No. _____

IN THE

# Supreme Court of the United States

DARYL HOLLOWAY,
Petitioner,
v.

THE CITY OF MILWAUKEE, et al.,
Respondents.

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This petition presents the following two questions:

1. Whether the Court should address ambiguity among the circuits on whether an unduly suggestive identification procedure violated the Due Process Clause when officers organized a lineup one day after showing a single photo to victims who never saw their attacker?

2. Whether the Court should reverse the doctrine of qualified immunity because of its absence in the Constitution and federal law?

## PARTIES TO THE PROCEEDING

Daryl Holloway, petitioner on review, was the plaintiff-appellant below.

The City of Milwaukee, Daniel Ruzinski, William Herold, Michael Carlson, Gregory Nowakowski, and Joseph Lagerman, respondents on review, were the defendant-appellees below.

## CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, petitioner, Daryl Holloway has no parent corporations and no publicly held company that owns 10% or more of an entity.

## RELATED PROCEEDINGS

U.S. Court of Appeals for the Seventh Circuit:

*Holloway v. City of Milwaukee, et al,* No. 21-3007 (7th Cir. August 8, 2022) (reported at 43 F.4th 760 (7th Cir. 2022)).

U.S. District Court for the Eastern District of Wisconsin:

*Holloway v. City of Milwaukee, et al.,* (September 29, 2021) (unreported, available at 2021 WL 4459876).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Daryl Holloway respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the Seventh Circuit is available at *Holloway v. City of Milwaukee*, 43 F.4th 760 (7th Cir. 2022) and is attached as Appendix A. The opinion of the district court's order granting summary judgment in favor of defendants is not reported, but can be located at *Holloway v. City of Milwaukee*, 2021 WL 4459876 and is attached as Appendix B. The Judgment from the United States District Court for the Eastern District of Wisconsin is attached as Appendix C.

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was filed on August 8, 2022. *See* Appendix A. This petition is timely filed pursuant to Supreme Court Rule 13.1. Associate Justice Barrett granted a 60-day extension of the period for filing this petition to December 21, 2022. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The case before the Court involves the Due Process Clause of the Fourteenth Amendment, which states: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 42 U.S.C. § 1983, which 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 or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress***.

## STATEMENT

After serving 24 years for crimes he did not commit, Daryl Holloway was found innocent as a matter of law by the same judge who convicted him decades earlier. Holloway's conviction rested on the respondents' deceitful tactics to apprehend a Black male responsible for raping and terrorizing White women on the East Side of Milwaukee, Wisconsin. Such commitment to protect the community should

have been met with the same pledge to detain the correct individual.

Despite no physical evidence of Holloway's presence at any of the crimes, the Milwaukee Detectives primed two victims less than 32 hours before they viewed Holloway in a live lineup. The day before the lineup, the detectives showed a photo array containing Holloway's photo to two victims, both of whom stated they never saw their attacker's face, with one victim still being treated in the hospital. Holloway was the only individual to appear in both the photo array and lineup. The victims isolated Holloway from the lineup because of the improper priming effect of the photo array.

Furthermore, there exists a critical question of whether Section 1983 confers a right to defense of qualified immunity. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244, 13 L.Ed.2d 545 (2022). Qualified immunity, as used today, was not well established in 1871 when Section 1983 was enacted.

In mirroring the Court's decision in *Dobbs*, many factors weigh in favor of overturning decade-long precedent. The nature of the error in incorporating qualified immunity into 1983 jurisprudence should not be taken lightly. Qualified immunity was created by "raw judicial power," and the Court "usurped the power…that the Constitutional unequivocally" left for Congress. *Dobbs*, 142 S. Ct. at 2265. The doctrine mimics a legal defense that is expected to come from a legislative body, not a judicial

one. *Id*. at 2268. Qualified immunity rests on weak grounds. This Court must "guard against the natural human tendency to confuse what the [statute] protects with the Court's own ardent views about the [immunities] that [state actors] should enjoy." *Id*. As a result, this case represents a recurring and important question regarding qualified immunity's grip on the legal landscape. Because qualified immunity acts as a barrier to Holloway's otherwise valid and meritorious claim, this case embodies a strong vehicle for reconsideration of the judicially created defense of qualified immunity.

### A. Factual Background

Daryl Holloway was charged and convicted of, among other things, two sexual assaults that had occurred in Milwaukee during the summer of 1992. App. 20. During this time period, there were numerous sexual assaults that had taken place in the City of Milwaukee. However, at least five of sexual assaults shared common themes: white women were robbed in their homes and sexually assaulted at knifepoint by a Black male on Milwaukee's East Side. App. 2, 21. Holloway's conviction rested on unduly suggestive identification practices that primed the victims to choose him as the rapist, despite the lack of physical evidence. App. 20.

The two victims that a jury found Holloway to have assaulted, G.D. and M.G., provided Milwaukee police with a brief description of their attacker. App. 3, 21. M.G. was sexually assaulted early in the morning on September 2, 1992, and indicated her

attacker was a Black male in his mid-twenties, medium-to-muscular build, 5'7" to 5'8" in height, and that he wore a bright handkerchief around his face but under his eyes. App. 21. Detective Michael Carlson was involved in the investigation of M.G.

G.D. was sexually assaulted late at night on September 26, 1992, and stated that her attacker was a Black male, 5'8" in height, around 160 to 170 pounds, but due to the dim lighting in her room at the time of the assault, she did not get a good look at his face. App. 21. Detective Daniel Ruzinski was the initial detective to file the official report in G.D.'s case on September 26, 1992. App. 25. Ruzinski was dispatched to the scene to speak with witnesses such as G.D.'s roommates and to observe the crime scene. App. 25. Ruzinski noted in his reports that the attacker took G.D.'s wallet from her purse, observed a blood-splattered wall, blood-stained sheets, and shoeprints belonging to the attacker in G.D.'s room – none of which, he would later find, could be tied to Holloway. App. 25, 37.

The three other victims of the purported same assailant – K.R., R.R. and A.K., for whom Holloway did not face charges – offered similar physical descriptions of their attacker. App. 22. Importantly, R.R. informed a detective that her attacker smelled of a very strong odor of cigarette smoke, especially on his clothes, but that fact did not make it into the detective's notes. App. 22-23. Holloway did not smoke cigarettes.

**The Photo Array on September 29, 1992**

Detective Carlson investigated the September 26, 1992, assault of R.R., which occurred only two hours before the assault on G.D., at R.R.'s home on the East Side of Milwaukee, near the campus of the University of Wisconsin-Milwaukee and only a few blocks from the border of a neighboring community, the Village of Shorewood. App. 27-28.

Police knew that they were looking for a Black male of a certain heigh and build who had used a knife in his attacks. While working on R.R.'s case, Carlson contacted the Shorewood Police Department to inquire about similar offenses in the area. App. 28. Holloway was identified as a potential suspect because he was a Black male who was stopped by Shorewood Police and cited for an ordinance violation of "prowling" on September 21, 1992. App. 27. Holloway also was on parole for a 1985 sexual assault conviction. *Id*. Carlson, in researching Holloway's prior conviction, decided the facts of the 1985 conviction were similar enough to the circumstances surrounding the assaults on R.R., G.D., and M.G. App. 27-28.

Carlson obtained a booking photo of Holloway and placed it into a photo array to show R.R. on September 29, 1992. App. 28. R.R. was not able to make a 100% positive identification. *Id*. R.R. stated Holloway's photo looked similar to her attacker, but she would need to see him in person. *Id*. Carlson showed that same photo array to G.D., but she could not identify him. *Id*. Based solely on R.R.'s statement that Holloway looked similar to her attacker and

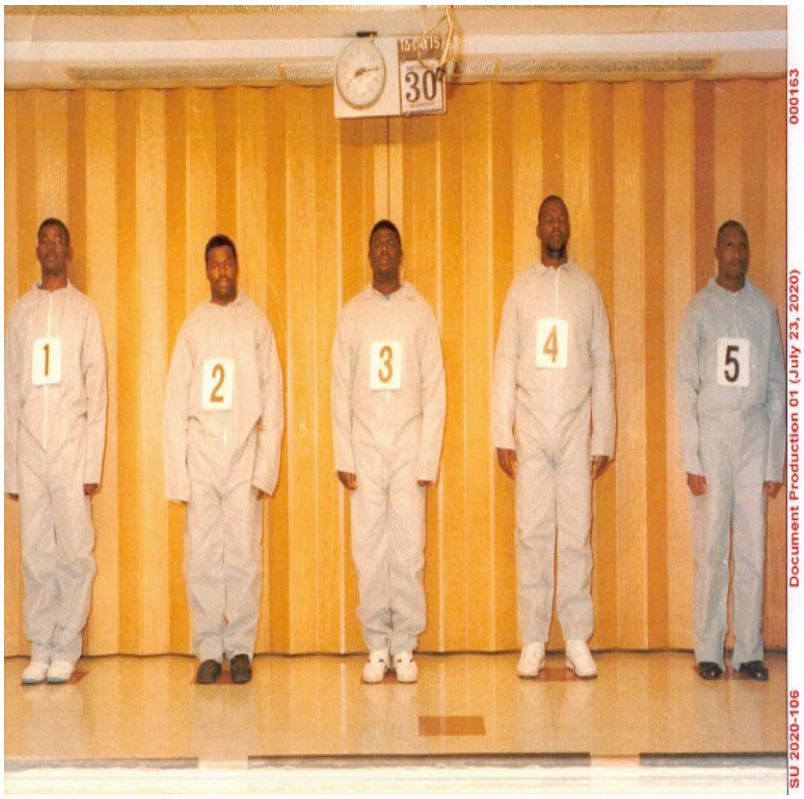
Holloway's 1985 conviction, Milwaukee Police Department officers arrested Holloway on September 30, 1992. *Id.* No photo array was shown to M.G.

**Lineup on September 30, 1992**

Holloway was brought to a police station, where Detective Joseph Lagerman took Holloway's statement, read him the charges for which he was under arrest, and advised him of his Miranda rights. App. 29. Holloway continually denied involvement in the crimes and willingly volunteered to stand in a lineup, provide samples of blood, hair, and saliva, and gave alibi information for the relevant dates. App. 29.

Holloway was placed in a lineup on September 30, 1992, at approximately 7:50 P.M. at the Milwaukee Police Administration Building with four other men pulled from the Milwaukee City Jail. App. 29. The four other men – called "fillers" – were chosen by the late Detective William Stawicki and Detective William Herold. App. 29. The fillers were supposed to be of similar height, build, facial features, and skin tone as Holloway. App. 29. Holloway was placed in position #2 at the direction of his public defender who made no objection to the lineup that day. App. 30. Holloway, at 5'10", was visibly shorter than suspects at positions #1, #3, and #4, and slightly shorter than suspect at position #5. App. 30. As a suspect, Holloway should never have been the shortest person, especially where all five women described their attacker(s) as 5'7"-5'8". App. 30. Besides a visual lineup, the detectives conducted a voice lineup, despite the officers never having conducted or used such an

identification procedure that required identifying a suspect based solely on voice identification. App. 30.




App. 18.

At the lineup, G.D. identified Holloway as the man who assaulted her. App. 30. G.D. told Herold she was "absolutely sure" that Holloway was the correct individual based on his voice and general physical characteristics, although G.D. admitted she never saw her attacker's face and did not choose Holloway from the photo array the day prior. App. 30. Despite M.G.'s statement that her attacker covered his face below his

eyes, M.G. also identified Holloway as the person who assaulted her. App. 31. M.G. told Detective Gregory Nowakowski "she was 'positive' that Holloway was the person who assaulted her, and that he looked 'exactly like' her rapist." App. 31.

A potential witness, Charles Humes, viewed the lineup because he lived near G.D. and encountered a Black male in the neighborhood on September 25 and 27. App. 31 fn. 12. Humes positively identified Holloway based on an interaction he had with a Black male (who self-identified himself to Humes as "Al") with a strong smell of alcohol on his breath and who Humes purportedly gave a ride to on September 25. *Id*.

The remaining victims, R.R. and A.K., did not identify Holloway as their attacker. App. 5, 31-32. A.K.'s roommate, L.G., along with B.D and E.G., also failed to identify Holloway at the lineup. App. 32. Interestingly, several key witnesses were not present for the lineup on September 30. App. 31, fn. 13. For example, M.G.'s neighbors and G.D.'s roommate, Tonya Bartoletti, were not present at the lineup. App. 31. Bartoletti was verbally accosted by a Black male around the time of the assaults near a commercial area in Milwaukee that was near the house she shared with G.D. App. 25. Bartoletti told Ruzinski that she had been followed home the day before the September 26 attack by a Black male known as "Al", whom everyone identified as the neighborhood drunk. App. 25-26.

Holloway moved to suppress the lineup as suggestive and overall tainted, but Milwaukee County Circuit Court Judge Jeffrey Wagner, who presided over Holloway's pretrial proceedings and subsequent trial, denied the motion stating the lineup was conducted in a "fair and impartial manner, using the necessary means to avoid any type of suggestiveness whatsoever." App. 5, 32.

**Charges, Trial and Conviction of Holloway**

Holloway was charged with first degree sexual assault and burglary in connection with the assaults on M.G. and G.D., as well as the burglary of L.G. App. 34. Despite the detectives asserting that each kept a hard copy of their reports and maintained their memo books, Holloway's trial counsel was only given the typed police reports, not the detectives' handwritten notes. App. 35. The information regarding R.R.'s assailant, including the detail as to the heavy smell of smoke, were missing from Carlson's written report. App. 35. Holloway asserted that had his trial attorney received proper information from Carlson's notes, he would have been alerted to R.R.'s attacker smelling of cigarettes, as Holloway was not a smoker at that time, and could have used that information to challenge the lineup and the identification. App. 35.

At the time of the investigation into Holloway, as well as during trial, the Wisconsin State Crime Lab had not begun to regularly conduct DNA analyses. App. 5, 35. Nonetheless, the decision as to whether to send out evidentiary materials for DNA testing to other labs was made by the assistant district attorney

assigned to the case. App. 35. During 1992-1993, DNA testing was approved for few private laboratories and even then, decisions to test DNA were balanced against costs and length of time needed to conduct the testing. App. 5, 35-36.

Raymond E. Menard, a serologist at the Wisconsin State Crime Lab, testified at Holloway's trial that he analyzed vaginal and cervical swabs of M.G. but could not determine a potential source of semen found in those sample because there "physically was not enough present," and that he could not include or exclude a particular person by blood type. App. 5, 36. Menard also tested two blankets from G.D.'s bedroom that detected the presence of semen. App. 36. Menard's testing of the blankets revealed that someone other than Holloway was the source of seminal fluid. App. 5, 36-37. Holloway was found guilty of the assaults on M.G. and G.D. App. 37. He was sentenced to 120 consecutive years in prison on September 30, 1993, by Judge Wagner. App. 37. Holloway was 25 years old.

**State Appeal and Post-Conviction Release**

After years of incessant requests for additional DNA testing by Holloway's post-conviction counsel, the Milwaukee County District Attorney's office agreed to have additional DNA testing performed on the rape kit samples from the assaults on M.G. and G.D. App. 38-39. That new testing demonstrated that Holloway may not have been the source of the seminal fluid. *Id*. After another round of testing conducted by a private lab, Holloway and the State agree that this

evidence was "exculpatory in nature." App. 38. The parties agreed that had this evidence been available at trial, "a reasonable probability exists that a jury would have reached a different result" and that, in light of the new evidence, "it would be difficult for the State to provide guilty beyond a reasonable doubt in a retrial." App. 39.

On October 4, 2016, Judge Wagner, the same judge who had sentenced Holloway 23 years earlier, vacated Holloway's convictions and rendered him innocent as a matter of law. App. 39.

### B. Procedural Background

Holloway filed a lawsuit under 42 U.S.C. § 1983 alleging that the City of Milwaukee and individual detectives failed in their investigation and improperly focused their attention on Holloway as the suspect and offender. App. 40. Notably, Holloway argued that the September 30, 1992, lineup was unduly suggestive because G.D. was shown a four-person photo array containing Holloway's photo on September 29, but he was the only person from the photo array in the lineup on September 30, thus violating his due process right to a fair trial. App. 43.

The district court granted summary judgment in favor of respondents on all claims. App. 66. The district court dismissed Holloway's due process claims regarding identification procedures and *Brady* violations.[1] App. 51-56. The district court found that

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

the September 30 lineup met the criteria to withstand a challenge to due process as it was not unduly suggestive, and that it did not violate Holloway's constitutional rights. App. 8, 44, 46. Further, the district court found that G.D.'s identification was not impermissible despite her viewing Holloway's photo in a photo array one day prior to the lineup. App. 50.

Next, the district court reviewed Holloway's *Brady* claims regarding several of the respondents' memo notebooks as well as other information Holloway claimed to be exculpatory that was not turned over. App. 53, 54, 56. Ultimately, the court decided that none of the *Brady* claims survived because Holloway was unable to show that the information was favorable to him in an exculpatory and impeaching way. App. 53, 54, 56.

Holloway's unlawful detention claim also was dismissed because the district court found the Carlson arrested Holloway with probable cause, consistent with the Fourth and Fourteenth Amendments. App. 61. Based on the finding that Carlson had probable cause, the district court quickly dismissed Holloway's civil conspiracy and failure to intervene claims. App. 62-64. Lastly, Holloway's *Monell*[2] claims did not survive because the district court held that it was an attempt to relitigate the same *Brady* violations under *Monell*, and that Holloway did not have a constitutional right to DNA testing. App. 65-66. Holloway appealed the district court's decision.

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[2] *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

The Seventh Circuit affirmed the district court's decision granting summary judgment in favor of the City of Milwaukee on August 8, 2022. App. 2. Notably, however, the court's decision emphasized that, notwithstanding the high probability that identification procedures were unduly suggestive and violated Holloway's constitutional rights, the officers were protected by qualified immunity. In relevant part, the Seventh Circuit stated:

> G.D. was shown a photograph of Holloway only 32 hours prior to the lineup. This may have caused G.D. mistakenly to identify Holloway, believing that she recognized him from the day of the assault when really she recognized him from the photograph she saw the day before. In social-science parlance, this well-documented psychological phenomenon is known as "unconscious transference." See Kenneth A. Deffenbacher, Brian H. Bornstein & Steven D. Penrod, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW AND HUM. BEHAV. 287, 299–306 (2006) (discussing unconscious transference); see also *Reyes v. Nurse*, 38 F.4th 636 (7th Cir. 2022) (same).
>
> The district court dismissed this concern, observing that it was "undisputed ... that G.D. identified Holloway based on his

> voice and general body shape," not his face. "This indicates," the court reasoned, "that G.D. was not, in fact, affected by the photo array. The photo array contained headshots, not full body photographs or voice samples. If the photo array primed G.D., she would have based her identification on Holloway's facial features."
>
> This is too much of a leap at the summary-judgment stage. It may be undisputed that G.D. *said* that her identification was based on Holloway's voice and general body shape. But a jury could well have concluded that G.D. was subconsciously influenced by having seen Holloway's face only 32 hours earlier. This is precisely why the phenomenon of unconscious transference presents such a vexing problem: it operates at the level of the subconscious, and so even a sincere and well-intentioned witness can unwittingly identify the wrong person.

App. 8-9.

Devastatingly, despite the above acknowledgment that Holloway's constitutional rights to a free and fair trial were infringed, the Seventh Circuit reluctantly concluded that "[b]ecause Holloway can point to no controlling or persuasive authority that clearly established that it was impermissible for the police to use a photo array only

a day or so before the physical lineup, defendants are entitled to qualified immunity as a matter of law." App. 10-11.

During the pendency of appeal, on April 14, 2022, the State of Wisconsin Claims Board rendered its decision on a claim for Innocent Convict Compensation pursuant to Wis. Stat. § 775.05. *See* Appendix D. Holloway, through Attorney Raymond Dall'Osto requested the maximum statutory reimbursement of $25,000, plus $100,110.13 for attorneys' fees related to his 1993 wrongful conviction. App. 72-73. Additionally, Holloway requested the Claims Board recommend to the state legislature additional compensation in the amount of $975,000 for the 24 years he spent in prison. App. 73.

The Claims Board conducted a hearing on March 22, 2022. The Claims Board determined that the evidence was clear and convincing that Holloway was innocent as a matter of law for the crimes for which he was imprisoned and awarded Holloway the maximum statutory amount, plus attorney's fees. App. 76-77. Furthermore, the Claims Board felt unanimously compelled to recommend to the legislature an additional payment of $975,000, which is believed to be the largest claim in the history of the State of Wisconsin to an individual. App. 78.

## REASONS FOR GRANTING THE CERT PETITION

This Court should grant certiorari for two reasons.

*First,* this Court should consider out of court identification procedures and the way that the circuits have developed separate standards when analyzing 42 U.S.C. § 1983 claims based on unduly suggestive procedures. There are two operative concepts in determining the admissibility of identification procedures stemming from this Court's precedent. There will never be a Due Process violation solely using suggestive identification procedures by law enforcement officials, no matter how unnecessarily suggestive they may be. Such a result is confusing and archaic. Had Holloway's case been presented in the Sixth Circuit, for example, the outcome certainly could have been different. The circuits appear split in their logical approach and understanding of this Court's precedent, requiring this Court's intervention.

*Second*, this Court should strongly consider abolishing qualified immunity. The application of qualified immunity has been heavily scrutinized for its insulation of officials, preventing otherwise valid constitutional violations to halt based on an unwritten defense to civil rights lawsuits brought under 42 U.S.C. § 1983. Qualified immunity posits as a steadfast shield without a backbone, necessitating this Court to reconsider its place in our jurisprudence as such immunity cannot be located in any text of the Constitution or otherwise. This petition requests that

this Court reverse the qualified immunity doctrine as unlawful and inconsistent with conventional principles of statutory interpretation, especially in light of the Court's recent decision in *Dobbs*.

## I. THE DECISION BELOW DEEPENED A SPLIT ON THE STANDARDS USED TO EVALUATE UNDULY SUGGESTIVE IDENTIFICATION PROCEDURES.

Since the Court's holding in *Stovall v. Denno* that identification procedures conducted in criminal cases could violate due process, courts have long wrestled with cases involving suggestive procedures. 388 U.S. 293 (1967). And, tangled within that analysis is whether the identification procedure itself has a suggestive impact or whether the *effect* of the suggestiveness taints the reliability of the identification. Holloway suffered from both. One year after the *Stovall* decision, the Court added to its definition on what constitutes a due process violation in *Simmons v. United States*, 390 U.S. 377, 384 (1968) (stating that "only if the photographic identification procedure was so impermissible suggestive as to give rise to a very substantial likelihood of irreparable misidentification" would an in-court identification be prohibited.). The Court has continued to add to its analysis of identification procedures to stress the importance of reliability and degree of harm as evinced in *Neil v. Biggers*, 409 U.S. 188 (1972) and *Mason v. Braithwaite*, 432 U.S. 98 (1977).

Historically, however, federal appellate courts have shown little willingness to follow the Court's lead

in countenancing admittedly suggestive police procedures. *See, e.g., Hudson v. Blackburn*, 601 F.2d 785 (5th Cir. 1979) (six months after robbery-murder, witness shown two pictures of defendant alone on eve of trial); *United States ex rel. Pierce v. Cannon*, 508 F.2d 197 (7th Cir. 1974) (defendant, the only person in lineup wearing a three-quarter length black leather coat fitting the description of coat worn by robber, identified by two victims viewing lineup together); *United States ex rel Lucas v. Regan,* 503 F.2d 1 (2d Cir. 1974) (after selecting a different man as robber, witness "corrects" herself and identifies defendant when shown his photo- graph alone); *In re L.W.*, 390 A.2d 435 (D.C. 1978) (defendant substantially shorter and younger than other lineup participants).

Despite serious errors in police conduct, incentivized by courts, courts are more than willing to uphold the use of challenged eyewitness testimony and suggestive tactics. "Since mistaken identifications are probably the greatest cause of erroneous convictions, we must require the fairest identification procedures available under the circumstances. With the stakes so high, due process does not permit second best." *Wright v. United States,* 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, J., dissenting).

The photo array procedure in Holloway's case improperly suggested his guilt and primed the victims to choose him in the subsequent lineup. Even then, it was not a wholesale identification of Holloway among the victims. Two of the victims were certain – including G.D., who was near-sighted and asleep at the time of her attack, specifically told Carlson that

she could not identify her attacker by his face, yet was shown a photo array that contained Holloway's face prior to the lineup – while others, including R.R., who had seen her attacker, did not make an identification whatsoever.

### A. Precedent on Unduly Suggestive Identification Procedures Have Produced Inconsistent Results Across the Nation.

The Supreme Court precedent regarding identification evidence in criminal trials is confusing in Section 1983 claims and continues to plague courts today. We know that the Due Process Clause forbids the admission of identification testimony that violates principles of fundamental fairness, yet the Court's historic decisions dealing with such violations have been inconsistent and perplexing, leading to lower courts' admission of suggestive identifications to convict innocent people. This doctrinal mess deserves correction.

A suggestive identification procedure is one that suggests to the identifying witness who the suspect expected to be identified is. *See, e.g., United States v. Brownlee,* 454 F.3d 131, 138 (3d Cir. 2006) ("As the Supreme Court has acknowledged, a show-up procedure is inherently suggestive because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime.").

All the confusion points back to the Court's seminal case about suggestive and necessary

identification procedures: *Stovall v. Denno*. The Court in 1967 produced a constitutional framework central to the admissibility of police-arranged identification procedures. The overarching issue in *Stovall* led to the Court's examination of whether the procedure was proper rather than examining how reliable the identification truly was. *Stovall*, 388 U.S. at 302. While starting with "fundamental fairness," this Court ignored whether tainted evidence is admissible at trial. The *Stovall* Court went on to conjure up a two-part test to determine if Due Process was implicated by positing suggestiveness and necessity as key ingredients. The test begs the question as to how far a suggestive identification procedure can go before it crosses the Due Process line, but, in the same breath, an identification can cross such a line if it was necessitated by exigent circumstances.

One year later, the Court again dealt with admissibility of suggestive identification procedures in *Simmons v. United States*, 390 U.S. 377, 381 (1968). With a fact pattern shockingly similar to Holloway's, the *Simmons* Court struggled to procure a standard between the administration of unconstitutional identification procedure and its subsequent admissibility at trial. *Id.*, at 384. However, *Simmons* corrected *Stovall's* major mistake by discussing reliability in its totality of the circumstances test. *Id.*, at 385-386 ("… Taken together, these circumstances leave little room for doubt that the identification of [the defendant] was correct, even though the identification procedure employed may have been in some respects fallen short of the ideal."). Yet, even with *Simmons* broadening the door by viewing the

reliability of a suggestive but necessary identification when determining admissibility, it continued to contradict the tight guidelines from *Stovall*.

Misidentification and reliability continued to knock at the Supreme Court's door. Four years later, in *Neil v. Biggers*, the Court held that the admission of a suggestive identification procedures did not violate the Due Process clause. 409 U.S. 188, 198 (1972). Next, the Court in *Mason v. Braithwaite* utilized the reliability factors from *Biggers* and stated that "[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself." 432 U.S. 98, 114-116 (1997). Yet, both *Braithwaite* and *Biggers* refused to disincentivize police for their faulty methods by allowing suggestive identification to proceed to trial.

The lower courts continue to struggle immensely in rendering correct decisions by regularly admitted evidence of police-arranged suggestive identification procedures without inquiring into the reliability of such identifications. For instances, the Ninth Court in *Ramirez v. Taylor* affirmed a one-person show up[3], the Seventh Circuit held that to determine whether "the admission of testimony regarding an out of court identification offends the defendant's due process rights" is a two-step process

[3] *Ramirez v. Taylor*, 103 Fed. App'x 248, 251 (9th Cir. 2004) (holding that reliability is only important in cases of "unnecessarily suggestive identification procedures").

in *United States v. Hawkins*[4]; and the Second, Third, Fifth, Eight, and Eleventh Circuits have all generated faulty exploration on admissibility of a suggestive identification procedure.[5]

Across the Nation, lower courts are struggling to adhere to this Court's precedent. Without correction, each circuit will continually manufacture a fact-by-fact analysis while trying to incorporate the standards produced from this Court. The decision below conflicts with decisions from the Fifth, Sixth, and Eighth Circuits involving analogous facts. This Court's intervention is necessary to restore uniformity among the circuits and to correct the Seventh Circuit's refusal to apply this Court's precedent.

### B. The Fifth and Sixth Circuits Have Established Clear Identification Procedure Guidelines.

When faced with a Section 1983 claim based on unduly suggestive identification procedures, the Sixth Circuit recognized that, at least since before 1992, there was clearly established constitutional right to be "free from identification procedures 'so unnecessarily suggestive and conductive to irreparable mistaken

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[4] *United States v. Hawkins*, 499 F.3d 703, 707 (7th Cir. 2007) (using a two-step process to determine if due process was offended).

[5] *See United States v. Bautista*, 23 F.3d 726 (2d Cir. 1994); *United States v. Steven*, 935 F.2d 1380 (3d Cir 1991); *Herrera v. Collins*, 904 F.2d 944 (5th Cir. 1990); *United States v. Martinez*, 462 F.3d 903 (8th Cir. 2006); *United States v. Walker*, 201 Fed. App'x 737, 741 (11th Cir. 2006) (rejected a due process challenged without any inquiry into the identification's reliability).

identification' that the identification's use violates due process of law." *Gregory v. City of Louisville*, 444 F.3d 725, 745-746 (6th Cir. 2006) (citing *Stovall*, 388 U.S. at 302). The Sixth Circuit used a two-part test; the court must determine if (1) the procedure leading to the alleged misidentification was so unduly suggestive that the defendant was denied a fair trial, and (2) whether the identification was reliable or not. *Hustell v. Sayre*, 5 F.3d 996, 1005 (6th Cir. 1993); *Haliym v. Mitchell*, 492 F.3d 680, 704 (6th Cir. 2007). The Sixth Circuit also concluded that *Neil v. Biggers* put officers on notice that they must evaluate the totality of the circumstances and reach a reasoned conclusion as to whether an identification procedure is impermissibly suggestive or not *before* conducting the procedure. *Gregory*, 444 F.3d at 746 (citing *Neil*, 409 U.S. at 199-200). Lastly, it concluded that because the right was clearly established, the reasonableness of an officer's decision to move forward with the lineup is a question for the finder of fact. *Gregory*, 444 F.3d at 746 (denying qualified immunity when officer showed witnesses a photo of exoneree, witnesses did not identify, but later identified exoneree at subsequent lineup).

The Fifth Circuit also recognized that the use of an unconstitutionally suggestive identification procedure that taints the right to a fair trial is a basis for Section 1983 claims. *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988). It concluded that obtaining positive identifications by unlawful means violates clearly established constitutional principles. *Id.*

### C. The Seventh and Eighth Circuits Do Not Have Clearly Established Tests on Unduly Suggestive Lineup Procedures.

The Seventh and Eighth Circuit hold, in the context of unduly suggestive lineups, that only a violation of the core right—the right to a fair trial— is actionable under Section 1983. *Alexander v. City of South Bend*, 443 F.3d 550, 555 (7th Cir. 2006); *Pace v. City of Des Moines*, 201 F.3d 1050, 1055 (8th Cir. 2000) (citing *Hensley v. Carey,* 818 F.2d 646, 648–49 (7th Cir. 1987), *cert. denied,* 484 U.S. 965, 108 S.Ct. 456, 98 L.Ed.2d 395 (1987)).

Unlike the Sixth Circuit, the Seventh and Eighth Circuits incorrectly interpreted the Court's unduly suggestive identification jurisprudence. The Seventh and Eighth Circuits hold that the jurisprudential doctrines outlining protection against unduly suggestive identification procedures are merely procedural safeguards and do not establish a constitutional right to be free from unduly suggestive lineups. *Pace*, 201 F.3d at 1055; *Hensley*, 818 F.2d at 648; *cf. Gregory*, 444 F.3d at 745-46. These Circuits have carved out a test inconsistent with this Court's *stare decisis*.

### D. This Court Should Adopt the Sixth Circuit's Interpretation.

The Seventh Circuit applied the incorrect legal standard. It was clearly established that the constitution demanded that Holloway be "free from

identification procedures 'so unnecessarily suggestive and conductive to irreparable mistaken identification' that the identification's use violate[d] [Holloway's] due process of law." *See Gregory*, 444 F.3d at 745-746 (citing *Stovall*, 388 U.S. at 302).

Had the Seventh Circuit applied the correct legal standard, it would have concluded that any reasonable officer at the time of Holloway's identification, would have—or at least should have—known that their identification procedure would violate his right to a fair trial. *See Gregory*, 444 F.3d at 747 (holding that liability may attach "if [the officer] reasonably should have known the use of the identification would lead to a violation of Plaintiff's right to a fair trial."). Moreover, the Seventh Circuit would have concluded that, at least since 1972, police officers were put on notice that *before* they proceed with an identification procedure, they must assess the totality of the circumstances and reach a reasoned conclusion as to whether an identification procedure is so impermissibly suggestive or not. *Gregory*, 444 F.3d at 746 (citing *Neil*, 409 U.S. at 199-200).

Any reasonable officer would have known that the second identification procedure was so "unnecessarily suggestive and conductive to irreparable mistaken identification" that the identification would violate Holloway's right to a fair trial. *Id*. Two witnesses were shown Holloway's photo in photo array—32 hours before—the lineup was conducted. At the photo array, one of the two witnesses stated she would likely be able to identify Holloway in person, but neither witness affirmatively

identified Holloway. In addition, the reality was that the victims never saw their perpetrator. Nevertheless, 32 hours later, police conducted a second identification procedure – the lineup. Only three out of thirteen witnesses identified Holloway at the lineup. Holloway was the ***only*** person that was in the photo array shown to the witnesses 32 hours before. In addition, Holloway undoubtably stuck out in the lineup. The "fillers" were not properly executed, Holloway was noticeably shorter than the fillers and the victims described their attacker as a shorter man; the officer's admitted part of their line up procedure was improper; and the witnesses nevertheless admitted they never saw their attacker's face. Importantly, the majority of witnesses who were never shown Holloway's photo 32 hours before the lineup did not positively identify him.

The officer's conduct violated Holloway's constitutional right to be free from "unnecessarily suggestive and conductive to irreparable mistaken identification" procedures, and violated Holloway's right to a fair trial. *Gregory*, 444 F.3d at 745-746 (quoting *Stovall*, 388 U.S. at 302). But for the unduly suggestive and conductive to irreparable mistake identification procedures, Holloway would never have been convicted to 120 consecutive years of incarceration.

This Court should grant certiorari to correct the divided circuit's approach to Section 1983 claims based on unduly suggestive identification procedures, and ensure that Holloway, and others like him, do not have their rights as guaranteed by the Constitution deprived without due process.

## II. THIS COURT SHOULD RECONSIDER QUALIFIED IMMUNITY BECAUSE THE DOCTRINE HAS NO BASIS IN LAW OR POLICY.

Better yet, this Court should grant certiorari to reconsider qualified immunity in Section 1983 claims. The doctrine has no basis in sound law or policy and was not an available defense in 1871 when the 13th, 14th and 15th Amendments were adopted. It is long past time for this Court to correct its flawed precedent in *Harlow v. Fitzgerald*. The perpetually egregious nature of qualified immunity continues to damage individuals every day; its weak reasoning and foundation propels unworkable rules; it continually contradicts various areas of sound law; and cannot support a reliance interest, thus it should be revisited. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265-2278 (2022) (stating basis for overruling prior precedent).

Qualified immunity has been "on a collision course" with Section 1983 "from the day it was decided." *Dobbs*, 142 S. Ct. at 2265. Rather than growing out of any textual foundation, qualified immunity was born out of pure judicial creation of a putative "good faith" defense to a few specific common-law torts. *Pierson v. Ray*, 386 U.S. 547, 554-556 (1967). It is now applied to all Section 1983 claims. But scholarship suggests that no such free-standing defense existed in common-law when Section 1983 was created. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) ("[S]ome evidence supports the conclusion that common-law

immunity as it existed in 1871 looked quite different from our current doctrine"). The current doctrine bears no resemblance whatsoever to any common-law immunity defense. The modern test refers to whether the right in question was clearly established. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This reflects, as the Court itself acknowledges, "principles not at all embodied in the common law" when Section 1983 was enacted. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

The Court has acknowledged this point time and time again—Section 1983 "on its face admits of no immunities," *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976); and "[Section 1983's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted," *Owen v. City of Independence*, 445 U.S. 622, 635 (1980).

Beyond that, qualified immunity has proven not to accomplish its purported goals. As for officer liability, indemnification is the norm. One study found that officers in a sample of settlements for police misconduct only paid 0.02% of the damages to plaintiffs, demonstrating the strong protection already afforded by indemnification by police departments and government agencies. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). And there is evidence that qualified immunity plays no meaningful role in alleviating litigation burdens. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 48-51 (2017). While justified solely by judicially identified policy, decades of experience have proven that those

policies are not meaningfully advanced by the doctrine.

No factors appear in favor of retaining qualified immunity in its current fashion. The Court has previously altered its judge-made rules regarding Section 1983, without serious hesitation. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 233-234 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194 (2001)); *Harlow*, 457 U.S. at 816-818 (overruling subjective-good faith requirement identified in *Scheuer*, *Gomez*, and other authorities). Having been "tested by experience," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-174 (1989); the existing doctrine has proven that it is not only ineffective at accomplishing its stated ends, but also affirmatively detrimental to litigants and the law alike. This Court should grant plenary review and resolve the questions presented.

### A. Qualified Immunity is Wholly Inconsistent with the History and Text of Section 1983.

Close inspection of qualified immunity suggests that something has gone wrong, as a legal matter, in the Court's jurisprudence. While true that qualified immunity cannot be located in the original text nor the codified text of Section 1983, unwritten defenses are not new to the law. However, qualified immunity was created, nearly 100 years after Section 1983 was originally enacted. It was not in existence at the time the statute was enacted. The real concern is how removed the doctrine has become from ordinary principles of fairness and legal interpretation. To be

direct, qualified immunity is the product of the Court's own "ardent views" and decision-making rather than ordinary posited law. *See Dobbs*, 142 S. Ct. at 2236. Such subjective decisions demand responsible reconsideration. *Id.*

Qualified immunity is not workable, the more egregious the conduct, the more likely qualified immunity will be granted. *See Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) ("...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 decision below marks yet another example of the Seventh Circuit being bound to follow this Court's qualified immunity precedent in a case involving egregious misconduct. Despite the obvious failures by the Milwaukee detectives in conducting a proper lineup, the Seventh Circuit granted qualified immunity in their favor on the theory that no factually identical case established the unlawfulness of their acts. Yet, just last term, this Court's approach to qualified immunity reprimanded the Fifth Circuit's failure for committing a materially identical error. *See Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam).

The Court's obvious pro-immunity crusade has showcases immense protection based solely on unwritten principles shoehorned by the Court's willingness to outstrip other comparable defenses. The Court used raw judicial power in creating the doctrine and usurped the power that the constitution

unequivocally gave to Congress. *See Dobbs*, 142 S. Ct. at 2265. Additionally, in light of the Court's recent decision in *Dobbs*, whereby the majority gutted a constitutional protection because it was not rooted in the text of the Constitution or other historical principles, qualified immunity must likewise fails.

When Congress passes new legislation, it "does not write upon a clean slate." *United States v. Texas*, 507 U.S. 529, 534 (1993). Rather, it legislates against a backdrop of established "common law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). When Congress decides to craft a new law, it has a choice: it can either retain or reject the "long-established and familiar principles" in the common law. *Texas*, *supra,* 507 U.S. at 534. Courts assume that Congress chose to retain the common law unless the text of the statute says otherwise. *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35–36 (1983). It is thus the statutory text that decides whether common-law principles survive and apply to any particular statute.

The statute at issue here is Section 1983. Starting in 1967, the Supreme Court has assumed that Congress intended to retain common-law principles in actions under Section 1983. *Pierson v. Ray*, 386 U.S. 547, 557 (1967) ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983"). In *Pierson,* the Supreme Court reviewed the version of

Section 1983 found in the U.S. Code (*id.,* fn. 1), and concluded that the "legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554. Accordingly, the Court granted defendants a "defense of good faith and probable cause" that existed in Mississippi's common law. *Id.* at 557.

That assumed-to-be-incorporated "good faith" defense evolved into the modern doctrine of qualified immunity. *See Harlow,* 457 U.S. at 806-807 ("As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.") And with each step along the path of qualified immunity, the Supreme Court has explicitly relied on the supposed silence of Section 1983 to ground the doctrine.[6]

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[6] *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (holding that "[c]ertain immunities were so well established in 1871" that "Congress would have specifically . . . provided had it wished to abolish them."); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989) (relying on the presumption that the 42nd Congress "likely intended" for the common law to apply); *Briscoe v. Lahue*, 460 U.S. 325, 337 (1983) ("[W]e find no evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions."); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) ("Although the Court has recognized that in enacting §1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials."); *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) ("The decision in *Tenney* established that §1983 is to be read in harmony with general principles of tort immunities and defenses, rather than in derogation of them.").

But the Supreme Court was wrong when it assumed that Congress intended to incorporate the common law in Section 1983. The Supreme Court got it wrong because the version of Section 1983 the Court looked at – the U.S. Code – *omits language originally passed by Congress.*

The original statute contained additional significant text –"[i]n between the words 'shall' and 'be liable.'" *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 101, 166-67 (forthcoming). Between "shall" and "liable" was an additional clause. That clause said that government officials "*shall*, **any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding**, *be liable*" under the statute. Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added). Thus, in *Pierson*, Mississippi's common-law "defense of good faith and probable cause" was to the contrary. However, the present 42 U.S.C. § 1983 statute states "*every person*" acting under the color of state law that causes any person to the deprivation of any rights, privileges, or immunities secured by the Constitution "*shall be liable*." 42 U.S.C. § 1983. There is no longer any text between the words "shall" and "be liable."

With this historical mishap in mind, *Harlow's* creation of qualified immunity stretched far beyond Congress's likely intent. Justice Antonin Scalia's dissent in *Crawford-El v. Britton* describes the impact of qualified immunity by having "changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal

courts tens of thousands of suits each year…" (implying that *Monroe* was wrongly decided). 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (relying on *Crawford-El v. Britton*, 93 F.3d 813, 829 (D.C. Cir. 1996) (Silberman, J., concurring)). Yet, this Court has recently and repeatedly pronounced that Congress, not the courts, should be the primary voice in deciding whether to provide a damages remedy for constitutional violations. *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 185 (2017).

This Court has, time and time again, criticized qualified immunity. The doctrine has "diverged to a substantial degree from the historical standards." *Wyatt v. Cole*, 504 U.S. 158, 170-172 (1992) (Kennedy, J., concurring); *Ziglar,* 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment) (critiquing qualified immunity as lacking grounding in the text and history of § 1983, an example of the Court "substitut[ing] [its] own policy preferences for the mandates of Congress"); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (per curiam) (Sotomayor, J., dissenting) (describing modern qualified immunity doctrine as an "absolute shield for law enforcement officers"). It bears little resemblance to any defense available at common law. *See, e.g.,* 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, 1922-24 (2010). And it is detached from the text and history of Section 1983 given that the Court created the defense nearly 100 years ***after*** the statute's enactment. *See Pierson v. Ray*, 386 U.S. 547, 556-557 (1967). In the

years since, that judge-made doctrine has improperly tolerated significant violations of constitutional rights.

Qualified immunity has diverged from its historical roots into a beast that needs taming. This Court has the opportunity to clarify its position on qualified immunity as consistent with its obvious and reoccurring distain for this precedent.

### B. This Case Presents a Compelling Vehicle for Examining Qualified Immunity.

The decision below embodies the overabundance of modern qualified immunity and its application to Holloway's case showcases its unyieldingly unjust results. The Seventh Circuit, strapped by precedent, denied Holloway his constitutional right to a fair trial. The Seventh Circuit's decision highlights that Holloway, more likely than not, suffered constitutional deprivation with an unfair, unduly suggestive identification procedure. Yet, qualified immunity unjustly protected the Milwaukee detectives' patently wrong police conduct.

This Court has upheld the notion that qualified immunity is appropriate where an officer "makes a decision that, even if constitutionally deficient, [the officer] reasonably misapprehends the law governing the circumstances [ ] confronted." *Taylor,* 141 S. Ct. at 53 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). However, when circumstances offer no

reasonable explanation, even without pointing toward applicable case law holding otherwise, qualified immunity is not warranted. *Id*. When officers are presented with a situation demanding constitutional protection and seemingly deny an individual the right to such protection, qualified immunity fails before it begins. While precedent tied to particularized facts can indicate that a point of law is clearly established, this Court does not demand a case directly on point. *Thompson v. Cope*, 900 F.3d 414, 422 (7th Cir. 2018); *see also Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (reiterating that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question")).

Holloway's case presents an excellent vehicle for this Court's review. The questions presented were pressed below and were outcome determinative. The Seventh Circuit's grant of qualified immunity turned on its conclusion that no precedent governed the same fact pattern despite it finding Holloway's rights were violated. Rather than heed this Court's directive in *Taylor* to find that a right clearly established where the violation is obvious, the Seventh Circuit was in clear error.

Since this Court's decision in *Taylor*, the Seventh Circuit has utilized it four times, and in negative ways. For instance, despite an inmate's cell filled with feces, lack of hot water, and accumulating dead flies, the Seventh Circuit found that the officers were entitled to qualified immunity. *See Thomas v.*

*Blackard*, 2 F.4th 716, 720 (7th Cir. 2021)("[u]nlike *Taylor,* Thomas failed to point to evidence that the prison officials responded with deliberate indifference…"). Overall, *Taylor* has been cited over fifty times by the Circuits, many of which not adhering to the Court's ruling. Resolution of the question presented is critical to ensuring that wrongfully convicted individuals in the Seventh Circuit are able to vindicate the same constitutional rights as those in other jurisdictions.

For the overwhelmingly persuasive reasons provided by the doctrine's chorus of critics, the Court should grant certiorari to reconsider qualified immunity altogether. But if it will not go that far, it should at least grant certiorari to settle the circuit split over the proper test to determine whether unduly suggestive, out of court identification procedures violate an individual's right to a fair trial.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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