

No. 25-1389

IN THE
Supreme Court of the United States

RICHARD HERSHEY,
Petitioner,

v.

CITY OF BOSSIER CITY; BOBBY GILBERT, individually
and in his capacity as Deputy Marshal; DANIEL
STOLL; DAVID SMITH; TYSHON HARVEY; EUGENE
TUCKER,
Respondents.

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

**BRIEF FOR BEACON CENTER OF
TENNESSEE AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST

The Beacon Center of Tennessee submits this brief as *amicus curiae* in support of Petitioner.¹

The Beacon Center is a nonprofit, nonpartisan, and independent organization dedicated to providing expert empirical research and timely free market solutions to public policy issues in Tennessee. By putting policy over politics, the Beacon Center has successfully pushed for bold reforms in education, healthcare, economic regulation, and tax policy.

As an organization committed to the principles of individual liberty and limited government, the Beacon Center is deeply interested in robust enforcement of constitutional safeguards. To that end, the Beacon Center urges the Court to grant certiorari in this case, repudiate qualified immunity, and restore Section 1983 to its purpose of affording plaintiffs redress for violations of their federal rights against “any person”—regardless of whether that person is wearing a badge or has found a novel way to offend the Constitution.

INTRODUCTION

The Court should take this case to end qualified immunity, which lacks any basis in Section 1983’s plain text. Qualified immunity is likewise untethered from the Court’s originating theory that Congress intended Section 1983 *sub silentio* to incorporate then-existing

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amicus curiae*’s intent to submit this brief at least ten days before it was due.

common-law immunities; qualified immunity looks nothing like the immunities that existed at common law in 1871.

Stare decisis does not prevent this Court from correcting course. Stare decisis is at its weakest when the Court is evaluating the Constitution and the rights that flow from it to the American people, and qualified immunity has yielded confusion, inconsistency, and a lack of government accountability in the face of civil rights violations.

At the very least, the Court should grant certiorari to clarify that the obviousness exception is not limited to the Eighth Amendment but extends to all federal rights. This Court has long held that an obvious constitutional violation defeats qualified immunity, even when no prior case shares its facts. Yet the Fifth Circuit has confined the obviousness exception to the Eighth Amendment, departing from every other circuit and consigning every other individual right to second-class status.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO DO AWAY WITH QUALIFIED IMMUNITY.

A. Qualified Immunity Is Incompatible With Section 1983's Plain Text And Historical Common-Law Immunities.

Section 1983 does not say anything about immunities. This Court's case law has nonetheless grafted onto Section 1983's text a rule that individual officers may not be sued in their personal capacities for constitutional violations unless those violations are "clearly established" by a factually similar case. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

That substantial embellishment of Section 1983's plain text originated with the dubious assumption that "the all-encompassing language of § 1983 * * * is not to be taken literally." *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983) (citing *Tenney v. Brandhove*, 341 U.S. 367, 371 (1951)). The Court reasoned that "[c]ertain immunities were so well established in 1871 * * * that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967)). Applying that old-soil hypothesis, the Court set out to incorporate the common-law immunities that prevailed at the time of Section 1983's enactment. *See, e.g., Tenney*, 341 U.S. at 372-376 (legislative immunity); *Pierson*, 386 U.S. at 553-555 (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 421-424 (1976) (prosecutorial immunity). But over time the Court drifted from historical common-law rules, and in the case of qualified immunity it departed from them altogether in a generalized "attempt to balance competing values." *Harlow*, 457 U.S. at 807; *see generally Baxter v. Bracey*, 590 U.S. 1011, 1012-13 (2020) (Thomas, J., dissenting from denial of certiorari) (recounting the development of qualified immunity).

That double error cries out for correction. Gone are the days when courts "lightly assume[] that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. Immigration & Customs Enft*, 543 U.S. 335, 341 (2005). Nor does modern jurisprudence understand courts to be "free to rewrite clear statutes under the banner of [their] own policy concerns." *Azar v. Allina Health Servs.*, 587 U.S. 566, 581 (2019). Section 1983 should be no different.

1. Section 1983 states that “[e]very person” acting under color of state law is liable for a violation of federal rights. 42 U.S.C. § 1983. The phrase “every person” is broad and signals the abrogation of immunity. Indeed, this Court has explained that this “all-encompassing” phrase, taken “literally,” does exactly that. *Briscoe*, 460 U.S. at 330; *see also Eisenhauer v. Culinary Inst. of Am.*, 84 F.4th 507, 517 (2d Cir. 2023) (explaining the word “every” gives a statute an “expansive” meaning). Legislatures frequently utilize phrases like “every person shall be liable” to abrogate existing immunities. For example, in the nineteenth century, state legislatures used the similar phrase “every railroad shall be liable” “to abolish [] common law defenses in railroad accident cases.” Patrick Jaicomo & Daniel Nelson, *Section 1983 (Still) Displaces Qualified Immunity*, 49 Harv. J.L. & Pub. Pol’y 161, 201-204 (2026).

Statutory history bolsters this plain-text reading. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 440 (2012) (contrasting statutory history—“[t]he enacted lineage of a statute”—with legislative history). When originally enacted in 1871, Section 1983 imposed liability on any “person who, under color of any law” violated constitutional rights “notwithstanding” “any . . . law, statute, ordinance, regulation, custom, or usage of the State to the contrary.” Ku Klux Klan Act of 1871 § 1, 17 Stat. 13. Because of the notwithstanding clause “everyone understood that Section 1983 abrogated state common law immunities.” Jaicomo & Nelson, *supra*, at 193 (citing Jacob Harvar, *The Original Meaning of Section 1983 and Official Immunity*, 73 U. Kan. L. Rev. 357, 396, 401 (2024)); *see also Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J.,

concurring) (discussing new scholarship demonstrating that the 1871 Congress’s use of a notwithstanding clause undermines the “original justification for qualified immunity”) (citing Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 Cal. L. Rev. 201 (2023)).

That is because legislatures use notwithstanding clauses with the terms “law, custom, or usage” to “send a ‘clear signal[]’ to courts that [a] statute [i]s meant to supersede contrary law,” including common law. Jaicomo & Nelson, *supra*, at 165, 169-172 (quoting *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993)). Notwithstanding clauses tell courts to give a “new statute its natural meaning.” Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 242 (2000). The 1871 Congress’s use of a notwithstanding clause is therefore inconsistent with the Court’s later conclusion that Congress meant to incorporate existing common-law immunities.

Revisers omitted the notwithstanding clause when drafting the Revised Statutes, including the now-operative Section 1983, which Congress then enacted in 1874. Compare Ku Klux Klan Act of 1871 § 1, *with* Rev. Stat. § 1979 (1874). But the revision was not a repudiation of the 1871 Congress’s abrogation of common-law immunities. The Revised Statutes provide a faithful—but concise—version of existing statutes, and the notwithstanding clause was omitted only because it was considered non-substantive. See Jaicomo & Nelson, *supra*, at 206-213. The revisers very likely thought the notwithstanding clause was redundant due to the clear statutory text of Section 1983, *id.* at 212, and because legislatures and courts were at that time more willing to read statutes as displacing

contradictory common law, *see* Reinert, *supra*, at 221-226 (summarizing “pre-1871 case law involving statutory displacement of common law rights”).

Congress likewise understood that the Revised Statutes’ aims were non-substantive. Congress authorized the revisers to make only non-substantive changes, it scrutinized the initial draft to “detect[] changes and restor[e] the original meaning,” and “[m]embers of Congress . . . stated unequivocally that no substantive changes were intended.” *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 625 (1979) (Powell, J., concurring).

The courts shared that understanding and thus required a clear statement to find a substantial change between an original statute and its revised version. *United States v. Ryder*, 110 U.S. 729, 740 (1884). In cases of doubt, courts referred to the original statute to resolve any ambiguity. *Doyle v. Wisconsin*, 94 U.S. 50, 51 (1876); *United States v. Bowen*, 100 U.S. 508, 513 (1879).

So even though Section 1983 no longer contains a notwithstanding clause, it retains the meaning of the original version, which “everyone understood” to abrogate common-law immunities. *Jaicomo & Nelson, supra*, at 193.

Congressional practice confirms that Congress is explicit when it wants to provide officials with an immunity defense from liability. Congressional practice can provide “strong evidence” of a statute’s meaning. *Learning Resources, Inc. v. Trump*, 607 U.S. 229, 250 (2026). And in other contexts, Congress has not counted on judges to read between the lines when granting public officials immunity for certain acts. It has used express language. From the founding up to

the Civil War, Congress provided immunities for official acts done in good faith. For example, in 1789, Congress immunized tax collectors from liability for unlawful seizures “upon finding reasonable cause,” and “[d]uring the Civil War, Congress [immunized] federal officers from liability for ‘any search, seizure, arrest, or imprisonment’ made under a presidential order.” Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity*, 112 J. Crim. L. & Criminology 105, 117-118 (2022). Given then-existing congressional practice, the Court should require a clear statement to establish the existence of immunity, not its absence.

2. Congress could not have incorporated qualified immunity into Section 1983 in any event because qualified immunity is an invention of the twentieth-century judiciary. See *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (“[Q]ualified immunity for public officials * * * ha[s] diverged to a substantial degree from the historical standards.”). Over time this Court has “completely reformulated qualified immunity along principles not at all embodied in the common law.” *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (discussing *Harlow*, 457 U.S. 800).

Courts in 1871 had no qualms about holding officers liable for wrongs committed “within the scope of their employment,” even if the wrong “had been authorized by the state,” David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 16-17 (1972) (emphasis omitted), and even if the officer believed he was following the law, *Buck v. Colbath*, 70 U.S. 334, 344 (1865). An officer could thus face personal liability for following a direct order in good faith. In *Little v. Barreme*, for instance,

a ship captain was held liable for seizing a ship under authorization from the executive branch but without statutory authority. 6 U.S. (2 Cranch) 170, 176-179 (1804).

At that time it was considered the political branches' responsibility to indemnify officials in the absence of statutory immunity. *The Apollon*, 22 U.S. (9 Wheat.) 362, 367 (1824). In *The Apollon*, a revenue official seized a ship in international waters after it had transited through U.S. territorial waters. *Id.* at 365. This Court found that a transit does not lead to the application of U.S. customs law, *id.* at 368-372, and ordered the official to pay damages to the ship's master, *id.* at 380. The Court emphasized that officers are responsible for knowing and following the law. *See id.* at 373 ("The party who seizes seizes at his peril."). But the Court also noted that there was little doubt Congress would indemnify the officer if warranted. *Id.* at 367; *see also Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80, 98-99 (1836) (suggesting that "the government in such cases is bound to indemnify [an] officer" for liabilities incurred while following orders). Congress, in turn, regularly indemnified officers, especially if they were acting under instruction. *Jaicomo & Bidwell, supra*, at 117.

The common law did recognize a kind of good-faith immunity for certain discretionary acts. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). But in 1871, this was not a true immunity and instead reflected "political question and finality doctrines." Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396, 436 (1987). And the predominant view was that state and local officials did not have immunity for committing illegal

acts because such acts fell beyond the bounds of their discretion. *Id.* Narrow exceptions existed, but they would be inapplicable to most Section 1983 claims. *See, e.g., id.* at 430-431 (noting that high-ranking federal officials had discretion to interpret the law); *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711, 720-723, 768-769 (1883) (holding that the plaintiff cannot compel state officials to enforce a contract against the will of the state legislature). Furthermore, courts did not provide officials immunity for intentional torts—“affirmative acts, willfully done, which amounted to a trespass or other wrong.” Engdahl, *supra*, at 16-18; *see also* Jaicomo & Bidwell, *supra*, at 114 n.67 (summarizing cases finding officials liable for exceeding the bounds of their legal authority).

Today’s qualified immunity is worlds away from the immunities that existed at common law in 1871. It shields even intentional torts committed in bad faith, so long as the plaintiff is unable to identify a factually similar case. *See Harlow*, 457 U.S. at 816. The divergence is not surprising. After all, the Court did not even attempt to ground qualified immunity in historical common law; the doctrine was forged from concerns about the need to “balance competing values,” including the need to “encourag[e] the vigorous exercise of official authority” and address the “substantial costs [that] attend the litigation of” subjective intent. *Id.* at 807, 816.

In short, Section 1983’s categorical language does not admit of common-law immunities. And historical common-law immunities look nothing like this Court’s qualified immunity jurisprudence in any event—leaving only this Court’s “freewheeling policy choice[s]” to

justify the doctrine. *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012).

**B. Stare Decisis Does Not Bar This Court
From Correcting Course.**

Stare decisis poses no obstacle. The Court has identified a number of factors informing whether precedent should be overturned. “Five of these are most important here.” *Janus v. American Fed’n of State, Cnty., & Mun. Emps. Council 31*, 585 U.S. 878, 917 (2018). Those are (1) the quality of the reasoning justifying qualified immunity, (2) the workability of qualified immunity in practice, (3) qualified immunity’s consistency with other doctrine, (4) new factual and legal developments, and (5) reliance interests. *See id.* at 918-927. Each supports jettisoning qualified immunity.

First, the quality of the precedent’s reasoning. As discussed, Section 1983 states that *every person* is subject to liability for violating constitutional rights under color of state law—not every person except those serving as public officials. *See supra* pp. 4-7. And even if Section 1983 had incorporated existing common-law immunities, those immunities looked nothing like today’s qualified immunity. *See supra* pp. 7-10.

Second, the precedent’s workability. *Harlow’s* “clearly established” standard has functionally required plaintiffs to identify a case in which the precise rights violation they experienced already happened to someone else, making qualified immunity operate in practice as a kind 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.” *Cole v. Carson*,

935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting) (quotation marks omitted).

The need to identify a factually similar case is a problem for courts, too, as what constitutes sufficiently analogous circumstances is a line that “has proved to be impossible to draw with precision.” *Janus*, 585 U.S. at 921. And not for lack of trying. This Court regularly reverses qualified-immunity cases for failure to abide by “the longstanding principle that ‘clearly established law’ should not be defined ‘at a high level of generality.’” *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)); *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 613-614 (2015) (“We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.”); *City of Tahlequah v. Bond*, 595 U.S. 9, 12-13 (2021) (per curiam) (“We have repeatedly told courts not to define clearly established law at too high a level of generality [yet] * * * [t]he Tenth Circuit contravened those settled principles here.”).

Yet appellate courts continue to struggle. As Judge Willett has observed, “courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist.” *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). “How indistinguishable must existing precedent be? On the one hand, the Supreme Court reassures plaintiffs that its caselaw ‘does not require a case directly on point for a right to be clearly established.’ On the other hand, the Court admonishes that ‘clearly established law must be ‘particularized’ to the facts of the case.’” *Id.* (first quoting *Kisela*

v. *Hughes*, 584 U.S. 100, 104 (2018) (per curiam), then quoting *White*, 580 U.S. at 79). “Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established.” *Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014).

In the meantime, the rule’s malleability all but guarantees arbitrary enforcement. “[W]hether a right is found to be ‘clearly established’ is very much a function of which circuit (and * * * which judge) is asking the question, and how that question is framed.” Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 Wm. & Mary Bill Rts. J. 913, 925 n.68 (2015).

Third, the precedent’s consistency with other case law. Qualified immunity is a legal anomaly in tension with modern jurisprudence. This Court’s early decisions reading common-law immunities into Section 1983 did so in pursuit of atextual congressional intent. *See supra* pp. 2-3. The Court openly declared that “the all-encompassing language of § 1983 . . . is not to be taken literally.” *Briscoe*, 460 U.S. at 330 (citing *Tenney*, 341 U.S. at 371). But this Court will no longer “lightly assume[] that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.” *Jama*, 543 U.S. at 341; *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (“Going behind the plain language of a statute in search of a possibly contrary congressional intent is ‘a step to be taken cautiously’ even under the best of circumstances.”) (citation omitted).

Moreover, as the Court’s qualified-immunity jurisprudence has departed from principles “embodied in the common law,” *Anderson*, 483 U.S. at 645, it has

turned toward policy concerns like “the balance between vindication of constitutional rights and government officials’ effective performance of their duties,” *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quotation marks omitted); *see also Harlow*, 457 U.S. at 807 (explaining that “the recognition of a qualified immunity defense . . . reflected an attempt to balance competing values”); *supra* p. 9. But today “[c]ourts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 403 (2024). The reasoning leveraged to justify qualified immunity thus cannot be reconciled with modern case law.

Fourth, factual and legal developments have “eroded [qualified immunity’s] underpinnings.” *Janus*, 585 U.S. at 924. The Court thought qualified immunity would advance various policy goals, including reducing frivolous lawsuits that take officers away from their duties and removing the risk that fear of liability will make officers unduly cautious. *Harlow*, 457 U.S. at 814. But “experience has shown otherwise.” *Janus*, 585 U.S. at 924.

Scholarship has demonstrated that qualified immunity in practice has little to no impact on an officer’s time in the field or an officer’s confidence in the discharge of his duties. Financial incentives for officers are unlikely to change because state and municipal governments nearly always indemnify them. *See* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 885 (2014). In a five-year study of the forty-four largest jurisdictions in the United States, police officers financially contributed to less than one-half of one percentage point of settlements. *See id.* at

890. State and municipal governments paid the settlements even in circumstances in which they terminated or otherwise disciplined the officer for his conduct. *Id.*

Furthermore, defense counsel are frequently provided to officers by an associated union, municipal government, or municipal insurer. Joanna Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 5, 1797 (2018). In the unusual situation in which an officer does contribute, the median amount paid by the officer directly was only \$2,250. *Id.* at 1806. Removing qualified immunity would therefore not materially impact the pressures on officers.

Concerns related to frivolous claims distracting officers from their duties are also unlikely to come to fruition because there are ample other barriers to keep frivolous claims out of court, including pleading and evidence requirements. Joanna Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 361 (2020). Practically, plaintiffs' attorneys are unlikely to begin taking on meritless claims simply because the qualified immunity defense is removed, particularly given financial incentives and contingent fee structures. *Id.*

Legal developments have exacerbated qualified immunity's problems. Following *Harlow*, the Court announced a two-step procedure, requiring courts first to decide whether the plaintiff had alleged a constitutional violation and, if so, second to determine whether that violation was clearly established by factually analogous precedent at the time it occurred. See *Saucier v. Katz*, 533 U.S. 194, 207-208 (2001). But the Court later decided it was permissible to skip the more difficult constitutional question and go straight

to the second, simpler question whether factually analogous precedent exists. *See Pearson v. Callahan*, 555 U.S. 223, 236-237 (2009). The practical result being that many courts stopped making constitutional law in qualified-immunity cases. In a study of 844 published and unpublished circuit opinions decided after *Pearson*, courts of appeals opted to reach constitutional questions in only about forty-five percent of claims. Aaron L. Nielson and Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 33-34 (2015).

In addition to stagnating case law, *id.* at 12, this trend creates a vicious cycle that prevents plaintiffs from vindicating their rights: “Plaintiffs must produce precedent even as fewer courts are producing precedent.” *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part). By refusing to create new case law, courts are facilitating a perpetual lack of accountability for ongoing and future civil rights violations with no resolution in sight. *See* Pet. 14.

Fifth, reliance interests. For this factor the Court asks whether the public has relied on the stability of the precedent at issue for “advance planning of great precision.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 287 (2022) (citation omitted). No advance-planning interests are at stake here. Public officials who enjoy qualified immunity do not plan their constitutional violations in advance. And if they do, that is certainly not the kind of reliance that warrants retaining an otherwise defunct immunity doctrine. As to the larger public, its interest is in the robust vindication of constitutional rights. And the public has been “on notice for years regarding this Court’s

misgivings” about qualified immunity. *Janus*, 585 U.S. at 927. No fewer than four Justices “have authored or joined opinions expressing sympathy” with various critiques of qualified immunity. Schwartz, *The Case Against Qualified Immunity*, *supra*, at 1800.

Stare decisis, in short, is no obstacle to doing away with qualified immunity. The Court should do so.

II. AT A MINIMUM, THE COURT SHOULD TAKE THIS CASE TO CLARIFY THAT THE OBVIOUSNESS EXCEPTION EXTENDS BEYOND THE EIGHTH AMENDMENT.

For more than two decades, this Court has recognized that some constitutional violations are so obvious that factually identical precedent is unnecessary to overcome immunity. But the Court has left open whether that obviousness exception governs the whole Constitution or just the Eighth Amendment. The Fifth Circuit says the latter, and it stands alone in doing so. Under the Fifth Circuit’s rule, an officer who obviously violates a citizen’s free speech rights may still demand a case on all fours, and the panel below granted immunity on exactly that basis—even though two of its three members thought the violation obvious. This conflict is well documented, outcome determinative, and warrants this Court’s review.

A. This Court Has Repeatedly Denied Immunity For Obvious Violations Without A Case On Point, And Has Never Tied That Rule To A Single Amendment.

Qualified immunity turns on whether a right was “clearly established,” *Harlow*, 457 U.S. at 818, but this Court has never demanded an identical prior case. To

the contrary, it has held that “earlier cases involving ‘fundamentally similar’ facts” are “not necessary.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). What controls is whether the officer had “fair warning.” *Id.* at 739-741. And some violations are so obvious “in the light of pre-existing law,” *United States v. Lanier*, 520 U.S. 259, 271 (1997), as to be apparent to any reasonable officer even though “the very action in question has [not] previously been held unlawful,” *Hope*, 536 U.S. at 741 (quoting *Anderson*, 483 U.S. at 640). In those circumstances, “a general constitutional rule already identified in the decisional law” governs. *Lanier*, 520 U.S. at 271.

Hope offers a paradigmatic application. To punish an inmate for a worksite altercation, Alabama prison guards handcuffed him to a hitching post for seven hours in the sun, shirtless, giving water sparingly and allowing no bathroom breaks. 536 U.S. at 734-735. The Court held the Eighth Amendment violation so apparent that the “general statements of the law” on which it relied applied “with obvious clarity to the specific conduct in question,” giving the officials fair warning even without a factually similar case. *Id.* at 741. The Court applied the same rule in *Taylor v. Riojas*, summarily rejecting a grant of immunity because “any reasonable officer should have realized” that confining a prisoner in a cell full of human feces for six days was unconstitutional. 592 U.S. 7, 8-9 & n.2 (2020) (per curiam).

The fair warning principle has never been limited to the Eighth Amendment. Its origins, in fact, lie outside the prison context altogether. *See* Pet. 14, 19. *Hope*’s “obvious clarity” and “fair warning” language traces to *Lanier*, a criminal prosecution under 18 U.S.C. § 242

arising from a state judge’s sexual assaults—a matter of substantive due process having nothing to do with confinement conditions. *See Hope*, 536 U.S. at 739-741 (citing *Lanier*, 520 U.S. at 269-271). And this Court has since confirmed the principle outside the Eighth Amendment. In the Fourth Amendment setting, the Court has explained that “in an obvious case” general standards “can ‘clearly establish’ the answer, even without a body of relevant case law.” *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *cf. Sause v. Bauer*, 585 U.S. 957, 959 (2018) (per curiam) (vacating pleadings-stage immunity ruling in free-exercise case in which petitioner argued no “prior case involving [that] unusual situation” was required to deny immunity); *see also* Pet. 19, 24.

The obviousness exception therefore relies on a premise equally applicable to all constitutional rights: An official cannot convert the absence of precedent into a license to violate the Constitution. *See* Pet. 19. As then-Judge Gorsuch observed, “the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing,” so it “would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability.” *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015); *see also* Pet. 28.

**B. The Fifth Circuit Stands Alone In
Confining The Obviousness Exception
To The Eighth Amendment, In
Acknowledged Conflict With Every
Other Circuit.**

The Fifth Circuit has nonetheless confined the obviousness exception to the Eighth Amendment. Sitting en banc in *Villarreal v. City of Laredo*, the court

acknowledged that *Hope* and *Taylor* denied immunity for obvious violations without fact-specific precedent, but cabined those decisions as “Eighth Amendment cases” that establish only a “narrow” exception inapplicable to the First Amendment. 94 F.4th 374, 395 (5th Cir. 2024) (en banc). The court reached that result by treating the Eighth Amendment setting of *Hope* and *Taylor* as a limiting factor instead of a coincidence of their contexts, and by invoking its own earlier en banc decision in *Morgan v. Swanson*, *see id.*, which waved away this Court’s obviousness reasoning as mere “dicta,” 659 F.3d 359, 373 (5th Cir. 2011) (en banc). This Court vacated *Villarreal*, *see Villarreal v. Alaniz*, 145 S. Ct. 368 (2024), but the Fifth Circuit reinstated its holding on remand, *see Villarreal v. City of Laredo*, 134 F.4th 273, 276 (5th Cir. 2025), and the panel below applied that holding to compel immunity here, *see* Pet. 25-27.

Every other circuit reads this Court’s decisions the opposite way, treating obviousness as a generally applicable aspect of qualified immunity rather than an Eighth Amendment exclusive. *See* Pet. 29-32; *see also* Pet. App. 99 (seven Fifth Circuit judges acknowledging the split). In the Fourth Amendment setting, the Eleventh Circuit denied immunity to a school officer who threw a middle schooler to the ground and pinned him for three minutes, because “every reasonable officer would have known,” without a case on point, that conduct was unlawful. *Richmond v. Badia*, 47 F.4th 1172, 1185-86 (11th Cir. 2022). The Sixth Circuit similarly denied immunity to officers who forced their way into a home with no warrant or emergency, recognizing that in an “obvious case” a Fourth Amendment violation can be clear even without similar

precedent. *Williams v. Maurer*, 9 F.4th 416, 437 (6th Cir. 2021).

Due process violations have fared no differently. The Tenth Circuit refused immunity to a prosecutor who fabricated evidence to win a conviction, an “‘obvious case’ of a [due process] violation” that needed no factual match. *Truman v. Orem City*, 1 F.4th 1227, 1239-40 (10th Cir. 2021) (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018)). The Eighth Circuit held the same when officers, having deliberately caused a fleeing driver to crash, failed to seek medical aid. *Cheeks v. Belmar*, 80 F.4th 872, 877-878 (8th Cir. 2023).

The Seventh Circuit has applied the exception to an equal-protection claim, calling a racially motivated firing “that rare, obvious” violation that the “wealth of case law” on workplace discrimination placed beyond doubt. *Taylor v. Ways*, 999 F.3d 478, 492 (7th Cir. 2021).

In the First Amendment context—the very setting the Fifth Circuit carves out—the result is the same. The Second Circuit denied immunity to school officials who retaliated against a teacher for protected speech years earlier, holding that “no reasonable official could think that such speech-retaliatory conduct was constitutionally permissible,” even absent a circuit case on point. *Nagle v. Marron*, 663 F.3d 100, 115-116 (2d Cir. 2011); *see also* Pet. 30-31. The Fourth Circuit, too, refused immunity to officers who detained a traveler for baring his chest on which he had written the text of the Fourth Amendment in protest, holding that no case on point was needed to know that “retaliating against an individual for speaking critically of the

government” violates the First Amendment. *Tobey v. Jones*, 706 F.3d 379, 391-392 (4th Cir. 2013).

Indeed, even when granting immunity, the First, Ninth, and D.C. Circuits have applied the obviousness exception in cases outside the Eighth Amendment, confirming that the doctrine is generally available. *See, e.g., Díaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011) (First Amendment); *Galvin v. Hay*, 374 F.3d 739, 746-747 (9th Cir. 2004) (First Amendment); *Atherton v. D.C. Office of the Mayor*, 706 F.3d 512, 515-516 (D.C. Cir. 2013) (Fifth Amendment).

These decisions share a foundational principle the Fifth Circuit alone rejects: Regardless of the constitutional right at stake, an official who commits an obvious constitutional violation cannot escape suit merely because no earlier case shared its facts.

C. The Question Is Recurring, Important, And Squarely Presented.

The acknowledged circuit split over the obviousness exception carries significant consequences. The overwhelming majority of qualified immunity cases arise outside the Eighth Amendment context. Indeed, First Amendment claims alone account for nearly a fifth of all qualified-immunity suits. Jason Tiezzi et al., Inst. for Just., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses* 4, 18 (2024); *see also* Pet. 33. And a study of every published decision applying *Taylor* in its first three years found that lower courts invoked the obviousness exception to deny immunity across at least six constitutional and statutory rights other than the Eighth Amendment. *See* Bailey D. Barnes, *The Obvious Violation Exception to Qualified Immunity: An Empirical Study*, 99 Wash. L. Rev. 725, 750, 769-774 (2024). The

study’s central criticism is that courts do not make use of the obviousness exception *more often* to vindicate those rights. *Id.* at 766-767. Yet the Fifth Circuit has barred that use outright.

The result is that the same obvious violation that defeats immunity in the eleven other circuits can secure it in the Fifth, simply “because no one in government has yet to be abusive enough to commit that particular violation—and then stubborn enough to litigate it.” *McMurry v. Weaver*, 142 F.4th 292, 304 (5th Cir. 2025) (Ho, J., concurring); *see also* Pet. 33. That is precisely the uneven justice this Court’s review exists to correct.

This case also presents the question with unusual clarity. A majority of the panel below agreed that the well-pleaded allegations establish an obvious violation, such that immunity turned only on the Fifth Circuit’s incorrect idea that *Hope* does not reach non-Eighth Amendment rights. *See* Pet. 14, 24-25, 34. Few cases would allow this Court to resolve this question on such an undisputed record.

The most reliable course remains the one primarily advocated by this brief: A qualified-immunity doctrine “no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act” should yield to the statute Congress wrote. *Ziglar v. Abbasi*, 582 U.S. 120, 159 (2017) (Thomas, J., concurring in part and concurring in the judgment). Recognizing the obviousness exception, however, is a step in the right direction. In the clearest cases, the exception restores Section 1983’s demand that those who violate constitutional rights “shall be liable.” 42 U.S.C. § 1983; *see also* Pet. 33. At a minimum, the Court should grant review to confirm the obviousness

exception applies across the Constitution and to end a conflict that shields so many obvious violations from suit.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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