No. 17-2603

United States Court of Appeals for the Seventh Circuit

ESTATE OF DEREK WILLIAMS JR. ET AL.,
PLAINTIFFS-APPELLEES

v.

JEFFREY CLINE, ET AL.,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN,
CASE NO. 16- CV-00869,
The HON. JUDGE J.P. STADTMUELLER

MOTION OF THE CATO INSTITUTE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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**Not admitted in this Court*

Pursuant to Fed. R. App. P. 29(a)(2), the Cato Institute respectfully moves for leave to file a brief as *amicus curiae* in support of Plaintiffs-Appellees and affirmance in the above-captioned case. Counsel for Plaintiffs-Appellees consented to the filing of this brief. Counsel for Defendants-Appellants withheld consent.

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. Toward these ends, Cato publishes books and studies, conducts conferences, issues the annual Cato Supreme Court Review, and files *amicus* briefs with courts across the nation. Recent cases in which Cato was granted leave to file *amicus* briefs include *Midwest Fence Corp. v. U.S. Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016), and *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015).

The brief of *amicus* here will aid the court in resolving the issues before it, as it provides a "unique perspective" that will "assist the court of appeals beyond what the parties are able to do." *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). Our brief does not "merely duplicate[]" the brief of Plaintiffs-

Appellees, *id.*, but rather offers a detailed, comprehensive analysis of the qualified immunity doctrine in general—both in terms of its legal, historical background and recent trends in application by the Supreme Court and federal appellate courts. *Amicus* offers analysis of the lack of legal justification for qualified immunity, the deleterious effect it has on the power of citizens to vindicate their constitutional rights, and the subsequent erosion of accountability among public officials that the doctrine encourages. Our brief also develops arguments about how appellate courts may decide cases in a manner that is consistent with binding Supreme Court precedent, but nevertheless attuned to these serious concerns.

Respectfully submitted,

DATED: April 13, 2018.

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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/ *Clark M. Neily III*
April 13, 2018

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CORPORATE & FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Seventh Circuit Local Rule 26.1, *amicus* makes the following declarations:

The Cato Institute is a nonprofit public policy research foundation dedicated in part to the defense of constitutional liberties secured by law. *Amicus* does not have a parent corporation or issue shares of stock.

No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amicus's* participation.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the 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. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual Cato Supreme Court Review, and files *amicus* briefs with courts across the nation.

Cato's interest in this case arises from the lack of legal justification for qualified immunity, the deleterious effect it has on the ability of citizens 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: Only Plaintiffs-Appellees consented to this filing, so a motion for leave to file is attached. No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* and its members made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

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

The district court properly denied qualified immunity in this case, but the arguments that Defendants-Appellants press on appeal underscore the unjustified and unworkable nature of the doctrine in general. In particular, Defendants-Appellants' assertion that the constitutional right at issue was not "clearly established" simply illustrates that the "clearly established law" standard announced in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), has become hopelessly malleable. If applied as strictly as Defendants-

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

Appellants propose—and as some lower courts have done—it would eviscerate the protections of Section 1983 almost entirely.

Amicus recognizes, of course, that this Court is required to decide this case in light of binding Supreme Court precedent, whether or not that precedent is well reasoned—and for the reasons given in Plaintiffs-Appellees' merits brief, faithful application of that precedent requires affirmance. But the Court should also acknowledge and address the maturing contention that qualified immunity itself is unjustified. The Supreme Court has already indicated unusual readiness to reconsider aspects of its qualified immunity jurisprudence, especially in light of express criticism by this and other appellate courts, *see Pearson v. Callahan*, 555 U.S. 223, 235 (2009) (citing cases); it would thus be both appropriate and prudent to recognize and register faults with the doctrine generally. At the very least, the shaky legal rationales for qualified immunity warrant reluctance in extending the doctrine any further than current case law demands.

ARGUMENT

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

A. The text of 42 U.S.C. § 1983 does not provide for any kind of immunity.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016); *see also Senne v. Vill. of Palatine*, 695 F.3d 597, 601 (7th Cir. 2012) (en banc). Yet few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. Rarely can one comfortably cite the entirety of an applicable federal statute in a brief, but this case is an exception. As currently codified, Section 1983 provides:

> ***Every person who***, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, ***subjects***, or causes to be subjected, ***any citizen*** of the United States or other person within the jurisdiction thereof ***to the deprivation of any rights***, privileges, or immunities secured by the Constitution and laws, ***shall be liable to the party injured*** in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (emphases added).

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 a person acting under state authority who causes the violation of a protected right "shall be liable to the party injured." If the unconditional nature of this provision were unclear, it is reinforced by the following sentence, which creates one limited exception for "any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity." Thus, under the negative-implication canon, the expression of one limitation on the scope of relief implies the exclusion of other such limitations. *See Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992); *In re Globe Bldg. Materials, Inc.*, 463 F.3d 631, 635 (7th Cir. 2006).[3]

[3] *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 107-11 (2012). This Court has recognized that the maxim "expressio unius est exclusio alterius—which means literally that the expression of one thing is the exclusion of the other" is "not a rule of substantive law and is only one of statutory construction whose use is occasionally rejected." *In re Chicago, M., S. P. & P. R. Co.*, 658 F.2d 1149, 1158 (7th Cir. 1981). But in this context, the canon simply reinforces what is already plain on the face of the statute—that Section 1983 does not create any generalized immunities for all defendants.

Section 1983's unqualified textual command makes sense in light of the statute's historical context. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, a "suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[4] The original version of the statute specifically said that it would be called "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."[5]

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

Of course, no law exists in a vacuum, and a statute will not be interpreted to extinguish by implication longstanding legal defenses available at common law. *See Forrester v. White*, 484 U.S. 219, 225-26 (1988). In the context of qualified immunity, the Supreme Court has correctly framed the issue as whether "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509

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

[5] An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871). Congress rephrased and reenacted this provision in 1874, and it is that statute that was ultimately codified as 42 U.S.C. § 1983. *See* Baude, *supra*, at 49 n.13.

U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)). But the historical record shows that the common law of 1871 did not, in fact, provide for any such immunities.

B. From the founding through the passage of Section 1983, good faith was not a defense to constitutional torts.

The doctrine of qualified immunity is a kind of generalized good-faith defense for all public officials, as it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. But the relevant legal history does not justify importing any such freestanding good-faith defense into the operation of Section 1983; on the contrary, the sole historical defense against constitutional violations was *legality*.[6]

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

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

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

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

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[9] which involved a claim against an American naval captain who captured a Danish ship off the coast of France. Federal law authorized seizure only if a ship was going *to* a French port (which this ship was not), but President Adams had issued broader instructions to also seize ships coming *from* French ports. *Id.* at 178. The question was whether Captain Little's reliance on these instructions was a defense against liability for the unlawful seizure.

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

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

This "strict rule of personal official liability, even though its harshness to officials was quite clear,"[10] persisted through the nineteenth century. Its severity was mitigated somewhat by the prevalence of successful petitions to Congress for indemnification,[11] but indemnification was purely a legislative remedy; on the judicial side, courts continued to hold public officials liable for unconstitutional conduct without regard to a good-faith defense. *See, e.g.*, *Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891) (Holmes, J.) (holding liable members of a town health board for mistakenly killing an animal they thought diseased, even when ordered to do so by government commissioners).

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

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

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

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

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

> [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). This forceful rejection of any general good-faith defense "is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983's enactment."[13]

C. The common law of 1871 provided limited defenses to certain torts, not general immunity for all public officials.

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

For example, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826), held that a U.S. naval officer was not liable for capturing a Portuguese ship that had attacked his schooner under an honest but mistaken belief in self-defense. *Id.* at 39. The Court found that the

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

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

officer "acted with honourable motives, and from a sense of duty to his government," *id.* at 52, and declined to "introduce a rule harsh and severe in a case of first impression," *id.* at 56. But the Court's exercise of "conscientious discretion" on this point was justified as a traditional component of admiralty jurisdiction over "marine torts." *Id.* at 54-55. In other words, the good faith of the officer was incorporated into the *substantive* rules of capture and adjudication, not treated as a separate and freestanding defense.

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

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity.[16] *Pierson* involved a Section 1983 suit against police officers who arrested several people under an anti-loitering statute that the Court subsequently found unconstitutional. Based on the common-law elements of false arrest, the Court held that "the defense of good faith and probable cause . . . is also available to [police] in the action under [Section] 1983." *Id.* Critically, the Court extended this defense to include not just a good-faith belief in

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

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

probable cause for the *arrest*, but a good-faith belief in the legality of the *statute* under which the arrest itself was made. *Id.* at 555.

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

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue—false arrest—admitted a good-faith defense at common law. One might then have expected qualified immunity doctrine to adhere generally to the following model: determine whether the analogous tort permitted a good-faith defense

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

at common law, and if so, assess whether the defendants had a good-faith belief in the legality of their conduct.

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

The Supreme Court's qualified immunity jurisprudence has therefore diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support for the doctrine, and the relevant history establishes a baseline of strict liability for constitutional violations—at most providing a good-faith defense against claims analogous to some common-law torts. Yet qualified immunity functions today as an across-the-board defense, based on a "clearly established law" standard that was unheard of before the late twentieth century. In short, the doctrine has become exactly what the Court assiduously sought to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

II. THE COURT SHOULD AFFIRM THE DENIAL OF QUALIFIED IMMUNITY AND ADDRESS THE SHORTCOMINGS OF THE DOCTRINE GENERALLY.

Notwithstanding the arguments above, *amicus* obviously recognizes that this Court is obliged to follow Supreme Court precedent with "direct application," even if subsequent developments have thrown the validity of that precedent into question. *NRA of Am., Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009), *rev'd sub nom. McDonald v. City of Chicago*, 561 U.S. 742 (2010) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). For all of the reasons given in Plaintiffs-Appellees' merits brief, faithful application of that precedent, as well as Seventh Circuit case law, compel affirmance of the district court's denial of qualified immunity (assuming the Court has jurisdiction in the first place).[18]

But the Court should still take note of the legal infirmities with qualified immunity generally, for two principal sets of reasons. First, the aggressive arguments pressed by Defendants-Appellants on appeal, particularly with respect to the "clearly established law" standard, underscore the larger problems with the doctrine itself; at the very least, the lack of legal justification for qualified immunity should lead the Court to be hesitant in extending it any further than precedent requires. And second, it is both appropriate and useful for judges to candidly acknowledge the shortcomings of present case law, even as they adhere to it for purposes of actual disposition of cases. This criticism-and-

[18] *Amicus* does not take a position on whether Defendants-Appellants' arguments deprive this Court of jurisdiction; but either way, Plaintiffs-Appellees must prevail: either the Defendants-Appellants must accept an interpretation of the facts in the light most favorable to the plaintiffs (in which case the facts support a reasonable inference that defendants violated a clearly established right, *see* Br. of Pls.-Appellees, at 32-47), or else they must contest the district court's factual findings on appeal (in which case this Court lacks jurisdiction, *see id.* at 1-2, 27-32).

commentary function is especially important in the realm of qualified immunity, which the Supreme Court has functionally treated as a species of federal common law, and where the Court has already indicated its willingness to reconsider precedent in light of lower court opinions. *See Pearson*, 555 U.S. at 235.

A. "Clearly established law" is an inherently amorphous test, but the right at issue here was clearly established by any reasonable standard.

In 1982, the Supreme Court crystallized what would become the modern formulation of the qualified immunity doctrine—that "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. This test was intended to define qualified immunity in "objective terms," *id.* at 819, in that the defense would turn on the "objective" state of the law, rather than the "subjective good faith" of the defendant, *id.* at 816. In practice, however, the "clearly established law" standard announced in *Harlow* has proven hopelessly malleable and indefinite, because there is simply no objective way to define the level of generality at which it should be applied.

Since *Harlow* was decided, the Supreme Court has issued 31 substantive qualified immunity decisions in an attempt to hammer out a workable understanding of "clearly established law,"[19] but with little practical success. On the one hand, it has repeatedly instructed lower courts "not to define clearly established law at a high level of

[19] Baude, *supra*, at 82, 88-90; *see also Kisela v. Hughes*, 584 U.S. ___, No. 17-467, slip op. (Apr. 2, 2018); *District of Columbia v. Wesby*, 583 U.S. ___, No. 15-1485, slip op. (Jan. 22, 2018).

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 on the other hand, it has said that its case law "does not require a case directly on point for a right to be clearly established," *Kisela v. Hughes*, 584 U.S. ___, No. 17-467, slip op. at 4 (Apr. 2, 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)).

How to navigate between these abstract instructions? The Supreme Court's specific guidance has been no more concrete—it has stated simply that "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 742). The problem, of course, is that this instruction is circular—how to identify clearly established law depends on whether the illegality of the conduct was clearly established. It is therefore no surprise that lower courts have struggled to consistently answer the nebulous question of how similar the facts of a prior case must be for the law to be "clearly established."[20]

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

Notwithstanding the "truism" that "every case is distinguishable from every other," *Latits v. Phillips*, 878 F.3d 541, 558 (6th Cir. 2017) (Clay, J., concurring in part and dissenting in part), the Seventh Circuit has reasonably refused to apply qualified immunity in a manner that would make it near-impossible to overcome. The Court has held fast to the principle that "a case directly on point is not required for a right to be clearly established," and that "[e]ven where there are 'notable factual distinctions,' prior cases may give an officer reasonable warning that his conduct is unlawful." *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) (quoting *Estate of Escobedo v. Bender*, 600 F.3d 770, 781 (7th Cir. 2010)).

As Plaintiffs-Appellees explain, the facts and inferences construed in their favor establish that the defendants violated Mr. Williams' constitutional rights by intentionally refusing to call for aid, even though they knew Mr. Williams was in serious medical

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

distress. Br. of Pls.-Appellees, at 32-40. They also identify three recent Seventh Circuit decisions involving closely analogous facts (state officials who deliberately ignored the serious medical needs of those in their custody), all of which found not only the violation of a constitutional right, but that the right was clearly established at the time of the violation. *See Estate of Perry v. Wenzel*, 872 F.3d 439, 460 (7th Cir. 2017); *Estate of Clark v. Walker*, 865 F.3d 544, 552-53 (7th Cir. 2017); *Orlowski v. Milwaukee Cty.*, 872 F.3d 417, 422-23 (7th Cir. 2017). *Estate of Perry* even involved police officers who intentionally ignored the cries for help from someone they had arrested, who specifically was "complain[ing] that he could not breathe," 872 F.3d at 445; if those facts are not sufficiently similar to Mr. Williams' case, it is difficult to imagine what case would suffice.

Nevertheless, Defendants-Appellants argue that Mr. Williams' right "was not clearly established in a particularized sense" at the time of the violation, and that "[t]his case presents a unique set of facts and circumstances, as applied to each appellant." Br. of Defs.-Appellants, at 42, 45. Thus, they are "essentially urging [the Court] to conclude that because there is no case with the exact same fact pattern, qualified immunity applies." *Estate of Perry*, 872 F.3d at 460. The Court has rejected that invitation before, *id.*, and it should continue to do so here. Notwithstanding the Supreme Court's abstract and amorphous guidance on the subject, this Court should take care not to require a "degree of factual similarity that . . . is probably impossible for any plaintiff to meet." *Latits*, 878 F.3d at 558. Qualified immunity has already substantially impaired the efficacy of Section 1983, but the Court should at least refuse to reduce this monumental civil rights statute to a dead letter.

B. The Court should acknowledge the faulty foundations and unworkable nature of the qualified immunity doctrine.

Although this Court must adhere to binding precedent for the purposes of its decisions, there is nothing improper about candidly acknowledging the extent to which that precedent is practically unworkable or legally questionable. Indeed, in those very cases that stress the importance of following Supreme Court precedent, this Court has engaged in exactly such substantive discussions. *See, e.g.*, *NRA of Am., Inc.*, 567 F.3d at 858 (acknowledging that "the rationale of [*United States v.*] *Cruikshank* [92 U.S. 542 (1876)], *Presser* [*v. Illinois*, 116 U.S. 252 (1886)], and *Miller* [*v. Texas*, 153 U.S. 535 (1894)] is defunct" and discussing "scholarly arguments" that the Supreme Court ought to overrule the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)); *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996), *rev'd* 522 U.S. 3 (1997) ("We have considerable sympathy with the argument that *Albrecht* [*v. Herald Co.*, 390 U.S. 145 (1968)] is inconsistent with the cases that establish the requirement of proving antitrust injury. In fact, we think the argument is right and that it may well portend the doom of *Albrecht*."); *id.* at 1368 (Ripple, J., concurring) ("I have serious doubts as to the continued viability of *Albrecht*—especially in the context of conduct that is devoid of horizontal anticompetitive implications.").

If this criticism-and-commentary function is generally appropriate, it is especially so in the context of qualified immunity. Although the doctrine is nominally derived from Section 1983, it is doubtful whether qualified immunity should even be considered an example of "statutory interpretation." It is not, of course, an interpretation of any particular word or phrase in Section 1983 itself. In practice, the doctrine operates more

like free-standing federal common law, and lower courts routinely characterize it as such.[21] And in the realm of federal common law, *stare decisis* is less weighty, precisely because courts are expected to "recogniz[e] and adapt[] to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Indeed, the Supreme Court has already demonstrated its willingness to "openly tinker[] with [qualified immunity] to an unusual degree."[22] In *Harlow*, for example, the Court replaced subjective good-faith assessment with the "clearly established law" standard. 457 U.S. at 818-19. And the Court created a mandatory sequencing standard in *Saucier v. Katz*, 533 U.S. 194 (2001)—requiring courts to first consider the merits and then consider qualified immunity—but then retreated from the *Saucier* standard in *Pearson v. Callahan*, 555 U.S. 223 (2009), which made that sequencing optional.

Pearson is especially instructive, because the Supreme Court justified reversal of its precedent in large part due to the input of lower courts—including two decisions by this very Court. *See* 555 U.S. at 234 ("Lower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have not been reticent in their criticism of *Saucier*'s 'rigid order of battle.'" (quoting *Purtell v. Mason*, 527 F.3d 615, 622 (7th Cir. 2008))); *id.* at 235 ("'Whether [the *Saucier*] rule is absolute may be doubted'" (quoting *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001)) (alteration in original)).

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

[22] Baude, *supra*, at 81.

Ultimately, and in reliance on this Court's opinions, *Pearson* considered and rejected the argument that *stare decisis* should prevent the Supreme Court from reconsidering its qualified immunity jurisprudence. The Court noted in particular that the *Saucier* standard was a "judge-made rule" that "implicates an important matter involving internal Judicial Branch operations," and that "experience has pointed up the precedent's shortcomings." *Id.* at 233-34. As this brief has endeavored to show, the same charges can be laid against qualified immunity more generally. It would be a strange principle of *stare decisis* that permitted modifications only as a one-way ratchet in favor of greater immunity (and against the grain of text and history to boot). This Court may therefore appropriately acknowledge the "shortcomings" with qualified immunity—in particular, the "clearly established law" standard—with the expectation that the Supreme Court will be highly attentive to any such discussion.

CONCLUSION

Sound textual analysis, informed legal history, judicial prudence, and simple justice all weigh in favor of reconsidering qualified immunity; at the very least, courts should refuse to extend the doctrine any further. Applicable precedent supports the denial of immunity here, but the case also presents the Court with a valuable opportunity to assess the state of the doctrine generally. For the foregoing reasons, as well as those presented by Plaintiffs-Appellees, the Court should affirm the district court's denial of qualified immunity.

Respectfully submitted,

DATED: April 13, 2018.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 7th Cir. R. 29 because it contains 6,064 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Clark M. Neily III
April 13, 2018

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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.

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April 13, 2018