No. 16-2444

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JWAINUS PERRY,

Plaintiff-Appellant,

v.

LUIS S. SPENCER, Commissioner; THOMAS DICKAUT, Former Superintendent; ANTHONY MENDOSA, Former Deputy of Classification; JAMES SABA, Superintendent; ABBE NELLIGAN, Deputy of Classification; PATRICK TOOLIN, Correctional Program Officer; KRISTIE LADOUCER; CAROL MICI; THOMAS NEVILLE,

Defendants-Appellees,

JENS SWANSON, Property Officer,

Defendant.

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S SUPPLEMENTAL EN BANC BRIEF

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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 focuses on the scope of 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.

Amicus's interest in this case arises from the lack of legal justification for qualified immunity, the deleterious effect it has on the ability of people to vindicate their constitutional rights, and the subsequent erosion of accountability among public officials that the doctrine encourages.

[1] Fed. R. App. P. 29 Statement: All parties were notified and consented to the filing of this brief. No counsel for either party authored this brief in whole or in part. No one other than *amicus* and its members made monetary contributions to its preparation or submission.

SUMMARY OF THE 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, when the statute was originally passed, did not include the sort of across-the-board defense for all public officials that characterizes qualified immunity today. 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 of all stripes 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]

Amicus recognizes, of course, that this Court is obligated to follow Supreme Court precedent with direct application, whether or not that precedent is well reasoned—and for the reasons given in Plaintiff-Appellant's supplemental en banc

[2] *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *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."); *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) (noting "disquiet over the kudzu-like creep of the modern [qualified] immunity regime"); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

brief, faithful application of that precedent requires reversal. But the fact that qualified immunity itself is so deeply at odds with the text and history of Section 1983 should make appellate courts especially wary about countenancing extensions of the doctrine beyond the contours of existing precedent—and the magistrate judge's decision below is exactly such an extension.

Jwainus Perry was kept in extreme solitary confinement conditions for 20 months, and his placement in such conditions was subjected only to meaningless, perfunctory review in which he was given no real opportunity to participate. *See* Pl.-Appellant's Supplemental En Banc Br. at 1-5. During this period of time, Supreme Court and First Circuit case law clearly established that Perry had a liberty interest in avoiding prolonged and indefinite solitary confinement, *id.* at 18-21, and that Perry was denied a meaningful process to challenge such confinement, *id.* at 21-24.

In holding to the contrary, the magistrate judge employed an unduly myopic approach to the qualified immunity inquiry, finding that Perry's rights were not "clearly established" due to the lack of consensus on the exact length of time in solitary confinement necessary to implicate a liberty interest. But this approach to assessing whether rights are clearly established is exactly the sort of misapplication of qualified-immunity precedent that the Supreme Court recently warned against in *Taylor v. Riojas*, 141 S. Ct. 52 (2020). *Taylor* reaffirmed that the fundamental question in qualified immunity cases is whether the defendant had "fair warning"

that their conduct was unlawful, not whether there is a prior case with functionally identical facts. *Id.* at 54.

Unfortunately, the sort of misapplication of qualified immunity employed by the magistrate judge here is no isolated error, but rather part of an all-too-common practice in lower courts. That persistent misunderstanding of qualified immunity not only gets the law wrong, but its application to both police and corrections officers has exacerbated a growing crisis of accountability in the criminal-justice system more generally. In light of the difficulties posed to public officials by deteriorating public trust, this Court should be especially vigilant in correcting such errors.

ARGUMENT

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

The doctrine of qualified immunity, especially the modern "clearly established law" standard, is irreconcilable with both the text and history of the federal statute that it purports to modify. Obviously, this Court is bound to apply Supreme Court precedent with direct application, regardless of how well reasoned that precedent is. But the legal deficiencies of qualified immunity are still relevant to this proceeding, for two reasons. First, the fact that qualified immunity lacks a proper legal basis should make this Court especially vigilant against impermissible expansions of the doctrine. Second, the Supreme Court has already indicated unusual readiness to revisit aspects of its qualified immunity jurisprudence, especially in

light of express criticism by appellate courts. *See Pearson v. Callahan*, 555 U.S. 223, 235 (2009) (citing cases). And while the Supreme Court recently declined to grant a handful of petitions calling for qualified immunity to be reconsidered,[3] whether it should do so in a future case remains an open and pressing question.[4] Indeed, at the end of this last year, the Court called for a response to a petition raising exactly this issue.[5]

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. As currently codified, Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983.

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[3] *See Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (cert petition denied); *Corbitt v. Vickers*, No. 19-679, 2020 U.S. LEXIS 3152 (June 15, 2020) (same); *Zadeh v. Robinson*, No. 19-676, 2020 U.S. LEXIS 3170 (June 15, 2020) (same).

[4] *See Baxter*, 140 S. Ct. at 1865 (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition.").

[5] *Cope v. Cogdill*, No. 21-783 (petition docketed Nov. 24, 2021) (asking, *inter alia*, "[w]hether the judge-made qualified immunity doctrine requires reform") (response requested on December 28, 2021).

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."

This unqualified textual command makes sense in light of the statute's historical context. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, itself part of a "suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[6] This 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 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 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 Supreme Court correctly frames the issue as whether or not "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we

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

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 nineteenth century, courts recognized that good faith was not a general 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 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*.[7]

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

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

defense.[8] As many scholars over the years have demonstrated, these founding-era lawsuits did not permit a good-faith defense to constitutional violations.[9]

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[10] which involved a claim against an American naval captain who captured a Danish ship off the coast of France. Federal law authorized seizure only if a ship was going *to* a French port (which this ship was not), but President Adams had issued broader instructions to also seize ships coming *from* French ports. *Id.* At 178. The question was whether Captain Little's reliance on these instructions was a defense against liability for the unlawful seizure.

The *Little* Court seriously considered but ultimately rejected Captain Little's defense, which was based on the very rationales that would later come to support the doctrine of qualified immunity. Chief Justice Marshall explained that "the first bias of my mind was very strong in favour of the opinion that though the instructions of

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[8] *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.

[9] *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).

[10] *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863 (2010) ("No case better illustrates the standards to which federal government officers were held than *Little v. Barreme*.").

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, he 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,"[11] was mitigated somewhat by the prevalence of successful petitions to Congress for indemnification.[12] But indemnification was purely a legislative remedy; on the judicial side, courts continued to hold public officials liable for unconstitutional conduct without regard to any sort of good-faith defense, well into the nineteenth century. *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 Supreme Court originally rejected the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, 238 U.S. 368

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

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

(1915), the Supreme Court considered a suit against election officers that had refused to register black voters under a "grandfather clause" statute, in violation of the Fifteenth Amendment. *Id.* at 380. The defendants argued 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.[13] The *Myers* Court noted that "[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in argument," but it ultimately rejected these arguments, noting that they were "disposed of by the ruling this day made in the *Guinn* Case [which held that such statutes were unconstitutional] and by the very terms of [Section 1983]." *Id.* at 378. In other words, the defendants were violating the plaintiffs' constitutional rights, so they were liable—period.

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

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

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

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."[14]

C. Contemporary qualified immunity doctrine is plainly at odds with any plausible reading of nineteenth-century common law.

The Supreme Court's primary rationale for qualified immunity is the purported existence of similar immunities that were well-established in the common law of 1871. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). But while there is some disagreement and uncertainty regarding the extent to which "good faith" was relevant in common-law suits, no possible reading of that common law could justify qualified immunity as it exists today.

There is no dispute that nineteenth-century common law did account for "good faith" in many instances, but those defenses were generally incorporated into the elements of particular torts.[15] In other words, a government agent's good-faith belief in the legality of the challenged action might be relevant to the *merits*, but there was not the sort of freestanding immunity for all public officials that characterizes the doctrine today.

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

[15] *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 Supreme 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 Supreme 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 Supreme 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).[16]

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified

[16] *See* RESTATEMENT (SECOND) OF TORTS § 121 (AM. LAW. INST. 1965).

immunity.[17] *Pierson* involved a Section 1983 suit against police officers who arrested several people under an anti-loitering statute that the Supreme Court subsequently found unconstitutional. Based on the common-law elements of false arrest, the *Pierson* 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 Supreme Court extended this defense to include not just a good-faith belief in probable cause for the *arrest*, but a good-faith belief in the legality of the *statute* under which the arrest itself was made. *Id.* at 555.

Even this first extension of the good-faith aegis 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 the tort of 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 both 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").[18]

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

[18] *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

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue—false arrest—admitted a good-faith defense at common law. But subsequent qualified immunity cases soon discarded even this loose tether to history. By 1974, the Supreme 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). And by 1982, the Supreme Court disclaimed reliance on the actual 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).

A recent article by Scott Keller does argue, in contrast to what he calls "the modern prevailing view among commentators," that executive officers in the mid-nineteenth century enjoyed a more general, freestanding immunity for discretionary acts, unless they acted with malice or bad faith.[19] But even if Keller is correct about the general state of the common law,[20] there is strong reason to doubt whether

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to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts.").

[19] Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1344 (2021).

[20] Will Baude has posted a response to Scott Keller's piece, in which he argues that Keller's sources at most establish a common-law basis for "quasi-judicial immunity," which only protected quasi-judicial acts like election administration and tax assessment, not ordinary acts of law enforcement, and which was only a legal defense, not an immunity from suit. Therefore, the historical "immunity" Keller identifies has very little in common with modern qualified immunity. William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?* (December 9, 2020), SSRN, https://papers.ssrn.com/ sol3/papers. cfm?abstract_id=3746068.

Section 1983 itself was understood to incorporate any such immunity. The defendants in *Myers v. Anderson* made *exactly* the sort of good-faith, lack-of-malice argument that Keller says was well established at common law[21]—but the Supreme Court refused to apply any such defense to Section 1983. *Myers*, 238 U.S. at 378. Moreover, Keller himself acknowledges that the contemporary "clearly established law" standard is at odds even with his historical interpretation because "qualified immunity at common law could be overridden by showing an officer's subjective improper purpose, while today a plaintiff must satisfy the stringent clearly-established-law test."[22]

The Supreme 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 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 Supreme Court has said it was trying to avoid—a "freewheeling

[21] *Myers*, 238 U.S. at 375 (defendants argued that "[t]he declarations filed in these cases are insufficient in law, because they fail to allege that the action of the defendants in refusing to register the plaintiffs was corrupt or malicious" and that "[m]alice is an essential allegation in a suit of this kind against registration officers at common law").

[22] Keller, *supra*, at 1337-38.

policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

II. THIS COURT SHOULD REVERSE THE MAGISTRATE JUDGE'S GRANT OF QUALIFIED IMMUNITY.

A. The magistrate judge's determination that Perry's rights were not "clearly established" conflicts with recent Supreme Court decisions clarifying that overcoming immunity does not require a prior case exactly on point.

As Plaintiff-Appellant explains in detail, Perry's constitutional rights were clearly established both by Supreme Court and First Circuit precedent. The conditions of Perry's confinement were as or more severe than the conditions that the Supreme Court recognized as implicating a liberty interest in *Wilkinson v. Austin*, 545 U.S. 209 (2005), *see* Br. at 8-10, 19, and this Court's decision in *Stokes v. Fair* likewise put Defendants on notice that Perry had a liberty interest "in the initiation and continuance" of his non-disciplinary solitary confinement. 795 F.2d 235, 238 (1st Cir. 1986). *See* Br. at 19-20. Supreme Court and First Circuit case law likewise made clear that Defendants were required to explain to Perry the factual basis for his confinement, give him a meaningful opportunity to respond, and provide meaningful review—none of which were given in this case. *See id.* at 21-23. Despite this clear authority, however, the magistrate judge held that Perry's rights were not "clearly established," mainly because the judge perceived that there was "no consensus

regarding what length of time in segregated confinement is required to implicate a liberty interest." ECF 127 at 28.

Admittedly, the Supreme Court has not always spoken with clarity on how lower courts should decide whether a right was "clearly established." It has 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), and stated that "clearly established law must be 'particularized' to the facts of the case," *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). But the Court has also emphasized that its case law "does not require a case directly on point for a right to be clearly established," *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White*, 137 S. Ct. at 551), and that "'general statements of the law are not inherently incapable of giving fair and clear warning.'" *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). While "earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Despite these conflicting statements of principle, for decades the Court *did* send a clear message to lower courts through the outcomes in actual qualified immunity cases. From 1982 through the 2018-2019 term, the Court issued 32

substantive qualified immunity decisions,[23] and only twice did it find that defendants' conduct violated clearly established law.[24] Moreover, in all but two of the 27 cases explicitly granting immunity, the Supreme Court *reversed* the lower court's denial of immunity below.[25] The takeaway was clear: lower courts should ratchet up the difficulty of demonstrating "clearly established law."

Lower courts received this message. A recent Reuters investigation examined hundreds of circuit court opinions from 2005 to 2019 on appeals of cases in which police officers accused of excessive force raised a qualified immunity defense. The report revealed that the rate of qualified immunity grants has been steadily rising over time—in the 2005-2007 period, courts granted immunity in only 44% of cases, but in the 2017-2019 period, courts granted immunity in 57% of cases.[26]

But in 2020, the Supreme Court began to change course. In light of recent scholarship undermining the purported legal rationales for qualified immunity[27] and

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[23] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82, 88-90 (2018) (identifying all qualified immunity decisions between 1982 and the end of 2017); *see also Sause v. Bauer*, 138 S. Ct. 2561 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

[24] *See Groh v. Ramirez*, 540 U.S. 551 (2004); *Hope v. Pelzer*, 536 U.S. 730 (2002).

[25] *Lane v. Franks*, 134 S. Ct. 2369 (2014), and *Wilson v. Layne*, 526 U.S. 603 (1999), were the two cases affirming grants of immunity.

[26] Andrew Chung, et al., *Shielded*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.

[27] *See* Baude, *supra*; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

explicit calls to re-evaluate the doctrine from both Justices[28] and lower-courts judges,[29] the Court has faced the question of whether the doctrine of qualified immunity should be reconsidered.[30] And while the Justices have yet to grant a petition on this fundamental, underlying issue, the Supreme Court did recently issue an opinion in *Taylor v. Riojas*, 141 S. Ct. 52 (2020), which provides crucial clarity on how lower courts should apply the doctrine.

In *Taylor*, the Fifth Circuit had granted qualified immunity to corrections officers who held an inmate in inhumane conditions—one cell that was covered floor-to-ceiling in human feces, and another kept at freezing temperatures with sewage coming out of a drain in the floor—for six days. *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019). The panel reasoned that, "[t]hough the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end," the law in this case "wasn't clearly established" because "Taylor stayed in his extremely dirty cell for only six days." *Id.*

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[28] *Kisela*, 138 S. Ct. at 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *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.").

[29] *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) ("I add my voice to a growing, cross-ideological chorus of jurists urging recalibration of contemporary immunity jurisprudence . . . .").

[30] *See, e.g.*, *Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition.")

But the Supreme Court summarily reversed. In its per curiam opinion, the Court explained that even though no prior case had addressed these exact circumstances, "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." *Taylor*, 141 S. Ct. at 53. The Court also reaffirmed the basic principle that "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'" *Id.* at 53-54 (quoting *Lanier*, 520 U.S. at 271).

Despite its brevity, and notwithstanding that the opinion did not formally alter black-letter law, the *Taylor* decision marks a clear change in the trajectory of qualified immunity jurisprudence. Indeed, the Supreme Court has already vacated and remanded *another* Fifth Circuit decision granting qualified immunity "for reconsideration in light of *Taylor v. Riojas*." *McCoy v. Alamu*, No. 20-31, 2021 U.S. Lexis 768 (Feb. 22, 2021). In *McCoy*, a prison guard had allegedly assaulted an inmate with pepper spray because he had "grown frustrated" with *another* inmate and "arbitrarily took out his anger on McCoy by spraying him 'for no reason at all.'" *McCoy v. Alamu*, 950 F.3d 226, 231 (5th Cir. 2020). But the Fifth Circuit affirmed immunity because no prior case had specifically held that "an isolated, single use of pepper spray" was more than a *de minimis* use of force. *Id.* at 233.

The court's error in *McCoy* was the same sort of error as in *Taylor*: requiring a prior case with nearly identical facts before denying immunity, even though application of clearly established law to the particular conduct at issue would have been obvious to any reasonable person in the defendant's position. As the dissent in *McCoy* explained, prior judicial decisions had already held that gratuitously punching, tasing, or beating an inmate with a baton would violate clearly established law. *Id.* at 235 (Costa, J., dissenting). Why should the gratuitous use of pepper spray be any different? By vacating the *McCoy* order and remanding for reconsideration in light of *Taylor*, the Supreme Court has signaled that lower courts should cease the practice of granting immunity simply because there is no prior case with identical facts.

This Court should therefore reverse the magistrate judge's grant of immunity, not just to correct the error in this case, but to ensure that district courts in the First Circuit understand how to properly apply the "clearly established law" standard going forward in light of the Supreme Court's recent guidance.

B. Misapplying qualified immunity to shield public officials from liability is exacerbating a crisis of accountability in law enforcement.

Granting qualified immunity to public officials who commit obvious constitutional violations not only misapplies applicable precedent and works an unlawful injustice to the victims of official misconduct—it also undermines the legitimacy of public institutions, by reinforcing the public's perception that

government officers are held to a far lower standard of accountability than ordinary citizens. While this case in particular does not involve police officers, the doctrinal errors the magistrate judge committed have especially grave consequences for the law-enforcement community.

In the aftermath of many high-profile police killings—most obviously, the murder of George Floyd at the hands of Minnesota police officers in May 2020—Gallup reported that trust in police officers had reached a twenty-seven-year low. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020). For the first time ever, fewer than half of Americans place confidence in their police force. *Id.*

This drop in confidence has been driven in large part by videos of high-profile police killings of unarmed suspects, but also the public perception that officers who commit such misconduct are rarely held accountable for their actions. Indeed, according to a recent survey of more than 8,000 police officers themselves, 72 percent *disagreed* with the statement that "officers who consistently do a poor job are held accountable." Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017).

Policing is dangerous, difficult work. Without the trust of their communities, officers cannot safely and effectively carry out their responsibilities. "Being viewed as fair and just is critical to successful policing in a democracy. When the police are

perceived as unfair in their enforcement, it will undermine their effectiveness." Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20-21 (2008).

In other words, "when a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness." Fred O. Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018); *accord* U.S. Dep't of Justice, Investigation of the Ferguson Police Department 80 (Mar. 4, 2015) (A "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.").

When properly trained and supervised, the vast majority of officers follow their constitutional obligations, and they will benefit if the legal system reliably holds rogue officers accountable for their misconduct. Indeed, "[g]iven the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated." Inst. on Race and Justice, *supra*, at 21. Aggressive application of qualified immunity prevents law-enforcement officers from overcoming those negative perceptions

about policing. It instead protects the minority of police who routinely break the law and thereby erodes relationships between communities and law enforcement.

In a recent survey, a staggering nine in ten law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings. Pew Research Ctr., *supra*, at 65. Eighty-six percent agreed that their jobs have become more difficult as a result. *Id.* at 80. Many looked to improved community relations for a solution, and more than half agreed "that today in policing it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public." *Id.* at 72. Responding officers also showed strong support for increased transparency and accountability, for example, by using body cameras, *id.* at 68, and—most importantly for these purposes—by holding wrongdoing officers more accountable for their actions, *id.* at 40.

To be sure, the extent to which qualified immunity has undermined public trust in law enforcement might counsel in favor of reconsidering the doctrine entirely, which is obviously not the question before this Court. But it is still worth acknowledging that the magistrate judge's misapplication of qualified immunity doctrine was no mere technical error; rather, it is exactly the sort of error that is fueling a crisis of confidence in law enforcement, hurting both the victims of police misconduct and police officers themselves, and which this Court should be especially vigilant about correcting.

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiff-Appellant, the Court should reverse the district court's summary judgment order.

Respectfully submitted,

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/s/ Jay R. Schweikert

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,017 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ *Jay R. Schweikert*
March 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Jay R. Schweikert*
March 11, 2022