No. 20-55622

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J.K.J., INDIVIDUALLY AND SUCCESSOR IN INTEREST TO THE DECEASED ALEAH JENKINS, BY AND THROUGH HIS GUARDIAN-AD-LITEM JEREMY HILLYER,
Plaintiff-Appellant,

v.

CITY OF SAN DIEGO, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California, No. 3:19-cv-02123-CAB (RBB)
District Judge Cathy Ann Bencivengo

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

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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. *Amicus*' 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: 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 course of a few hours, Aleah Jenkins—in the presence and then in the custody of Officer Lawrence Durbin—suffered a severe medical emergency, causing her to fall into a coma and die. Although she was apparently alert and healthy when first placed in Officer Durbin's patrol car, she began groaning, breathing irregularly, screaming, and eventually begging for help over the course of an hour-long ride to police headquarters. Despite such obvious signs of medical distress, Officer Durbin did nothing to summon medical care, telling Ms. Jenkins instead to "knock it off." When they finally arrived, Ms. Jenkins was apparently unconscious and twitching, but Officer Durbin again made no effort to summon medical care, proceeding instead with fingerprinting. As she slipped in and out of consciousness, Officer Durbin told her to "stop faking," placed her limp body back in the patrol car, and left her alone for over 11 minutes. Only after returning and discovering that she wasn't breathing did he finally call for paramedics, who were unable to resuscitate her.

Viewing the facts in the light most favorable to the Plaintiff, Officer Durbin's atrocious and inhuman conduct violated Ms. Jenkins' constitutional rights. Both the petition for rehearing and Judge Watford's dissent explain in detail how the panel majority ignored this Court's precedent and created a circuit split by crediting Durbin's unreasonable belief that Ms. Jenkins was "faking," because "[a]n unreasonable mistake of fact does not provide the basis for qualified immunity."

Demuth v. Cnty. of Los Angeles, 798 F.3d 837, 839 (9th Cir. 2015). Pet. at 7-12; Op. at 38-42. *Amicus* will not retread those arguments here, but instead writes separately to elaborate on two supplemental reasons why this Court should grant the petition.

First, the panel's holding that Officer Durbin was entitled to qualified immunity was no mere error—it is also reinforced a dangerous but widespread misunderstanding of how the doctrine of qualified immunity should apply in cases of obvious constitutional violations. In its recent decision in *Taylor v. Riojas*, 141 S. Ct. 52 (2020), the Supreme Court reaffirmed the basic principle that qualified immunity turns on whether a defendant had "fair warning" that their conduct was unlawful, and that in cases with "particularly egregious facts," it is unnecessary for plaintiffs to identify a prior case involving the same factual scenario. *Id.* at 54.

Second, persistent misunderstanding of qualified immunity not only gets the law wrong, but its application to police officers has exacerbated a growing crisis of accountability in law enforcement. In light of the difficulties posed to public officials by deteriorating public trust, this Court should be especially vigilant in identifying and correcting such errors.

ARGUMENT

I. RECENT SUPREME COURT DECISIONS HAVE REAFFIRMED AND CLARIFIED THAT COURTS SHOULD NOT GRANT QUALIFIED IMMUNITY SIMPLY BECAUSE THERE IS NO PRIOR CASE INVOLVING THE SAME FACTS.

Under the doctrine of qualified immunity, public officials can only be held liable under 42 U.S.C. § 1983 if they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, 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,[2] and only twice did it find that defendants' conduct violated clearly established law.[3] Moreover, in all but two of the 27 cases explicitly granting immunity, the Supreme Court *reversed* the lower court's denial of immunity below.[4] 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.[5]

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[2] *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).

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

[4] *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.

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

But in 2020, the Supreme Court began to change course. In light of recent scholarship undermining the purported legal rationales for qualified immunity[6] and explicit calls to re-evaluate the doctrine from both Justices[7] and lower-courts judges,[8] the Court has faced the question of whether the doctrine of qualified immunity should be reconsidered.[9] 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 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

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

[7] *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.").

[8] *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 . . . .").

[9] *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.")

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.*

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 soon thereafter vacated and remanded *another* 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, and ask instead whether the unlawfulness of the relevant conduct would have been obvious to a reasonable defendant. Rehearing is therefore necessary in this case to ensure that courts in the Ninth Circuit do not continue repeating this same mistake.

II. MISAPPLYING QUALIFIED IMMUNITY TO SHIELD POLICE OFFICERS FROM LIABILITY IS EXACERBATING A CRISIS OF ACCOUNTABILITY IN LAW ENFORCEMENT.

Granting qualified immunity to police officers who commit obvious constitutional violations not only misapplies applicable precedent and works an unlawful injustice to the victims of police misconduct—it also hurts the law enforcement community itself, by reinforcing the public's perception that government officers are held to a far lower standard of accountability than ordinary citizens.

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 over-come 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, 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 panel'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 grant the petition.

Respectfully submitted,

DATED: October 24, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 and 9th Circuit Rule 29-2, I certify that:

1. This brief complies with the type-volume limitation of 9th Circuit Rule 29-2 because it contains 2,598 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

/s/ *Jay R. Schweikert*
October 24, 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*
October 24, 2022