No. 17-1078

In the Supreme Court of the United States

Daniel T. Pauly, et al.,

Petitioners,

v.

Ray White, et al.,

Respondents.

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

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

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March 2, 2018

QUESTIONS PRESENTED

1. Under 42 U.S.C. § 1983, is a public official, whose reckless conduct proximately causes another official to violate a plaintiff 's federally protected right, liable for the plaintiff 's injuries, even though the latter official is entitled to qualified immunity?

2. When a public official violates clearly established law through his pre-seizure conduct, and the conduct causes the need to use deadly force, is the official protected by qualified immunity?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is the deleterious effect that qualified immunity has on the power of citizens to vindicate their constitutional rights, and the subsequent erosion of accountability among public officials that the doctrine encourages.

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

SUMMARY OF ARGUMENT

Over the last half-century, the doctrine of qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based. The text of 42 U.S.C. § 1983 ("Section 1983") makes no mention of immunity, and the common law of 1871 did not include any across-the-board defense for all public officials. With limited exceptions, the baseline assumption at the founding and throughout the nineteenth century was that public officials were strictly liable for unconstitutional misconduct. Judges and scholars alike have thus increasingly arrived at the conclusion that the contemporary doctrine of qualified immunity is unmoored from any lawful justification—and in serious need of correction.[2]

The Tenth Circuit's decision in this case deviates even further from statutory text and common-law principles. Most notably, the lower court held that, because Officer White was entitled to qualified immunity, his unlawful shooting of Mr. Pauly "cannot serve as the basis of liability for Officers Mariscal and Truesdale," *Pauly v. White*, 874 F.3d 1197, 1223 (10th Cir.

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[2] *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT (Fall 2017) (essay by judge on the U.S. District Court for the Eastern District of Wisconsin); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Jon O. Newman, Opinion, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://perma.cc/9R6N-323Z (article by senior judge on the U.S. Court of Appeals for the Second Circuit).

2017)—even though the misconduct of the latter officers was alleged to be the proximate cause of the constitutional violation. In so holding, the Tenth Circuit ignored both the text of Section 1983 and well-established common-law principles of tort liability. Its decision also creates a circuit split on a critical issue.

But in a larger sense, the questions presented in the Petition throw into sharp relief the shaky legal rationales for qualified immunity generally. This case therefore presents an ideal vehicle for the Court to consider and address the maturing contention that the doctrine itself is unfounded. Whether or not the Court considers arguments for reversing precedent in this case, granting the petition would permit the Court to address the matter directly, and ensure at least that lower courts do not drag the doctrine further away from its legal roots.

If the Court is inclined to reconsider its qualified immunity jurisprudence, it should not hesitate to do so because of *stare decisis*. The inherently amorphous nature of the "clearly established law" standard announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), has precluded the doctrine from effecting the stability and predictability that justify respect for precedent in the first place. Moreover, the Court has already indicated its willingness to treat qualified immunity as a judge-made, common-law doctrine, and thus appropriate for reconsideration. *See Pearson v. Callahan*, 555 U.S. 223, 233-34 (2009). And qualified immunity has not created the sort of reliance interests that this Court is obliged to respect. Continued adherence to the doctrine would simply prolong the inability of citizens to effectively vindicate their constitutional rights.

ARGUMENT

I. THE DOCTRINE OF QUALIFIED IMMUNITY IS UNTETHERED FROM ANY STATUTORY OR HISTORICAL JUSTIFICATION.

A. The Text Of 42 U.S.C. § 1983 Does Not Provide For Any Kind Of Immunity.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Yet few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. Rarely can one comfortably cite the entirety of an applicable federal statute in a brief, but this case is an exception. As currently codified, Section 1983 provides:

> 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 proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

Notably, "the statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language just says that any person acting under state authority who causes the violation of any federal right "shall be liable to the party injured." Even if the unconditional nature of this provision were unclear, it is confirmed by the following sentence, which creates a limited exception for "any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity." Thus, under the negative-implication canon, the expression of one limitation on the scope of relief implies the exclusion of other such limitations. *See Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992).[3]

This unqualified textual command makes sense in light of the statute's historical context. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, a "suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[4] The original version of the statute specifically said that it would be called "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."[5]

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[3] *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 107-11 (2012).

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

[5] An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871). Congress rephrased and reenacted

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

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

B. From The Founding Through The Passage Of Section 1983, Good Faith Was Not A Defense To Constitutional Torts.

The doctrine of qualified immunity amounts to a kind of generalized good-faith defense for all public officials, as it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475

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this provision in 1874, and it is that statute that was ultimately codified as 42 U.S.C. § 1983. *See* Baude, *supra*, at 49 n.13.

U.S. at 341. But the relevant legal history does not justify importing any such freestanding good-faith defense into the operation of Section 1983; on the contrary, the sole historical defense against constitutional violations was *legality*.[6]

In the early years of the Republic, constitutional claims typically arose as part of suits to enforce general common-law rights. For example, an individual might sue a federal officer for trespass; the defendant would claim legal authorization to commit the alleged trespass in his role as a federal officer; and the plaintiff would in turn claim that the trespass was unconstitutional, thus defeating the officer's defense.[7] As many scholars over the years have demonstrated, these founding-era lawsuits did not permit a good-faith defense to constitutional violations.[8]

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[9] which involved a claim against an

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

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

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

[9] *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863 (2010) ("No case

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

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

This "strict rule of personal official liability, even though its harshness to officials was quite clear,"[10] persisted through the nineteenth century. Its severity

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better illustrates the standards to which federal government officers were held than *Little v. Barreme*.").

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

was mitigated somewhat by the prevalence of successful petitions to Congress for indemnification.[11] But indemnification was purely a legislative remedy; on the judicial side, courts continued to hold public officials liable for unconstitutional conduct without regard to a good-faith defense. *See, e.g.*, *Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891) (Holmes, J.) (holding liable members of a town health board for mistakenly killing an animal they thought diseased, even when ordered to do so by government commissioners).

Most importantly, the Court originally rejected the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Court held that a state statute violated the Fifteenth Amendment's ban on racial discrimination in voting. *Id.* at 380. The defendants argued that they could not be liable for money damages under Section 1983, because they acted on a good-faith belief that the statute was constitutional.[12] The Court noted that "[t]he nonliability . . . of the election officers for their official conduct is seriously pressed in argument," but it ultimately rejected any such good-faith defense. *Id.* at 378.

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

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed

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[11] Pfander & Hunt, *supra*, at 1867 (noting that public officials succeeded in securing private legislation providing indemnification in about sixty percent of cases).

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

> by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910). This forceful rejection of any general good-faith defense "is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983's enactment."[13]

C. The Common Law Of 1871 Provided Limited Defenses To Certain Torts, Not General Immunity For All Public Officials.

The Court's primary rationale for qualified immunity is the purported existence of similar immunities that were well-established in the common law of 1871. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). But to the extent contemporary common law included any such protections, these defenses were incorporated into the elements of particular torts.[14] In other words, a good-faith belief in the legality of the challenged action might be relevant to the *merits*, but there was nothing like the freestanding immunity for all public officials that characterizes the doctrine today.

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

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

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

Similarly, as the Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." *Id.* at 556-57. But this defense was not a protection from liability for unlawful conduct. Rather, at common law, an officer who acted with good faith and probable cause simply did not commit the tort of false arrest in the first place (even if the suspect was innocent).[15]

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity.[16] *Pierson* involved a Section 1983 suit against

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[15] *See* 1 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER JAMES AND GRAY ON TORTS § 3.18, at 414 (3d ed. 2006); RESTATEMENT (SECOND) OF TORTS § 121 (AM. LAW. INST. 1965).

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

police officers who arrested several people under an anti-loitering statute that the Court subsequently found unconstitutional. Based on the common-law elements of false arrest, the Court held that "the defense of good faith and probable cause . . . is also available to [police] in the action under [Section] 1983." *Id.* Critically, the Court extended this defense to include not just a good-faith belief in probable cause for the *arrest*, but a good-faith belief in the legality of the *statute* under which the arrest itself was made. *Id.* at 555.

Note that even this first extension of the good-faith aegis is questionable as a matter of constitutional and common-law history. Conceptually, there is a major difference between good faith as a factor that determines whether conduct was unlawful in the first place (as with false arrest), and good faith as a defense to liability for admittedly unlawful conduct (as with enforcing an unconstitutional statute). As discussed above, the baseline historical rule at the founding and in 1871 was strict liability for constitutional violations. *See Anderson*, 182 F. at 230 (anyone who enforces an unconstitutional statute "does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law").[17] More generally, the suggestion that police cannot be held responsible for enforcing unconstitutional statutes is antithetical to

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[17] *See also* Engdahl, *supra*, at 18 (a public official "was required to judge at his peril whether his contemplated act was actually authorized . . . [and] judge at his peril whether . . . the state's authorization-in-fact . . . was constitutional"); Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927) ("Prior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts.").

the idea that the executive is a coequal branch of government, with an independent responsibility to ensure that it acts within constitutional bounds.

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue—false arrest—admitted a good-faith defense at common law. One might then have expected qualified immunity doctrine to adhere generally to this model: determine whether the analogous tort permitted a good-faith defense at common law, and if so, assess whether the defendants had a good-faith belief in the legality of their conduct.

But the Court's qualified immunity cases soon discarded even this loose tether to history. By 1974, the Court had abandoned the analogy to those common-law torts that permitted a good-faith defense. *See Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) ("[S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad."). And by 1982, the Court disclaimed reliance on the subjective good faith of the defendant, instead basing qualified immunity on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Court's qualified immunity jurisprudence has therefore diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support, and the relevant history establishes a baseline of strict liability for constitutional violations—at most

providing a good-faith defense against claims analogous to some common-law torts. Yet qualified immunity functions today as an across-the-board defense, based on a "clearly established law" standard that was unheard of before the late twentieth century. In short, the doctrine has become exactly what the Court assiduously sought to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

II. THE COURT SHOULD GRANT CERTIORARI AND RECONSIDER ITS QUALIFIED IMMUNITY JURISPRUDENCE.

The shaky legal grounds for qualified immunity have not gone unnoticed by members of this Court. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity for executive officials, . . . we have diverged from the historical inquiry mandated by the statute."); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 USC § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume.");[18] *Wyatt v. Cole*, 504

[18] Justice Scalia defended qualified immunity on the alternative ground that it was a compensating correction for what he saw as the Court's error in *Monroe v. Pape*, 365 U.S. 167 (1961), which held that Section 1983 covered illegal executive conduct not authorized by state law. *See Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). But Justice Scalia was mistaken on this point. The phrase "under color of" state law "is a longstanding legal term that encompasses false claims of legal authority." Baude, *supra*, at 64. *See generally* Steven L. Winter,

U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials, . . . we have diverged to a substantial degree from the historical standards.").

Unless and until this tension is addressed, the Court will "continue to substitute [its] own policy preferences for the mandates of Congress." *Ziglar*, 137 S. Ct. at 1872. Fortunately, the Petition at issue presents exactly that "appropriate case" for the Court to "reconsider [its] qualified immunity jurisprudence." *Id.*

Even in light of existing precedent, the decision below raises serious questions about both the text of Section 1983 and the common-law background against which it was enacted. As Petitioners explain, Section 1983 covers any state official who "subjects, or *causes to be subjected*, any citizen . . . to the deprivation of any rights" protected by federal law. 42 U.S.C. § 1983 (emphasis added). *See* Pet. at 14-15. The Tenth Circuit's holding that Officers Mariscal and Truesdale could not possibly be liable—even if they recklessly caused the violation of Mr. Pauly's constitutional rights at the hands of Officer White—is thus at odds with the plain meaning of the statute. It is also at odds with basic common-law principles of proximate cause and joint liability among tortfeasors, which were well established as of 1871. *See* Pet. at 20-24.

The Tenth Circuit's erroneous decision has created a circuit split on a matter of great import, *see* Pet. at 27-29, and for that reason alone would warrant the

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The Meaning of "Under Color of" Law, 91 MICH. L. REV. 323 (1992). Thus, *Monroe* was correctly decided, and there was no error for which to compensate.

Court's attention. But in a larger sense, the case affords the Court a much-needed opportunity to consider qualified immunity as a whole in the proper statutory and historical context. At the very least, granting the petition would allow the Court to candidly assess the doctrine, and to clarify that in light of its manifest legal infirmities, qualified immunity will not be extended any further than it already has been. *See, e.g.*, *Wyatt*, 504 U.S. at 171 (Kennedy, J. concurring) ("We need not decide whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy, reshaping immunity doctrines in light of those policy considerations. But I would not extend that approach to other contexts.").

Beyond just the magnitude of the legal error, strong prudential considerations weigh in favor of reconsidering the Court's qualified immunity jurisprudence. In practical terms, the doctrine has utterly failed to produce the "stability, predictability, and respect for judicial authority" that comprise the traditional justifications for *stare decisis*. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

First, the "clearly established law" standard announced in *Harlow* has proven hopelessly malleable, because there is no objective way to define the level of generality at which it should be applied. The Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). But for more specific guidance, the Court has stated simply that "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 742). The difficulty, of

course, is that this instruction is circular—how to identify clearly established law depends on whether the illegality of the conduct was clearly established.

It is therefore no surprise that lower courts have struggled to consistently apply the Court's precedent. Since the "clearly established law" standard was announced in *Harlow*, the Court has decided thirty qualified immunity cases—only twice has the Court ever found that conduct violated clearly established law,[19] and all but two of the cases granting qualified immunity *reversed* the lower court's decision.[20] Notwithstanding this aggressive disposition of cases, however, lower court judges persist in their confusion on the nebulous question of how similar the facts of a prior case must be for the law to be "clearly established."[21]

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[19] *See Groh v. Ramirez*, 540 U.S. 551 (2004); *Hope v. Pelzer*, 536 U.S. 730 (2002); Baude, *supra*, at 82, 88-90.

[20] *See* Baude, *supra*, at 84 & n.228.

[21] From the last year alone: *Compare, e.g.*, *Demaree v. Pederson*, 880 F.3d 1066, 1080 (9th Cir. 2018) (denying immunity because of "a very specific line of cases . . . which identified and applied law clearly establishing that children may not be removed from their homes without a court order or warrant absent cogent, fact-focused reasonable cause to believe the children would be imminently subject to physical injury or physical sexual abuse"), *with id.* at 1084 (Zouhary, J., concurring and dissenting in part) (arguing that no case addressed "circumstances like these, where the type of abuse alleged is sexual exploitation, and it would take a social worker at least several days to obtain a removal order"); *Latits v. Phillips*, 878 F.3d 541, 553 (6th Cir. 2017) (granting immunity because prior cases "did not involve many of the key[] facts in this case, such as car chases on open roads and collisions between the suspect and police cars"), *with id.* at 558 (Clay, J., concurring in part and dissenting in part) ("It is a truism that every case is distinguishable from every other. But the degree of

Second, qualified immunity is not entitled to the "special force" that is traditionally accorded *stare decisis* in the realm of statutory precedent. *Hilton*, 502 U.S. at 202. As a threshold matter, it is doubtful whether the qualified immunity doctrine should even be considered "statutory interpretation." It is not, of course, an interpretation of any particular word or phrase in Section 1983 itself. In practice, the doctrine

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factual similarity that the majority's approach requires is probably impossible for any plaintiff to meet."); *Sims v. Labowitz*, 877 F.3d 171, 181 (4th Cir. 2017) (denying immunity because "well-established Fourth Amendment limitations . . . would have placed any reasonable officer on notice that [ordering a teenage boy to masturbate in front of other officers] was unlawful"), *with id.* at 187 (King, J., dissenting) ("[N]o reasonable police officer or lawyer would have considered this search warrant . . . to violate a clearly established constitutional right."); *Allah v. Milling*, 876 F.3d 48, 59 (2d Cir. 2017) (granting immunity because "[d]efendants were following an established DOC practice" and "[n]o prior decision . . . has assessed the constitutionality of that particular practice"), *with id.* at 62 (Pooler, J., concurring in part, dissenting in part, and dissenting from the judgment) ("I do not see how these [year-long solitary confinement] conditions were materially different from 'loading [him] with chains and shackles and throwing him in a dungeon.'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979))); *Young v. Borders*, 850 F.3d 1274, 1281 (11th Cir. 2017) (Hull, J., concurring in the denial of rehearing en banc) ("The dissents define clearly established federal law at too high a level of generality . . . ."), *with id.* at 1292 (Martin, J., dissenting in the denial of rehearing en banc) ("In circumstances closely resembling this case, this Court held that an officer's use of deadly force was excessive even though the victim had a gun."); *see also Harte v. Bd. of Comm'rs*, 864 F.3d 1154, 1158, 1168, 1198 (10th Cir. 2017) (splintering the panel into three conflicting opinions on whether the various acts of misconduct violated clearly established law).

operates more like freestanding federal common law, and lower courts routinely characterize it as such.[22]

In the realm of federal common law, *stare decisis* is less weighty, precisely because the Court is expected to "recogniz[e] and adapt[] to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). "[T]he general presumption that legislative changes should be left to Congress has less force" in those situations where Congress expects the Court to apply a broad statutory framework "by drawing on common-law tradition." *Id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978)).

But the most compelling reason not to treat qualified-immunity precedent with special solicitude is that this Court itself has not done so in the past.[23] In *Harlow*, for example, the Court replaced subjective good-faith assessment with the "clearly established law" standard. 457 U.S. at 818-19. And the Court created a mandatory sequencing standard in *Saucier v. Katz*, 533 U.S. 194 (2001)—requiring courts to first consider the merits and then consider qualified immunity—but then overruled *Saucier* in *Pearson v. Callahan*, 555 U.S. 223 (2009), which made that sequencing optional.

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[22] *See, e.g.*, *Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009); *Woodson v. City of Richmond*, 88 F. Supp. 3d 551, 577 (E.D. Va. 2015); *Jones v. Pramstaller*, 678 F. Supp. 2d 609, 627 (W.D. Mich. 2009).

[23] *See* Baude, *supra*, at 81 ("[W]hile qualified immunity has remained in place, the Court has openly tinkered with it to an unusual degree.").

Indeed, the *Pearson* Court squarely considered and rejected the argument that *stare decisis* should prevent the Court from reconsidering its qualified immunity jurisprudence. The Court noted in particular that the *Saucier* standard was a "judge-made rule" that "implicates an important matter involving internal Judicial Branch operations," and that "experience has pointed up the precedent's shortcomings." *Id.* at 233-34. As this brief has endeavored to show, the same charges could be laid against qualified immunity more generally. It would be a strange principle of *stare decisis* that permitted modifications only as a one-way ratchet in favor of *greater* immunity (and against the grain of text and history to boot).

Third, qualified immunity should be reconsidered because it cripples the ability of citizens to vindicate their constitutional rights. The Court has been most willing to reconsider its precedent when it would continue to subject individuals to unconstitutional conduct. *See, e.g.*, *Arizona v. Gant*, 556 U.S. 332, 348 (2009) ("We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice."). While qualified immunity is not itself a constitutional rule, it has the practical effect of permitting constitutional violations, because it vitiates the very statute that was intended "to protect all persons in the United States in their civil rights, and to furnish the means of their vindication." 17 Stat. 13, § 1 (1871).

The mere fact that state practices may be informed by qualified immunity is not itself a reason to adhere to erroneous precedent. By definition, qualified immunity is only relevant when a public official has, in fact, violated rights protected by federal law. And while some state actors may have come to view this

protection as an entitlement, that expectation "does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Gant*, 556 U.S. at 349.

CONCLUSION

Sound textual analysis, informed legal history, judicial prudence, and simple justice all weigh in favor of reconsidering qualified immunity. This case is an ideal vehicle for that reconsideration. For the foregoing reasons, and those described by the Petitioners, this Court should grant certiorari.

Respectfully submitted,

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March 2, 2018