Nos. 23-1055 & 23-1075

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SARAH LIEBERENZ,
Plaintiff-Appellee/Cross-Appellant,

v.

KENNETH WILSON,
Defendant-Appellant/Cross-Appellee,

ELKE WELLS & SHELBY SHIELDS,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Colorado
No. 1:21-CV-00628-NYW-NRN
The Honorable Nina Y. Wang

MOTION OF THE CATO INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE/CROSS-APPELLANT SARAH LIEBERENZ

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Dated: September 18, 2023

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Cato Institute is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amicus*'s participation.

RULE 29 DISCLOSURE STATEMENT

No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission.

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS*

Pursuant to this Court's discretion, the Cato Institute respectfully moves for leave to file an *amicus* brief supporting Appellee/Cross-Appellant Sarah Lieberenz, to assist the Court in its consideration of their claims. All parties were provided with notice of *amicus*'s intent to file as required under Rule 29(2). Counsels for Ms. Lieberenz has consented to the filing of this brief. Counsel for the other parties have not consented.

INTEREST OF *AMICUS CURIAE*

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.

ISSUE TO BE ADDRESSED BY *AMICUS*

Amicus will discuss flaws in the historical and empirical bases of qualified immunity and the district court's expansion of it in this case.

CONCLUSION

For the reasons stated above, the Cato Institute respectfully requests that the Court grant this motion to participate as *amicus* in the above-captioned case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel certifies under FRAP 32(g) that the foregoing motion meets the formatting and type-volume requirements set under FRAP 27(d) and FRAP 32(a). The motion is printed in 14-point, proportionately-spaced typeface utilizing Microsoft Word and contains 250 words, including headings, footnotes, and quotations, and excluding all items identified under FRAP 32(f).

/s/ *Anastasia P. Boden*
Counsel for Amicus Curiae

Dated: September 18, 2023

CERTIFICATE OF SERVICE

The undersigned certifies that on September 18, 2023, she electronically filed the above motion with the Clerk of Court using the CM/ECF System, which will send notice of such filing to counsel for all parties to this case. The undersigned also certifies that lead counsel for all parties are registered ECF Filers and that they will be served by the CM/ECF system.

/s/ *Anastasia P. Boden*
Counsel for Amicus Curiae

Dated: September 18, 2023

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Dated: September 18, 2023

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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] Pursuant to Fed. R. App. P. 29, counsel for *amicus* states that no party's counsel authored any part of this brief and no person other than *amicus* made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

Over the last half-century, the doctrine of qualified immunity has sharply diverged from the statutory and historical framework on which it is supposed to be based. The codified text of 42 U.S.C. § 1983 ("Section 1983") makes no mention of immunity, and the common law of 1871 did not include the sort of across-the-board defense for all public officials that characterizes qualified immunity today. Moreover, the text of Section 1983 as *originally enacted* by Congress—and later miscodified—forecloses qualified immunity by abrogating *all* immunities. In terms of the common law, though recent scholarship indicates some disagreement over the scope of certain good-faith immunities, there is no dispute that the modern "clearly established law" standard lacks historical support. Contemporary qualified immunity doctrine is therefore unmoored from any lawful justification.

Amicus recognizes, of course, that this Court is obliged to follow Supreme Court precedent whether or not that precedent is well reasoned. But the fact that qualified immunity is so deeply at odds with the text and history of Section 1983 should make appellate courts especially wary about extending the doctrine beyond the contours of existing precedent, and the partial grant of qualified immunity below is exactly such an extension.

The need for correction of qualified immunity is especially urgent today, at a time when public trust in our government institutions has fallen to record lows. A civil action under 42 U.S.C. § 1983 is frequently the only way for a victim of official misconduct to vindicate federally guaranteed rights. But qualified immunity often bars even those plaintiffs who have indisputably suffered a violation of rights protected by the Constitution and made actionable by Section 1983 from remedying the wrong they have suffered at the hands of the state: harm, but no foul. Qualified immunity thus enables public officials who violate federal law to sidestep their legal obligations to the victims of their misconduct. In so doing, the doctrine corrodes the public's trust in government officials—and members of law enforcement in particular—making on-the-ground policing more difficult and dangerous for all officers, including those who consistently respect their constitutional obligations.

The Supreme Court has recently clarified the limited contours of qualified immunity. These decisions better reflect the limited role that precedent plays in curbing officials' unconstitutional behavior. They, too, caution against unjustifiable expansions of qualified immunity like those effected by the district court's partial grant of qualified immunity.

ARGUMENT

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

The doctrine of qualified immunity is irreconcilable with both the text and history of the federal statute that it purports to modify. What is more, recent scholarship demonstrates that the original text of Section 1983 expressly and unambiguously abrogated state common-law immunities. Certainly, courts are bound to apply Supreme Court precedent. But the manifest jurisprudential deficiencies of qualified immunity are still relevant to this proceeding. Now more than ever, courts should guard against unwarranted expansions of this legally baseless doctrine.

A. The text of Section 1983 does not provide for any kind of immunity.

"Statutory interpretation . . . begins with the text . . . ." *Ross v. Blake*, 578 U.S. 632, 638 (2016). Few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. As currently codified and in relevant part, 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 . . .

> 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.[2]

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 a protected right "shall be liable to the party injured."

This unqualified textual command makes sense in light of the statute's historical context. Section 1983 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."[3] This statutory purpose would have been undone by qualified immunity. The Fourteenth Amendment itself had only been adopted three years earlier, in 1868, and the full implications of its broad provisions were 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. The codified text of Section 1983 provides no basis for qualified immunity.

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[2] The codified version of Section 1983 omits sixteen crucial words—enacted by Congress and signed by President Grant, and so binding—that foreclose qualified immunity. *See* discussion *infra* at Part I.B.

[3] *See* William Baude, *Is Qualified Immunity Unlawful*, 106 CALIF. L. REV. 45, 49 (2018).

B. As enacted by Congress, Section 1983 forecloses qualified immunity.

There is an even greater historical flaw undermining the legitimacy of qualified immunity: the Supreme Court has been construing the wrong statutory text. Shortly after Congress enacted the Civil Rights Act of 1871, the First Reviser of Statues erroneously removed a sixteen-word clause from the statute during the codification process. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 235 (2023). These sixteen crucial words afford a cause of action "notwithstanding" any "law, statute, ordinance, regulation, custom, or usage of the State to the contrary."[4] *Id.* This clause clearly and unambiguously abrogates common-law immunities.

In 1874, the Reviser of Federal Statutes compiled and consolidated federal statutes in one place for the first time. *See id.* at 236–37; Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 L. LIBR. J. 213, 218–19 (2020). In doing so, the Reviser, for unknown reasons, erroneously omitted the Notwithstanding Clause from the text of Section 1983. *See* Reinert, *supra*, at 237. And while the Revised Statutes "were supplemented and corrected over time," the omission of the Notwithstanding Clause was never corrected. *Id.*

[4] This clause has been referred to as the "Notwithstanding Clause" and it appears "between the words 'shall' and 'be liable'" in the original statutory text. *Reinert*, *supra*, at 235.

The Reviser's changes were meant to "consolidate[e] the laws," not change their meaning. *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). As the Supreme Court has explained, where a statutory change "was made by a codifier without the approval of Congress, it should be given no weight." *Id.*; *see also Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 227 (1957) (Reviser's changes "do not express any substantive change"); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939) (changes to the statutory text "were not intended to alter the scope of the provision); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968) (Reviser's removal of a clause in Section 1982 did not change the statute's meaning); *United States v. Price*, 383 U.S. 787, 803 (1966) (removal of a clause in Section 241 was accompanied by 'the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance").

The Supreme Court's qualified immunity precedent follows from the premise that "Congress by the general language of its 1871 statute" did not intend "to overturn the tradition" of common law immunity. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *see also Pierson*, 386 U.S. at 555–57. Qualified immunity is derived from the Supreme Court's understanding of historical state common law. *See Reinert*, *supra*, at 23; *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967); *Wood v. Strickland*, 420 U.S. 308, 318–20 & nn. 9, 12 (1975). But the original text of Section 1983 fatally undermines that premise because it expressly displaces state common

law immunities. What is more, the common law of 1871 did not, in fact, provide for qualified immunity.

C. From the Founding Era through the passage of Section 1983, good faith was not a general defense to constitutional torts.

Qualified immunity is a generalized good-faith defense for all public officials, shielding "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 defense into Section 1983; on the contrary, the sole historical defense in constitutional-tort suits was *legality*.[5]

In the early years of the Republic, constitutional claims typically arose as part of suits to enforce common-law rights. For example, an individual might sue a federal officer for trespass, the defendant would claim legal authorization as a federal officer, and the plaintiff would in turn claim the trespass was unconstitutional in order to overcome this defense.[6] Such Founding-era lawsuits did not permit a good-faith defense.[7]

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[5] *See* Baude, *supra*, at 55–58.

[6] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506–07 (1987). Of course, until the Fourteenth Amendment, "constitutional torts" were committed almost exclusively by federal officers.

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

The clearest example of this principle is Chief Justice Marshall's opinion in the statutory case *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).[8] The federal law at issue authorized seizure only of a ship going *to* a French port, but President Adams had issued broader instructions to also seize ships coming *from* French ports. *See id.* at 178. The question was whether a captain's reliance on the presidential instructions was a defense against liability for a seizure that violated the federal law.

The Supreme Court seriously considered—but ultimately rejected—such a defense, which was based on the very rationales that now support 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 defendant had acted in good-faith reliance and seized the ship "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.* 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,"[9] persisted throughout the nineteenth century. Its severity

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[8] *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 . . . .").

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

was mitigated by congressional indemnification.[10] But judicially, courts continued to hold public officials liable for unconstitutional conduct without adopting a good-faith defense. *See, e.g.*, *Miller v. Horton*, 26 N.E. 100, 100–01 (Mass. 1891) (per Holmes, J.) (holding liable officials for killing an animal they mistakenly thought diseased, even though they were ordered to do so by commissioners).

Most importantly, the Supreme Court rejected a good-faith defense to Section 1983 liability. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Court considered a suit against election officers who had refused to register Black voters under a "grandfather clause" statute, thereby violating the Fifteenth Amendment. *Id.* at 377–78. The defendants argued that they could not be liable for money damages under Section 1983 because they acted on a good-faith belief in the statute's constitutionality.[11] The *Myers* Court noted that "[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in argument," but it held that the matter was "disposed of" by the ruling holding such statutes unconstitutional "and by the very terms" of Section 1983. *Id.* at 378–79. The defendants violated the plaintiffs' constitutional rights, so they were liable—period.

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

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[10] *See* Pfander & Hunt, *supra*, at 1867 (noting that Congress granted about 60 percent of indemnification petitions).

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

> [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.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910).

Such 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."[12]

D. The "clearly established law" standard contradicts 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 although there is some disagreement regarding the extent to which "good faith" was relevant in common-law suits, no possible reading of that precedent could justify modern qualified immunity.

Nineteenth-century common law did account for "good faith" in many instances, but those defenses were generally incorporated into the elements of

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

particular torts.[13] Good faith might be relevant to *merits*, but it was not the sort of freestanding immunity for all public officials that characterizes the doctrine today.

For example, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826), held that a naval officer was not liable for capturing a ship that had attacked his schooner under an honest, but mistaken, belief of self-defense. *See id.* at 39. The Supreme Court found that the officer "acted with honourable motives, and from a sense of duty to his government" and declined to "introduce a rule harsh and severe in a case of first impression." *Id.* at 52, 56. But this exercise of judicial "conscientious discretion" was justified as a traditional part of admiralty jurisdiction. *Id.* at 54–55. Good faith was incorporated into the substantive rules of capture and maritime tort law. It was not a separate and freestanding defense.

As the Supreme Court similarly explained in *Pierson v. Ray*, 386 U.S. 547 (1967), an officer who arrested someone in good faith, with probable cause *to arrest*, simply did not commit the common-law tort of false arrest (even if the arrestee was innocent). *Id.* at 556–57. But this was not a protection from liability for unlawful conduct. *Pierson*, however, contributed to modern qualified-immunity doctrine when it extended the defense to include a good-faith belief in the *legality of the underlying statute*. *See id.* at 555.

[13] *See generally* Baude, *supra*, at 58–60.

Even this first extension of the good-faith shield was questionable. 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 (holding that whoever 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").[14] And of course, the Supreme Court had already rejected incorporation of a good-faith defense into Section 1983 in the *Myers* case—which *Pierson* failed to mention, much less discuss.

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue (false arrest) incorporated a good-faith defense at common law. But subsequent qualified immunity cases discarded even this loose tether to history. In 1974, the Supreme Court abandoned historical reasoning in favor of policy considerations. *See Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). Most importantly, in 1982, the Supreme Court disclaimed any reliance on the defendant's beliefs or intentions, instead basing qualified immunity on "the objective

[14] *See also* Engdahl, *supra*, at 18 (noting that a public official "was required to judge at his peril whether his contemplated act was actually authorized" and 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.").

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 prevailing view among modern commentators"—that executive officers in the mid-nineteenth century enjoyed a more general, freestanding immunity for discretionary acts not done in malice or bad faith.[15] But even if he is correct,[16] there is strong reason to doubt whether Section 1983 itself was understood to incorporate any such immunity. After all, the *Myers* Court refused to apply any such defense to Section 1983. *See Myers*, 238 U.S. at 378–79.

Moreover, Keller himself acknowledges that the modern "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 motive."[17] Even the foremost academic *defenders* of qualified immunity, then, recognize that the modern doctrine is historically flawed in this key regard. *See also* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified*

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

[16] Will Baude has argued that Keller's sources establish at most a common-law basis for a much narrower legal defense of "quasi-judicial immunity," such that whatever historical "immunity" Keller identifies has very little in common with modern qualified immunity. *See generally* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115 (2022).

[17] Keller, *supra*, at 1346.

Immunity, 93 NOTRE DAME L. REV. 1853, 1868 (2018) ("We agree that, as a historical matter, the objective standard is harder to defend than a good-faith standard.").

Section 1983 provides no textual support for qualified immunity, and the relevant history establishes a baseline of strict liability for constitutional violations where "good faith" was a defense only to some specific torts. Qualified immunity, then, is exactly what the Supreme Court sought to avoid in adopting it—a "freewheeling policy choice." *Malley*, 475 U.S. at 342. Unless and until it is abolished, the Judiciary "will continue to substitute [its] own policy preferences for the mandates of Congress." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment).

Amicus recognizes that this Court is not empowered to overrule Supreme Court precedent and wholly abolish the doctrine of qualified immunity—no matter how clear it is that the law actually enacted by Congress plainly and intentionally foreclosed that specific defense. *See Rogers v. Jarrett*, 63 F.4th 971, 981 (5th Cir. 2023) (Willett, J., concurring). However, this case presents a valuable opportunity to clarify circuit precedent and rein in qualified immunity's most gratuitous excesses.

II. QUALIFIED IMMUNITY HARMS PUBLIC OFFICIALS BY ERODING PUBLIC TRUST AND UNDERMINING THE RULE OF LAW.

Qualified immunity not only misunderstands Section 1983 and works unlawful injustices to the victims of official misconduct, it undermines the legitimacy of public institutions by reinforcing the perception that government officers are held to a far lower standard of accountability than ordinary citizens. While this particular case does not involve policing, the lower court's doctrinal errors have especially grave consequences for the law-enforcement community.

Police misconduct is the context most often associated with how qualified immunity undermines the public's trust in government, perhaps especially when it causes unnecessary loss of life. Though only a small proportion of law-enforcement officers each year are involved in a fatal confrontation, even those few generate a shocking number of fatalities. From 2015 to 2017, law-enforcement officers fatally shot, on average, nearly a thousand Americans each year. *See* Julie Tate et al., *Fatal Force*, WASH. POST DATABASE.[18] Tens of thousands more were wounded or injured, to say nothing of those harmed without obvious physical effects. *See* Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, NEWSWEEK (Apr. 19, 2017).[19]

[18] Available at https://github.com/washingtonpost/data-police-shootings.

[19] Available at https://www.newsweek.com/51000-people-injured-annually-police-586524.

Given the ubiquity of smartphones and other personal recording devices, citizens are documenting these encounters like never before, making them harder to ignore and further raising the stakes for a judiciary that systematically allows the conduct depicted to go without adjudication or remedy. New technology has generated powerful, immediately accessible evidence of police misconduct. For example, a cell-phone camera live-streamed the aftermath of a Minnesota officer shooting a motorist stopped for a broken taillight who notified the officer that he was lawfully carrying a firearm. ABC News, *Philando Castile Police Shooting Video Livestreamed on Facebook*, YOUTUBE (July 7, 2016).[20] A cell-phone camera recorded two Baton Rouge officers who shot a father of five after they pinned him to the ground. ABC News, *Alton Sterling Shooting Cellphone Video*, YOUTUBE (July 6, 2016).[21] And a cell-phone camera captured a South Carolina officer shooting a man eight times in the back as he fled from another broken-taillight stop. N.Y. Times, *Walter Scott Death: Video Shows Fatal North Charleston Police Shooting*, YOUTUBE (Apr. 7, 2015).[22]

[20] Available at https://www.youtube.com/watch?v=PEjipYKbOOU.

[21] Available at https://www.youtube.com/watch?v=pt4ynfRXnjg.

[22] Available at https://www.youtube.com/watch?v=XKQqgVlk0NQ.

These four videos collectively have been viewed millions of times on YouTube alone. All precipitated major protests and demonstrations. They are but a few examples among many.[23]

It is little wonder that as public awareness of these often jaw-droppingly brutal recordings of police misconduct has grown, faith in law enforcement has fallen—no matter the actual overall rate of misconduct. In the aftermath of many high-profile police killings—most obviously, the video-recorded murder of George Floyd at the hands of Minnesota police officers in May 2020—Gallup reported that trust in police officers had reached a 27-year low. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020).[24] For the first time, fewer than half of Americans reported placing confidence in the police. *See id.* Confidence in the police has not recovered.[25]

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[23] See *Police Misconduct Registry*, UNIV. OF S. CAL. PRICE SCH. OF BUS. SAFE COMMUNITIES INITIATIVE (Apr. 5, 2023) https://sci.usc.edu/police-misconduct-registry/; John Kelly & Mark Nichols, *Tarnished Brass: Search the List of More than 30,000 Police Officers Banned by 44 States.*, USA TODAY (June 27, 2022), https://www.usatoday.com/in-depth/news/investigations/2019/04/24/biggest-collection-police-accountability-records-ever-assembled/2299127002/; Derek Willis et al., *The NYPD Files*, PROPUBLICA (July 26, 2020) https://projects.propublica.org/nypd-ccrb/.

[24] Available at https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html.

[25] *See* Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), https://news.gallup.com/poll/508169/historically-low-faith-institutions-continues.aspx (identifying 2023 as the low-water mark for public confidence in police); Gary Langer, *Confidence in Police Practices Drops to a New Low: POLL*, ABC NEWS (Feb. 3, 2023), https://abcnews.go.com/Politics/confidence-police-practices-drops-new-low-poll/story?id=96858308.

Public opinion has been driven by videos, and also by the perception that officers who commit such misconduct are rarely held accountable.[26] Members of law enforcement concur with this premise: according to a recent survey of more than 8,000 police officers, 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable." Rich Morin et al., PEW RSCH. CTR., *Behind the Badge* 40 (2017).[27] Between 2005 and 2021, despite thousands of police shootings, only "142 officers have been arrested for murder or manslaughter, but only seven have been convicted of murder. An additional 37 were convicted of lesser offenses, and 53 were not convicted." Rick Rouan, *Fact check: Police Rarely Prosecuted for On-Duty Shootings*, USA TODAY (June 21, 2021).[28] Many more are never indicted at all. *See* J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014).[29]

Problems also abound in settings less transparent to the public and less likely to attract public sympathy, such as the correctional facility at issue in this case. Two

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[26] *See* Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html.

[27] Available at https://pewrsr.ch/2z2gGSn.

[28] Available at https://www.usatoday.com/story/news/factcheck/2021/06/21/fact-check-police-rarely-prosecuted-duty-shootings/7642741002/.

[29] Available at https://nyti.ms/2z0kbZl.

million Americans with mental illness are booked into custody annually, and "as many as half of all jail and prison suicides in the United States are committed by those suffering from severe mental illness," yet qualified immunity has stymied reforms in care and accountability for even atrocious indifference. *See* Samuel Bourgeois, Comment, *Mental Illness, Fourteenth Amendment Violations, and the Insurmountable Threshold to Overcome Qualified Immunity*—Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021)*, 18 J. HEALTH & BIOMED. L. 223, 231 (2022). Indeed, the decision below afforded qualified immunity to jail officials who failed to protect Jackson Maes from suicide despite knowing of his intoxication, suicidal intentions, and self-harm.

The inability to remedy rights violations contributing to the loss of human life—and the lack of a need to determine whether there even was a rights violation in the first place—are qualified immunity's rotten fruit. Such a lack of accountability has dire social consequences. "[W]hen 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 the 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.").[30]

When properly trained and supervised, the majority of police and corrections officers who follow their constitutional obligations will benefit if the legal system reliably holds rogue officers accountable. But under the status quo, "[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." *Promoting Cooperative Strategies to Reduce Racial Profiling*, INST. ON RACE & JUSTICE, NORTHEASTERN UNIV. 21 (2008).[31] Qualified immunity unhelpfully—and unlawfully—shields the minority of officers who bring discredit upon the entire vocation and flout the law, and so it erodes relationships between communities and law enforcement.

In a recent survey, a staggering 93 percent of law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings. *See* Morin, *supra*, at 65. Many hoped for improved community relations as 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

[30] Available at https://perma.cc/XYQ8-7TB4.

[31] Available at https://www.ojp.gov/ncjrs/virtual-library/abstracts/promoting-cooperative-strategies-reduce-racial-profiling.

with the public." *Id.* at 72. Responding officers also strongly supported more transparency, and—most importantly for this case—did not think that problematic officers were held accountable. *See id.* at 40, 68.

Unfortunately, "accountability" often serves as nothing more than a rhetorical cloak for unchecked abuse thanks to qualified immunity. Then-U.S. Attorney General William Barr recently told citizens facing potentially unlawful commands from police to meekly comply because there is "a time and place to raise . . . concerns or complaint." Adam Shaw, *Barr Sounds Call to Push Back against Anti-Cop Attitudes, Adopt 'Zero Tolerance' to Resisting Police*, FOX NEWS (Feb. 27, 2020).[32] A Los Angeles police officer similarly warned: "if you don't want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you"—and if a citizen is abused anyway, "Feel free to sue the police!" Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me.*, WASH. POST (Aug. 19, 2014).[33] Words of "assurance" like these come cheaply, because qualified immunity in fact removes the federal judiciary as a venue for raising most complaints with any hope of remedy.

Qualified immunity has undermined society's trust in law enforcement and government institutions more generally. By clarifying that defendants who violate

[32] Available at https://www.foxnews.com/politics/barr-anti-cop-attitudes-resisting-police.

[33] Available at https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/.

constitutional rights should be held accountable, this Court can take a significant step toward restoring public confidence.

III. LOWER COURTS SHOULD SEEK TO CONSTRAIN, NOT EXPAND QUALIFIED IMMUNITY.

The district court's partial grant of qualified immunity was based in part on a purported lack of precedent clearly establishing the right at issue and putting jail officials on sufficient notice regarding the unconstitutionality of their behavior. But the rationale for that decision was faulty and rests in part on a number of mistaken empirical assumptions that have been cited to justify qualified immunity.

A. 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 be held liable under Section 1983 only if they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818. 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*, 580 U.S. 73, 79 (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*, 580 U.S. at 79), and that "'general statements of the law are not inherently incapable of giving fair and clear warning.'" *White*, 580 U.S. at 79 (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 Supreme Court *did* send a clear message to lower courts through the outcomes in actual qualified immunity cases. From 1982 through the 2018–19 term, the Court issued 32 substantive qualified immunity decisions,[34] and only twice did it find that defendants' conduct violated clearly established law.[35] Moreover, in all but two of the 27 cases explicitly granting immunity, the Supreme Court *reversed* the lower court's denial of immunity below.[36] The takeaway was clear: lower courts should ratchet up the difficulty of demonstrating "clearly established law."

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[34] *See* Baude, *supra*, at 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*, 138 S. Ct. 1148; *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

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

[36] *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.

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 2005–07 period, courts granted immunity in only 44% of cases, but in the 2017–19 period, courts granted immunity in 57% of cases.[37]

But in 2020, the Supreme Court began to change course. In light of recent scholarship undermining the purported legal rationales for qualified immunity[38] and explicit calls to re-evaluate the doctrine from both justices[39] and other judges,[40] the Court has faced the question of whether the doctrine of qualified immunity should be reconsidered.[41] And while the justices have yet to grant a petition on this fundamental, underlying issue, the Supreme Court did issue an opinion in *Taylor v.*

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

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

[39] *See 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*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

[40] *See 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 . . . .").

[41] *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.").

Riojas, 141 S. Ct. 52 (2020), which provides crucial clarity as to 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 coming out of a drain in the floor—for six days. *See 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*, 141 S. Ct. 1364 (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 Fifth Circuit's error in *McCoy* was the same sort of error as in *Taylor*, and as the district court committed below: 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. *See 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 signaled that 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. Reversal of the partial grant of qualified immunity below is necessary in this case to ensure that courts in the Tenth Circuit do not continue repeating this same mistake.

B. Qualified immunity rests upon faulty empirical assumptions.

The overly demanding standard employed by the district court reflects faulty empirical assumptions behind qualified immunity. *See Crawford-El v. Britton*, 523 U.S. 574, 606 (1998) (Rehnquist, C.J., dissenting) ("In crafting our qualified immunity doctrine, we have always considered the public policy implications of our decisions."). Qualified immunity wrongly assumes that officials personally bear the cost for Section 1983 judgments against them and that judicial decisions "clearly establishing" rights put officials on "fair notice" to change their unconstitutional behavior.

Despite the growing recognition that qualified immunity harms the very officials it seeks to protect by justifiably undermining public confidence in their accountability, the Supreme Court has asserted—with a notable lack of empirical support—that qualified immunity prevents over-deterrence because "there is the

danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 814 (cleaned up and citation omitted); *see also Forrester v. White*, 484 U.S. 219, 223 (1988).

This concern was largely premised on the faulty assumption that individual officers pay their own judgments. But they don't. The widespread availability of indemnification already protects individual public officials from ruinous judgments. *See, e.g.*, Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under* Bivens, 88 GEO. L.J. 65, 78 (1999). For one example, a recent study shows that governments paid approximately 99.98 percent of all dollars paid out for civil rights claims against police officers. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

Far from threatening individual officers with financial ruin, then, replacing qualified immunity with the fully remedial legal regime actually enacted by Congress would simply ensure that the victims of rights violations are not done the further injustice of being saddled with the cost of those harms, rather than them being justly placed upon perpetrators. Indeed, departments facing more frequent judgments may also invest in better training, hiring, disciplinary, and other salutary programs. *See* Kimberly Kindy, *Insurers Force Change on Police Departments*

Long Resistant to It, WASH. POST (Sept. 14, 2022).[42] Lawsuits can serve as "a valuable source of information about police-misconduct allegations," and police departments that "use lawsuit data—with other information—to identify problem officers, units, and practices" are better equipped to "explore personnel, training, and policy issues that may have led to the claims." Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 844–45 (2012).

Lawsuits can prompt institutional learning when they carry real consequences for defendant agencies. But qualified immunity wrongly assumes that ordinary officials meaningfully change their actions based on their knowledge of the entire universe of judicial precedent. Qualified immunity has been justified in part on the ground that an official has the right to "fair notice" regarding whether conduct is unconstitutional and that binding decisional law finding a rights violation based on "materially similar" facts provides such notice. *Hope*, 536 U.S. at 739–41.

That assumption is baseless. While agencies may instruct officials about "watershed decisions," "officers are not regularly or reliably informed about court decisions interpreting those decisions in different factual scenarios—the very types of decisions that are necessary to clearly establish the law." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 610 (2021). Officials lack

[42] Available at https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-insurance-settlements-reform/.

the capacity to "learn the facts and holdings of the hundreds or thousands of cases that clearly establish the law and, even if they learned about some of these cases, they would not reliably recall their facts and holdings while doing their jobs." *Id.* at 612.

Compounding this problem, qualified immunity affords federal courts the discretion to avoid deciding whether alleged misconduct even violated federal rights in the first place and to dispose of potentially meritorious claims solely on the ground that any possible violation was not "clearly established." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The *Pearson* escape hatch creates a vicious cycle: violations must be clearly established for plaintiffs to survive qualified immunity, but qualified immunity itself stunts the development of the law and prevents rights from becoming clearly established.

Faulty empirical assumptions have led the Supreme Court to adopt qualified immunity, at a heavy price to victims of government wrongdoing. "Every time a privilege is created or an immunity extended, it is understood that some meritorious claims will be dismissed that otherwise would have been heard." *Crawford-El*, 523 U.S. at 606 (Rehnquist, C.J., dissenting). Official immunity in particular "comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation," contravening "the basic tenet that individuals be held accountable for their wrongful conduct." *Westfall v. Ervin*, 484 U.S. 292, 295 (1988). Sweeping

immunity should not be maintained—much less expanded, as happened below—when it rests upon little more than mistaken factual assumptions and faulty legal reasoning.

Qualified immunity frustrates the remedy Congress enacted for violations of Americans' rights. It undermines government accountability. It lacks a sound basis in reality. It should be abolished—not expanded in the manner of the decision below.

CONCLUSION

"The government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But as Chief Justice Marshall admonished, our government "will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* Qualified immunity denies the availability of a remedy for violations of paramount legal rights in contradiction of Congress's clear command in Section 1983. For the foregoing reasons and those described by the Petitioner, this Court should reverse the decision below insofar as it partially granted qualified immunity, and uphold that decision insofar as it denied qualified immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 7,311 words, excluding the parts of the brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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Dated: September 18, 2023

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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3. The electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, Bitdefender Endpoint Security Tools, and is free of viruses.

/s/ *Anastasia P. Boden*
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Dated: September 18, 2023

CERTIFICATE OF SERVICE

The undersigned certifies that on September 18, 2023, she electronically filed the above motion with the Clerk of Court using the CM/ECF System, which will send notice of such filing to counsel for all parties to this case. The undersigned also certifies that lead counsel for all parties are registered ECF Filers and that they will be served by the CM/ECF system.

/s/ *Anastasia P. Boden*
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Dated: September 18, 2023