18.

The Tenth Circuit's contrary assertion—that "judicial decisions are the only valid interpretive source of the content of clearly established law," Pet. App. 20a—is not only inconsistent with governing case law; it also defies both common sense and empirical scholarship

on how police officers are actually trained to respect people's constitutional rights.

The doctrinal principle that "clearly established law must be 'particularized' to the facts of the case," *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson*, 483 U. S. at 640), necessarily assumes that individual officers are both aware of the specific facts of prior cases and consider those facts when making on-the-spot decisions. It has long been recognized that this assumption is unrealistic. As one federal judge explained:

> It is far more likely that, in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles, rather than engaging in a detailed comparison of their situation with a previous Supreme Court or published Tenth Circuit case. It strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: "Are the facts here anything like the facts in *York v. City of Las Cruces*?"

Manzanares v. Roosevelt Cty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018).

Recent scholarship confirms this common-sense understanding. Joanna Schwartz, perhaps the leading empirical scholar of qualified immunity in the country,[19] reviewed hundreds of police policies and officer

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[19] *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101 (2020); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2

training materials, and she discovered that individual officers are almost never taught the particular facts of prior judicial decisions.[20] Instead, officers are simply taught general constitutional principles from major Supreme Court decisions, most notably *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985).[21]

Thus, if the Tenth Circuit is correct that judicial decisions are the *only* possible way of "clearly establishing" constitutional rights, then the "clearly established law" standard is essentially reduced to a legal fiction. The "particularized" facts of prior cases would matter only because of the lottery a civil-rights plaintiff faces when trying to find a similar prior case in their jurisdiction, not because those prior cases actually affect officer decision-making. Therefore, so long as the "clearly established law" standard remains the governing principle for qualified immunity, the Court should at least make clear that official training and department policies are relevant considerations.

B. The Court should grant the petition to ensure the uniform protection of the right to record the police in public.

The right to record police officers in public is essential to a free society. *See Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *ACLU of Ill. v. Alvarez*, F.3d 583,

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(2017); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

[20] Joanna C. Schartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 610 (2021).

[21] *Id.*

599 (7th Cir. 2012) ("To the founding generation, the liberties of speech and press were intimately connected with popular sovereignty and the right of the people to see, examine, and be informed of their government").

The gravity of this right today needs little elaboration, but perhaps the clearest example of its import and effect would be the recording of the killing of George Floyd in May 2020. In the immediate aftermath of Floyd's death, the Minneapolis Police Department reported only that a suspect suffered "a medical incident," that officers "noted he appeared to be suffering medical distress," and that he "was transported to Hennepin County Medical Center by ambulance where he died a short time later."[22] Without the citizen recording depicting the raw brutality of Floyd's death, it is doubtful whether the incident would have garnered public awareness at all, and the course of history in this country might well have been altered.

Every circuit court to address this question on the merits has concluded that there is, in fact, a First Amendment right to record the police in public.[23] But because of qualified immunity—and specifically, the

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[22] John Elder, *Man Dies After Medical Incident During Police Interaction*, Minneapolis Police (May 26, 2020), *available at* https://www.famous-trials.com/george-floyd/2720-originalmpd-statement-on-floyd-a-medical-incident.

[23] *See Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995).

discretion that courts have under *Pearson v. Callahan*, 555 U.S. 223 (2009), to grant immunity without first deciding the merits issue—this right has needlessly gone unprotected in many regions of the country for years.

For example, the Third Circuit confronted this issue in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), noting that the court had "not addressed directly the right to videotape police officers." *Id.* at 260. The panel therefore granted immunity on the ground that the right was not clearly established in the Third Circuit, but it declined to decide whether there actually was such a right. *Id.* at 263. Nearly a decade later, the Third Circuit faced this same police-recording question in two additional cases—*Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018), and *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017)—and again granted immunity to the police in both cases because the right was still not "clearly established." Similarly, the Fourth Circuit confronted the police-recording question in *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009), but granted immunity without deciding whether such a right exists. *Id.* at 853.

The Tenth Circuit took the same tack in this case, declining to decide—and thus, failing to "clearly establish"—whether there actually is a First Amendment right to record the police. *See* Pet. App. 30a n.4. Somewhat bizarrely, the court justified this act of discretion largely because "neither party disputed that such a right exists." *Id.* In other words, the existence of the right was sufficiently plain to the officer respondents that they did not even bother to deny its existence in this litigation.

Thus, the fact that the right is so obvious is exactly the reason it will *not* be protected in the Tenth Circuit going forward. As a result, these same officers could commit the same misconduct tomorrow, and in the Tenth Circuit, they would still be entitled to qualified immunity. Such a manifestly unjust result is not likely to inspire public confidence either in the police or the judiciary.

Even if this Court does not grant the petition to clarify the scope of the "clearly established law" standard in general, it should at least grant the petition to clearly establish, nationwide, that the First Amendment protects the right to record the police in public. To be sure, there is as yet no circuit split on this question, and in normal circumstances, the unanimity of lower courts would weigh *against* the cert-worthiness of such an issue. But in light of how this constitutional question has been repeatedly litigated through the lens of qualified immunity, it is, paradoxically, precisely *because* of this unanimity that the right to record police continues to go unprotected in many circuits. Until and unless this Court addresses the issue directly, police officers will continue to violate citizens' First Amendment rights with impunity.

CONCLUSION

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

Respectfully submitted,

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

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