CASE NO. 23-50696

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAVIER AMBLER, SR., individually and on behalf of ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, and as next friends of J.R.A., a minor child, et al.,

Plaintiffs-Appellees,

v.

MICHAEL NISSEN,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
District Court Case No. 1:20-CV-1068

MOTION OF THE CATO INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO DEFENDANT-APPELLANT MICHAEL NISSEN'S EN BANC REHEARING PETITION

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November 4, 2024

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

On September 10, 2024, a panel of this Court decided the above-captioned appeal. The panel dismissed the appeal for lack of jurisdiction and remanded for further proceedings, agreeing with the district court's holding that genuine fact disputes precluded judgment as a matter of law.

On October 8, 2024, Defendant-Appellant petitioned this Court for rehearing en banc. An unopposed motion for leave to file brief amici curiae in support of the Defendant-Appellant was filed by a group of law-enforcement and municipal organizations on October 15, 2024, and granted on October 22.

Movant Cato Institute now seeks leave under FRAP 29(b)(2) for leave to file an amicus brief in opposition to that motion. Attached to this motion is a copy of the Cato Institute's proposed amicus brief.

IDENTITY OF THE PROPOSED *AMICUS*

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

INTEREST OF THE PROPOSED *AMICUS*

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.

REASONS TO ALLOW THE PROPOSED *AMICUS* BRIEF

This *amicus* brief provides unique insight into the difficulty of consistently applying qualified immunity's "clearly established" standard even when material facts are not in dispute and how it becomes impossible to apply that standard coherently where, as here, key facts are unresolved. The brief further explains why the existence of disputed facts relevant to the clearly established inquiry militates with special force against granting en banc review at this stage of this case.

CERTIFICATE OF CONFERENCE

The undersigned counsel has contacted counsel for the Plaintiffs and Defendant via email, and both are unopposed to the filing of this motion and have each consented to the filing of this *amicus* brief.

CONCLUSION

Based on the foregoing, the Cato Institute respectfully requests this Court to grant the motion for leave to file the attached *amicus curiae* brief in opposition to Defendant-Appellant's pending petition for rehearing en banc.

Respectfully submitted,

/s/ *Clark M. Neily III*

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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 417 words, including headings, footnotes, and quotations, and excluding all items identified under FRAP 32(f).

/s/ Clark M. Neily III

November 4, 2024

CERTIFICATE OF SERVICE

The undersigned certifies that on November 4, 2024, he 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/ Clark M. Neily III

November 4, 2024

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**BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE*
IN OPPOSITION TO DEFENDANT-APPELLANT'S PETITION**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No. 23-50696

Ambler, et al. v. Nissen

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Clark M. Neily III	Counsel to *Amicus*
Matthew P. Cavedon	Counsel to *Amicus*
Cato Institute	*Amicus curiae*

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 none issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the *amicus*'s participation.

/s/ Clark M. Neily III

November 4, 2024

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 1

I. DISPUTED MATERIAL FACTS PRECLUDE THE FORMULATION OF A CLEAR RULE AT THIS STAGE OF THE PROCEEDINGS. 2

II. THE "CLEARLY ESTABLISHED" TEST REQUIRES JUDGES TO IMAGINE A NONEXISTENT WORLD AND IS EVEN MORE IMPRACTICABLE WHEN RELEVANT FACTS ARE DISPUTED. 5

III. THE PANEL CORRECTLY HELD THAT THE DISPUTED MATERIAL FACTS OF THIS CASE SHOULD BE DETERMINED BY A JURY. 8

CONCLUSION 10

CERTIFICATE OF COMPLIANCE 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Cases

Amore v. Novarro, 624 F.3d 522 (2d Cir. 2010) 7

Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019) 8

Crane v. City of Arlington, Tex., 60 F.4th 976 (5th Cir. 2023) 1, 10

Heeter v. Bowers, 99 F.4th 900 (6th Cir. 2024)..7

Keohane v. Fla. Dept. of Corrs. Sec'y, 981 F.3d 994 (11th Cir. 2020)....................2

Kisela v. Hughes, 584 U.S. 100 (2018) 6

Latits v. Phillips, 878 F.3d 541 (6th Cir. 2017) 8

Morgan v. Swanson, 755 F.3d 757 (5th Cir. 2014) 6

O'Farrell v. Cnty. Of Bernalillo, 455 F. Supp. 3d 1172 (D.N.M. 2020) 7

Rogers v. Jarrett, 63 F.4th 971 (5th Cir. 2023) 5, 9

Shanks v. City of Arlington, Tex., No. 4:22-CV-00573, 2022 WL 17835509 (N.D. Tex. Dec. 21, 2022)...2

Spiller v. Harris Cnty., 113 F.4th 573 (5th Cir. 2024) 10

Young v. Borders, 850 F.3d 1274 (11th Cir. 2017) 8

Other Authorities

Bryan Lamon, *Reforming Qualified Immunity Appeals*, 87 MO. L. REV. 1137 (2023) 9

Eliana Fleischer, Comment, *Stating the Obvious: Departmental Policies as Clearly Established Law*, 90 U. CHI. L. REV. 1435 (2023)...................................7

Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) 7

Kyle Hawkins, Clark Neily, Fred Smith Jr., & Jay Schweikert, *Qualified Immunity: A Shield Too Big?*, 104 Judicature 65 (2020).......................................5

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.

ARGUMENT

Whether to grant en banc review in qualified-immunity cases has been a particularly challenging question for this Court,[2] which underscores the need for special care in deciding when to exercise that "always discretionary and disfavored"

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[1] Fed. R. App. P. 29 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.

[2] *See, e.g.*, *Crane v. City of Arlington, Tex.*, 60 F.4th 976, 977–78 (5th Cir. 2023) (Ho, J., concurring in denial of rehearing en banc) (noting persistent lack of intra-circuit consistency on when to grant qualified immunity to police and observing that "[e]n banc rehearing can be well worth the effort—so long as there's a genuine opportunity to advance the rule of law," but concluding that "[r]ehearing in this case would be futile").

prerogative.[3] Defendant's *amici* accurately describe this Court's application of qualified immunity as a "'morass of unpredictability'" and urge the Court to "secure the uniformity of its decisions" by granting en banc review.[4] As explained below, however, taking this case en banc would more likely deepen the morass than help drain it.

In reviewing the parties' and *amici*'s en banc submissions, together with the district court and panel opinions, two things stand out with particular clarity: (1) this case is not ready for appellate review because there are still material facts in dispute; and (2) coherently applying qualified immunity's "clearly established" standard is hard enough with agreed facts—and flatly impossible with disputed facts. Accordingly, the only thing en banc review is likely to produce here is more division, frustration, and confusion.

I. DISPUTED MATERIAL FACTS PRECLUDE THE FORMULATION OF A CLEAR RULE AT THIS STAGE OF THE PROCEEDINGS.

Key fact questions that remain sharply contested in this case include: How much pressure did Officer Nissen apply to Javier Ambler's back, neck, and head? Did Nissen continue to apply pressure *after* Ambler's body went limp? Did Nissen

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[3] *Keohane v. Fla. Dept. of Corrs. Sec'y*, 981 F.3d 994, 995 (11th Cir. 2020) (W. Pryor, J., statement respecting denial of rehearing en banc).

[4] Brief Amici Curiae of Texas Municipal League, et al. at 11 ("TML Amicus") (quoting *Shanks v. City of Arlington, Tex.*, No. 4:22-CV-00573, 2022 WL 17835509, *2 (N.D. Tex. Dec. 21, 2022) (Pittman, J.).

hear Ambler say he had congestive heart failure? Did Nissen know (or should he have realized) that Ambler failed to put his arms back to be cuffed because he was trying to breathe, not resist? Viewing the summary judgment evidence in the light most favorable to the plaintiffs, the answers are: considerable,[5] yes,[6] yes,[7] and quite possibly.[8] This matters because the argument for qualified immunity is substantially less persuasive if a reasonable jury could find *any* of those facts to be true—and vastly less persuasive if it could find *all* of them to be true.

The fact that these unresolved questions are material to the qualified-immunity question is underscored by the Defendant's and his *amici*'s continued insistence on a much different narrative than the Plaintiffs' about the fatal encounter between Nissen and Ambler. In Nissen's telling, "[his] body-worn camera video captured that he used a '*modicum*' of force," and Ambler died in part "because of an

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[5] Report & Recommendation at 7–8 (noting evidence that medical examiner found bruising on Ambler's head and hemorrhages of neck and back muscles).

[6] Plaintiffs-Appellees' Resp. to Pet. for En Banc Review at 4, 6 (citing ROA 5017-18).

[7] Report & Recommendation at 13-14 (noting that "Ambler can be heard on the video recording from Nissen's body-worn camera saying faintly: 'I have congestive heart failure,'" and finding that a reasonable jury could disbelieve Nissen's testimony that he did not hear Ambler make that statement).

[8] *Id*. at 11 (describing disagreement between Plaintiffs and Nissen as to whether Ambler was resisting Nissen's efforts to place Ambler's hands behind his back or was instead "instinctively putting one arm on the ground trying to breathe") (internal quotation marks omitted).

imperceptible medical condition"—presumably his congestive heart failure.[9] Meanwhile, Defendant's *amici* relate a notably restrained encounter that featured Nissen using "soft, open-hand techniques"[10] on Ambler and make no mention of Nissen's knee or the bruising and hemorrhages recorded by the medical examiner.[11]

If Plaintiffs are correct in their characterization of the summary judgment record (viewed in the light most favorable to themselves, as required at this stage), Officer Nissen would be entitled to qualified immunity only if a reasonable officer would believe that, following a high-speed pursuit, he may lawfully: (1) press an obese suspect's neck and face into the pavement with enough force to cause hemorrhaging while the suspect is struggling to breathe by using his arms to create space between his body and the ground; (2) continue applying full force even after the suspect has gone limp; and (3) dismiss out of hand the suspect's pleas that he cannot breathe *and* his warning that he suffers from congestive heart failure. The proposition that this Court's precedents, properly selected and synthesized, establish such a dystopian excessive-force doctrine is highly implausible, and it is telling that

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[9] Pet. for Reh'g En Banc at 4 (emphases added). The panel dissent likewise describes the amount of force used by Nissen as a "modicum." Slip Op. at 21. Notably, neither the Defendant nor the dissent assert that the Report & Recommendation's finding that "the amount of pressure applied is unclear in the videos," Report & Recommendation at 7–8, is itself clearly contradicted by the video evidence.

[10] TML Amicus at 4, 7 & 10.

[11] Report & Recommendation at 7–8.

neither the Defendant, nor his *amici*, nor even the dissent contend for it in arguing that Officer Nissen was entitled to qualified immunity.

In sum, whether existing circuit precedent supplies a comprehensible qualified-immunity framework for the material facts of this case cannot be determined until those facts have been ascertained. And because that has not happened yet, the panel was correct to find that it lacked jurisdiction over this interlocutory appeal.

II. THE "CLEARLY ESTABLISHED" TEST REQUIRES JUDGES TO IMAGINE A NONEXISTENT WORLD AND IS EVEN MORE IMPRACTICABLE WHEN RELEVANT FACTS ARE DISPUTED.

This Court is well-versed in the intense controversy over qualified immunity, including its dubious origins,[12] doubtful premises,[13] and myriad practical and conceptual shortcomings.[14] Indeed, opinions authored by judges of this Court—majority, dissenting, concurring, concurring *dubitante*, and dissentals—together

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[12] *See, e.g.*, *Rogers v. Jarrett*, 63 F.4th 971, 979–81 (5th Cir. 2023) (Willett, J., concurring) (summarizing recent law review article by Prof. Alex Reinert, which shows that the text of §1983 actually enacted by Congress includes a provision expressly displacing common-law defenses, and concluding that "[t]hese are game-changing arguments, particularly in this text-centric judicial era when jurists profess unswerving fidelity to the words Congress chose").

[13] *See infra*.

[14] *See, e.g.*, Kyle Hawkins, Clark Neily, Fred Smith Jr., & Jay Schweikert, *Qualified Immunity: A Shield Too Big?*, 104 Judicature 65 (2020) (cataloging various problems with qualified immunity, including judicial administrability, doctrinal stagnation, and failure to streamline litigation of civil rights claims).

comprise what may well be the most thoughtful intra-circuit discussion of qualified immunity among all the federal courts of appeals. Rather than recapitulating those arguments, *amicus* will focus on a key problem with qualified-immunity doctrine that looms particularly large in the context of this petition: namely, what it means for a given right to be established with sufficient clarity that qualified immunity should be denied.

As the Supreme Court[15] and this Court[16] have both explained repeatedly, the point of the "clearly established" standard is to ensure that police and other government officials had "fair notice" that the conduct for which they are being sued was unlawful. But there are two fundamental problems with that framework: first, police neither read nor receive regular instruction about judicial decisions; and second, even if they did, it is implausible to suppose that they could identify, recall, assess, and apply controlling case law in the split second they often have to decide whether to exercise force or take some other potentially rights-violating action.

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[15] *See, e.g.*, *Kisela v. Hughes*, 584 U.S. 100, 104 (2018); *see also id*. at 114 (Sotomayor, J., dissenting) (explaining that "[a]t its core . . . the 'clearly established' inquiry boils down to whether [the defendant] had 'fair notice' that he acted unconstitutionally").

[16] *See, e.g.*, *Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014) (explaining that to defeat qualified immunity, "there must exist a clearly established 'particular right' such that the official had 'fair notice' of that right and its concomitant legal obligations).

Thus, because the "clearly established" framework posits an essentially fictional character engaging in an equally fictitious mental process, judges will inevitably disagree about the amount of doctrinal clarity and specificity required to provide the requisite degree of "fair notice."

The notion that police and other government officials have the time, inclination, and wherewithal to keep abreast of evolving judicial doctrine—either by reading cases themselves or receiving regular updates from agency counsel—is "a legal fiction."[17] Indeed, "[i]t is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions."[18] This has been confirmed empirically by Professor Joanna Schwartz[19] and noted repeatedly by other commentators[20] and jurists.[21] Moreover, even if they did read all the necessary cases, police "would not reliably recall their facts and

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[17] *Amore v. Novarro*, 624 F.3d 522, 535 (2d Cir. 2010) (internal quotation marks omitted).

[18] *O'Farrell v. Cnty. Of Bernalillo*, 455 F. Supp. 3d 1172, 1206 n.29 (D.N.M. 2020).

[19] Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 610 (2021).

[20] *E.g.*, Eliana Fleischer, Comment, *Stating the Obvious: Departmental Policies as Clearly Established Law*, 90 U. CHI. L. REV. 1435, 1452–53 (2023).

[21] *E.g.*, *Heeter v. Bowers*, 99 F.4th 900, 921 (6th Cir. 2024) (acknowledging that "our qualified immunity analysis rests in part on a fiction that police officers read our cases").

holdings while doing their jobs," which include making snap decisions under conditions of uncertainty and risk.

The inherently fictitious nature of the "fair notice" standard not only explains the Supreme Court's inability to articulate a clear, consistent, and judicially administrable rule for how closely analogous the facts of preexisting case(s) must be in order to satisfy the clearly established test, it also guarantees that circuit court judges will regularly come to diametrically opposite conclusions[22] in qualified immunity cases, including ones featuring truly appalling[23] and tragic[24] uses of force by police.

III. THE PANEL CORRECTLY HELD THAT THE DISPUTED MATERIAL FACTS OF THIS CASE SHOULD BE DETERMINED BY A JURY.

Amicus recognizes that this Court is bound to apply both its own and Supreme Court precedent on qualified immunity, no matter how clear it may be that Congress

[22] *Latits v. Phillips*, 878 F.3d 541 (6th Cir. 2017) (divided panel granting qualified immunity to police who fatally shot fleeing suspect).

[23] *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019) (divided panel granting qualified immunity to officer who accidentally shot child in the leg while shooting at non-threatening dog).

[24] *Young v. Borders*, 850 F.3d 1274 (11th Cir. 2017) (divided court denying en banc review of panel decision granting qualified immunity to police who fatally shot innocent man who responded to commotion at his apartment door with lawfully owned pistol).

meant to—and did—foreclose that defense in §1983 cases.[25] The Court is likewise bound by precedent to hear interlocutory appeals of decisions denying qualified immunity under the collateral-order doctrine, notwithstanding the lack of statutory authorization from Congress to do so. But the full Court has no obligation to give qualified-immunity defendants a second (or third, or fourth, or fifth, as the case might be[26]) bite at the appellate apple when their arguments have failed to garner a panel majority.

Finally, and perhaps most importantly, the special largesse extended to government officials who have been plausibly alleged to have committed civil rights violations need not—and indeed must not—extend to displacing the Framers' decision to give juries, not judges, primary responsibility for deciding disputes between citizens and their government. Given the Founding Generation's universal veneration of civil and criminal juries, this Court should feel no "heartburn with the notion that the parties' dispute can go to trial," where material facts will be decided by ordinary citizens who have seen the relevant evidence presented and tested in

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[25] *See Rogers*, 63 F.4th at 981 (Willett, J., concurring).

[26] *See, e.g.*, Bryan Lamon, *Reforming Qualified Immunity Appeals*, 87 MO. L. REV. 1137, 1188 (2023) (noting that "courts have permitted defendants to take multiple appeals in a single action").

open court rather than "three [or more] appellate judges playing junior-varsity jury" with a cold and inchoate record.[27]

CONCLUSION

That this appeal produced a divided panel is scarcely surprising. It features a defense that Congress specifically negated in an interlocutory posture not authorized by Congress that posits a notional class of defendants acting on the basis of judicial guidance they neither receive nor generally have the time or ability to incorporate into their real-world decision-making. The panel was correct that the presence of disputed material facts deprives the Court of jurisdiction over this appeal. But even if the Court did have jurisdiction, the likelihood of clarifying rather than further muddling the "briar patch of conflicting rules"[28] surrounding qualified immunity by granting en banc review at this particular stage of this particular case appears vanishingly small. The petition should be denied.

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[27] *Spiller v. Harris Cnty.*, 113 F.4th 573, 582 (5th Cir. 2024) (Willett, J., concurring).

[28] *Crane v. City of Arlington, Tex.*, 60 F.4th 976, 979 (5th Cir. 2023) (Oldham, J., dissenting from the denial of rehearing en banc).

Respectfully submitted,

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November 4, 2024

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 2,355 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 Times New Roman, 14-point font.

/s/ Clark M. Neily III

November 4, 2024

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2024, 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/ Clark M. Neily III