No. 23-1155

IN THE

Supreme Court of the United States

PRISCILLA VILLARREAL,

Petitioner,

v.

ISIDRO R. ALANIZ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FIRST LIBERTY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the First Liberty Institute (First Liberty) respectfully submits this brief *amicus curiae* in support of Petitioner Priscilla Villarreal.[1]

Protecting religious liberty for all Americans since 1997, First Liberty is the largest, non-profit, legal organization in the nation dedicated exclusively to defending religious liberty for all Americans. First Liberty believes that every American of any faith—or no faith at all—has a fundamental right to follow their conscience and live according to their beliefs.

Religious freedom is the first freedom outlined in the First Amendment of the Constitution, and for good reason: it is the foundational right that all others are built upon. And if this cornerstone freedom ever falls, all other freedoms would be at risk of tumbling as well. That's why protecting and defending it is so important—because to fight for religious freedom is to fight for the future of all freedoms.

First Liberty files this brief *amicus curiae* to communicate the broad interest in this case for protecting the First Amendment.

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[1] Under this Court's Rule 37, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus and respective counsel made any monetary contributions to the preparation or submission of this brief. Amicus further states this brief is filed more than 10 days before the filing deadline.

SUMMARY OF ARGUMENT

This case involves an obvious constitutional violation. The government arresting a journalist for asking questions so obviously violates the First Amendment that no reasonable official would sanction such an action. It comes as no surprise that there is no case directly on point with the facts here, just like there was no case directly on point in *Hope v. Pelzer,* 536 U.S. 730 (2002) or *Sause v. Bauer*, 585 U.S. 957 (2018). These sorts of outrageous fact patterns are more frequently found in law school exams than in real life.

There is no credible argument that Texas Penal Code § 39.06 constitutionally applies to journalists asking government officials questions. Furthermore, it is difficult to fathom that there are very many rights more clearly established than the right for a journalist to ask a government official questions. Requiring a case with a similar fact pattern would pre-suppose that at some point not long ago, some other government officials had the temerity to arrest a journalist for asking questions. No official would do so because everyone knows that such an action clearly violates the First Amendment.

Moreover, qualified immunity is a judicial invention that has no basis in the text of Section 1983 and runs contrary to basic American legal principles. It provides a shield for government officials who will never have to pay a dime for their own defense or damages adjudicated against them under the false pretense that such personal liability may come from their own pockets. The government here can no more

produce a case in which a government official paid actual money out of the official's own pocket as a result of a Section 1983 suit than Ms. Villarreal can produce a case in which government officials thought it was legal to engage in such egregious conduct. The Court should grant review in this case and reverse the decision below.

ARGUMENT

I. Villarreal's First Amendment Right Was so Obvious That the Officers Had to Be on Notice That Arresting Her Under the Color of Law Was a Clear Violation of the Constitution.

The application of qualified immunity is compelling when it shields officers from reasonable, split-second decisions undertaken in the line of duty. However, here, Texas Penal Code § 39.06 was dredged up as part of an effort to punish newsgathering and silence citizen journalism. As this Court has already reflected, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. Certainly, officials should be on notice that they cannot use novel law to impinge upon obvious constitutional freedoms. Because the Fifth Circuit decision legitimized obvious violations of First Amendment rights, this Court should take up this case and reverse the Fifth Circuit's grant of qualified immunity.

A. Texas Penal Code § 39.06, As Applied to Newsgathering, Plainly Violates the First Amendment.

Texas Penal Code § 39.06 purports to prohibit citizens from asking public servants for nonpublic information:

> (c) A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that:
>
> > (1) the public servant has access to by means of his office or employment; and
> >
> > (2) has not been made public.

TEX. PENAL CODE § 39.06(c). The statute further defines nonpublic information as "any information to which the public does not generally have access, and that is prohibited from disclosure under [the Texas Public Information Act, TEX. GOV'T CODE §§ 552.001–.376]." TEX. PENAL CODE § 39.06(d). Consequently, under TEX. PENAL CODE § 39.06, one is prohibited from soliciting or receiving only *certain categories* of nonpublic information. However, this array of categories is quite large and diverse. It includes, for example, not only the names of traffic accident and suicide victims but also the identities of library users

(*see* TEX. GOV'T CODE § 552.124) and the names of applicants for the position of school district superintendent (*see* TEX. GOV'T CODE § 552.126).

Of course, this statute had never been applied to anyone prior to Villarreal, and certainly not a journalist. Indeed, the application of TEX. PENAL CODE § 39.06 to a citizen-journalist who even slightly profits from their reporting leads to absurd results. Equally absurd is the notion that one can be punished simply for seeking records of library users or the name of a school district superintendent applicant. *See Villarreal v. City of Laredo*, No. 20-40359, at 78 (5th Cir. Jan. 23, 2024) (Ho, J., dissenting) (discussing how the Texas Attorney General's Office took the position that asking the name of a superintendent applicant would be a crime).

Even an individual with the most rudimentary understanding of, and respect for, the First Amendment, let alone common sense, should recoil at such a proposition. *Cf. Connick v. Myers*, 461 U.S. 138, 145 (1983) (stating that speech occupies the "highest rung of the hierarchy of First Amendment values."). As an obvious matter, the First Amendment expressly protects "freedom of speech" and "the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. A corollary that flows from these two protections is the right of citizens to solicit information from government officials using routine news reporting techniques. *See Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (recognizing the First Amendment "right of citizens to inquire, to hear, to speak, and to use information"); *Smith v. Daily Mail*

Pub. Co., 443 U.S. 97, 99, 103 (1979) ("The reporters . . . obtained the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecuting attorney"—which are all "routine newspaper reporting techniques" protected by the First Amendment).

Thus, TEX. PENAL CODE § 39.06 directly collides with the First Amendment rights of citizen journalists, such as Villarreal. And the fact that TEX. PENAL CODE § 39.06 confines its prohibition on the "solicit[ation] or rece[ption]" of information from public servants to, *inter alia*, speech made with "intent to obtain a benefit" and nonpublic information, is of no import. Requests for information, even with these caveats, are still protected under the aegis of the First Amendment.

For instance, newsgathering is protected by the First Amendment, even if its ultimate purpose is for pecuniary gain. *Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) ("It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it . . . Speech likewise is protected even though . . . it may involve a solicitation to purchase or otherwise pay or contribute money.")

Further, this Court has never determined that competing interests—such as privacy, the protection of identity, or a family's emotional distress—are sufficiently compelling to enable the state to curtail freedom of speech. *Compare Villarreal*, No. 20-40359, at 12—13, *with Snyder v. Phelps,* 562 U.S. 443 (2011) (holding that severe emotional distress experienced

by father of a fallen soldier did not overcome protesters' right to freedom of speech); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that criminal penalty could not be imposed for publication of the name of a rape victim legitimately obtained); *and Cox Broad. Corp. v. Cohn,* 420 U.S. 469 (1975) (case similar to *The Florida Star* in which privacy interests did not overcome the right to publish the name of a deceased rape victim).

What is more, even if the solicitation of nonpublic information is somehow less deserving of First Amendment protection than other forms of speech, the government cannot content-discriminate within that lesser-protected category as TEX. PENAL CODE § 39.06(d) necessarily requires. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (Scalia, J.) (holding unconstitutional an ordinance that content and viewpoint-discriminated within the otherwise unprotected category of "fighting words.").

And even if solicitation of nonpublic information is less deserving of First Amendment protection, surely it must be granted *some* protection to give "breathing space" for other First Amendment protected-activity, namely, news reporting. *See Villarreal*, No. 20-40359, at 75-76 (Ho, J., dissenting) (citing a Politico article in support of the proposition that "backchannel" sources are important for determining substantive information)*; cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271—72 (1964) (famous application of the "breathing space" principle, in which the Court determined that another, arguably less-protected category of speech—erroneous or false speech—must be given a degree of protection to enable free debate).

And surely this "breathing space" must be extensive enough to prohibit punishment for merely asking the names of traffic accident and suicide victims, library users, or superintendent applicants.

B. Villarreal's First Amendment Right to Engage in Newsgathering Was Clearly Established.

The preposterous arrests and First Amendment infringements that would continue under the application of TEX. PENAL CODE § 39.06 begs the question—how did the Fifth Circuit fail to reach a decision on whether the Texas statute, as applied to citizen journalists, violates the First Amendment?

Simply, the Fifth Circuit majority relies on a dubious proposition that a never utilized statute can undermine a clearly established First Amendment right of journalist to engage in newsgathering. The crux of this position is that "[n]o controlling precedent gave the defendants fair notice that their conduct, or [TEX. PENAL CODE § 39.06], violates the Constitution facially or as applied to Villarreal." *Villarreal*, No. 20-40359, at 9. Now, under the law in the Fifth Circuit, so long as the government can point to an allegedly facially valid,[2] yet unlitigated, statute as the basis for their authority, they can effectively repress citizens'

[2] There is also good reason to believe that the statute is not only invalid as applied but also facially invalid on vagueness grounds. *See State v. Newton*, 179 S.W.3d 104, 107, 111 (Tex. App. 2005) (noting that "[t]he trial court . . . held that subsections (c) and (d) of §39.06 are unconstitutionally void for vagueness," while reserving the constitutional question); *State v. Ford*, 179 S.W.3d 117, 120, 125 (Tex. App. 2005) (same).

First Amendment rights as much as they like. *See id.* at 21—23. The law now is that officials cannot know that a First Amendment right is "clearly established" in contravention of any statute until the courts regard that particular statute, or one like it, as violative of the First Amendment.

Such a view defies common sense and undermines the ability to find any officer "plainly incompetent" or in "knowing[] violati[on of] the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quotation omitted). Any reasonably competent public official is aware of the rights protected under First Amendment. As discussed above, if one can speak freely, and one can request a change in government policy, it follows that one can also ask government officials questions. A public official can deduce this corollary principle without knowing a factually similar case that states the same.

Moreover, if the Respondents needed cases indicating that solicitation of information from the government is First Amendment protected activity, they had others to choose from. Besides the bevy of cases mentioned above, the Court has long made clear that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462—63 (1987). If a law that prohibits "interrupt[ing] an officer" violates the First Amendment, *id.* at 462, surely a law that prohibits *politely asking a police officer a question* is necessarily unconstitutional as well.

The approach taken by the Fifth Circuit towards qualified immunity is exactly the kind of approach this Court castigated in *Hope* and its progeny. In *Hope*, this Court indicated that public officials who commit obvious constitutional violations are not entitled to qualified immunity. *See* 536 U.S. at 740—42, 745—46. Although this principle was first articulated in the Eighth Amendment context, it has been extended to cases involving the First Amendment, by this Court and nine circuits. *See, e.g.*, *Sause v. Bower,* 585 U.S. 957, 959—960 (2018); *Diaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011); *Nagle v. Marron*, 663 F.3d 100, 115—116 (2d. Cir. 2011); *McGreevy v. Stroup*, 413 F.3d 359, 366 (3d. Cir. 2005); *Tobey v. Jones*, 706 F.3d 379, 391 n.6 (4th Cir. 2013); *MacIntosh v. Clous*, 69 F.4th 309, 319 (6th Cir. 2023); *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 798 (7th Cir. 2016); *Galvin v. Hay*, 374 F.3d 739, 746—47 (9th Cir. 2004); *Frasier v. Evans*, 992 F.3d 1003, 1021—22 (10th Cir. 2021); *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1345—46 (11th Cir. 2013).

Simply put, just as it is patently ridiculous for the government to assert that its officials were unaware that the use of a hitching post constituted cruel and unusual punishment (*Hope*, 536 U.S. at 745), or that preventing prayer for no apparent law enforcement need violated freedom of religious expression (*Sause*, 585 U.S. at 959—960), it is equally ridiculous for the government to assert that its officials were unaware that *asking officials questions regarding nonpublic information* constitutes protected First Amendment activity.

The approach taken has an insidious quality. Not only does it legitimate the ability of public officials to pluck archaic, unused, and unconstitutional statutes out of thin air and use them to punish dissent, it also presupposes that the public cannot understand the plain language of the Constitution or basic First Amendment law. In effect, the Fifth Circuit presupposes that without hitting officials over the head with the statement, "TEX. PENAL CODE § 39.06 violates the First Amendment," those officials cannot know the same is true. Until *Schenck v. United States*, 249 U.S. 47 (1919), the First Amendment was relatively unlitigated in this country, yet Americans then, just as now, understood the protections it gave them. Continued republican self-government would have been impossible without a shared public understanding of the constitutional framework in which we live, including the implications of the First Amendment. Whatever value qualified immunity has, it cannot be predicated on the distinctly un-American notion that our freedoms are *only* cognizable in the light of judicial pronouncements cast down from on high.

II. Qualified Immunity Is a Judicial Fiction That Fails to Serve Even Its Phantom Goals.

There is another reason why the Court should take up the case: to end, or at least narrowly constrain, the doctrine of qualified immunity. When public officials, particularly police officers, face life-threatening, split-second decisions in the line of duty, there is a merited argument they should be absolved from liability. *See Kisela v. Huges*, 584 U.S. 100, 104 (2018) (stating that

"the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts."). However, government officials jailing journalists for asking questions does not give rise to life or death split second decision-making. On the contrary, this absurd line of attack against Ms. Villarreal was so bizarre, it must have taken a substantial amount of time to formulate and execute. Allowing government officials to violate the First Amendment rights of citizens in order to protect police officers involved in life and death split-second decisions is using a hammer to kill a fly.

A. The Qualified Immunity Doctrine Does Not Have a Textual Basis in Section 1983.

Few defend modern qualified immunity doctrine as a historically faithful, textualist interpretation of Section 1983, which "on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (emphasis in original). *See also Horvath v. City of Leander*, 946 F.3d 787, 800 (5th Cir. 2020), *as revised* (Jan. 13, 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("Nothing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement."). As Justices Scalia and Thomas bluntly put it, "our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to

subsume." *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

The lack of a textual foundation for qualified immunity is problematic to say the least. Statutory text is the *sine qua non* of statutory interpretation. Accordingly, interpretation should begin and end with the statutory text, and not take into account extraneous considerations. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent cannon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there' . . . Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253—54 (1992)). *See also Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

As the text of Section 1983 does not include any discussion of qualified immunity, a sound statutory interpretation of the same should conclude that the doctrine has no place in Section 1983 jurisprudence. And, thus, that government officials, such as the Respondents, cannot be immunized from liability when they deny the obvious constitutional rights of litigants such as Villarreal.

B. The Policy Reasons Behind Qualified Immunity in a Case Such as This Are Unconvincing.

Even as the Court has increasingly made statutory text, structure, and historical context the focus of statutory interpretation, it has held fast to qualified immunity's judicial gloss on Section 1983. The hesitancy to ditch this judge-made doctrine has, at least in part, been driven by the desire to counterbalance the Court's modern expansion of Section 1983 liability, which originated with *Monroe v. Pape*, 365 U.S. 167 (1961). *See Crawford-El*, 523 U.S. at 611—12 (Scalia, J., dissenting) (stating that "[t]he § 1983 that the Court created in [*Monroe*] bears scant resemblance to what Congress enacted a century earlier," but that it is "just as well" that the Court continue "the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented . . . .").

Prior to *Monroe*, it was assumed that Section 1983 made government officials liable only for state law authorized deprivations of federal rights. Thus, to prevail on a Section 1983 claim, litigants were required to point to a specific source of state law that had enabled unconstitutional behavior—for instance, a statute. *Monroe* did away with this understanding. Instead, under *Monroe* and its progeny, Section 1983 imposes liability even for deprivations not expressly authorized by state law. *See West v. Atkins*, 487 U.S. 42, 49—50 (1988) (noting, *inter alia*, that "[i]t is firmly established that a defendant in a § 1983 suit acts under the color of state law when he abuses the position given to him by the State."). This

indisputably gave way to "a deluge of litigation." *Cole v. Carson*, 935 F.3d 444, 461 (5th Cir. 2019) (Jones, J., dissenting).

Protecting government officials against such a "deluge" is understandable when their conduct is the product of consequential split-second decisions. Again, *see Kisela*, *supra*. However, this case—and others like it—present an entirely different set of circumstances. Here, government officials engaged in a premediated, conspiratorial effort to deny Villarreal her First Amendment rights based on an *unconstitutional statute*. TEX. PENAL CODE § 39.06 serves as the *entire basis* for the Respondents' conduct. Thus, limiting or eliminating qualified immunity in this context is consistent with the understanding of Section 1983 liability that existed prior to *Monroe* and prior to the Court's subsequent creation of the qualified immunity doctrine in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982): that state officials answer for their conduct when "they act in accordance with their authority" rather than when they simply "misuse it."[3] *Monroe*, 365 U.S. at 172.

Moreover, as opponents of qualified immunity have previously noted, many of the concerns motivating application of the doctrine are simply

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[3] What makes the decision so bizarre is that it "turns the plain text of § 1983 on its head." *Villarreal*, No. 20-40359, at 66 (Ho, J., dissenting). Although a state statute is no longer a requirement for Section 1983 liability, it cannot, in the words of Judge Ho's dissent, serve as a "defense to liability altogether." *Id; see* 42 U.S.C. § 1983 (imposing liability for violations of the Constitution undertaken "under *color of any statute*, ordinance, regulation, custom, or usage, of any State.") (emphasis added).

unfounded. For instance, much of this Court's qualified immunity jurisprudence is driven by an assumption that government officials, including police officers, will necessarily bear individual responsibility for the payment of litigation costs. As the Court recently stated in *Ziglar v. Abassi*—

> The qualified immunity rule seeks a proper balance between two competing interests. On the one hand, damages suits "may offer the only realistic avenue for vindication of constitutional guarantees" . . . "On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability . . . will unduly inhibit officials in the discharge of their duties."

582 U.S. 120, 150 (2017) (quoting *Harlow*, 457 U.S. at 814 and *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). Empirical evidence does not support this proposition. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (emphasizing that between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers contributed *only 0.02%* of the over $730 million spent by states, cities, and counties defending cases). If

officials are nearly always indemnified, the overdeterrence concern motivating continuation of the qualified immunity doctrine dissolves considerably. Especially, such as here, where officials had ample opportunity to assess the consequences of their actions before depriving the complainant of her rights.

What is more is that qualified immunity is entirely incongruous with a fundamental policy that underlies much of American law: *ignorantia juris non excusat*—ignorance of the law is no excuse. *See McFadden v. United States*, 576 U.S. 186, 192 (2015) (recent case applying the principle in a criminal context); *Cheek v. United States*, 498 U.S. 192, 199 (1991) (indicating that the principle is "deeply rooted in the American legal system."); *Barlow v. United States*, 32 U.S. 404, 411 (1833) (noting that this maxim applies either "civilly or criminally"). In any country, but particularly in a democratic republic based upon popular self-governance, it is expected that citizens know and understand the state of the law to a comprehensive degree. *See* Letter from Thomas Jefferson to André Limozin (Dec. 22, 1787), *in* THE PAPERS OF THOMAS JEFFERSON VOL. 12, pp. 450-451 (Julian P. Boyd, ed., 1955) ("[I]gnorance of the law is no excuse in any country. If it were, laws would lose their effect, because it can be always pretended."). If this is so, it only makes sense that those entrusted with enforcing the law possess just as much knowledge as the rest of citizenry. *See Screws v. United States*, 325 U.S. 91, 129—30 (1945) (Rutledge, J., concurring in the result) ("Ignorance of the law is no excuse for men in general. It is less an excuse for

men whose special duty is to apply it, and therefore to know and observe it.").

However, the doctrine of qualified immunity—particularly its "clearly established" prong—has legitimated law enforcement ignorance of the highest order. For example, an official may be aware that it is unconstitutional to release a police dog on a suspect who is laying down but not a suspect who is sitting down with his hands in the air. *See Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018). Or, an official may be aware that it is unconstitutional to effectively steal a defendant's vehicle but not their cash and rare coins. *See Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019). And here, officials may be aware that citizens have the right to challenge police officers, even aggressively (*see City of Houston, supra*), but not that they can *politely ask those same police officers questions*. This case serves as yet another example of the inverted and absurd world of qualified immunity jurisprudence—where those we entrust with enforcing the law are presumed to be ignorant of it, save for the rare instance where present facts and prior law perfectly overlap.

CONCLUSION

The Constitution protects speech from government overreach and suppression. This Court is the arbiter of those protections.[4]

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[4] "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret

When the government, like Texas officials here, aggressively and arbitrarily apply their legislation in a way that clearly impedes on our most sacred freedoms captured in the First Amendment, it is incumbent on this Court to intervene, and not to allow a judicial doctrine to slowly erode its solidity.

The Fifth Circuit approach to qualified immunity must be stopped before it spreads.

Respectfully submitted,

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that rule. If two laws conflict with each other, the courts must decide on the operation of each." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Alexander Hamilton, Federalist No. 78, THE FEDERALIST PAPERS (J. Cooke ed. 1961) at 525 ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning….").