No. 23-227

In the Supreme Court of the United States

SARAH K. MOLINA, et al.,

Petitioners,

v.

DANIEL BOOK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government.

Amicus'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.

SUMMARY OF ARGUMENT

Over the last half-century, the doctrine of qualified immunity has diverged from the proper statutory and historical framework. The codified text of 42 U.S.C. § 1983 ("Section 1983") makes no mention of immunity. The original statutory text enacted by Congress positively forecloses it. And the common law of 1871 did not include the sort of sweeping defense that characterizes qualified immunity today.

The need for correction of this misbegotten doctrine is especially urgent today, at a time when public trust in our government institutions has fallen to record

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[1] Rule 37 statement: Petitioners were timely notified of the filing of this brief, and Respondents expressly waived any objection to timely notice of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than Amicus funded its preparation or submission.

Members of the Emory Free Speech Forum (EFSF) Executive Board assisted the Cato Institute in preparing this amicus brief. EFSF is a non-partisan Emory Law School student organization devoted to fostering critical discourse and open dialogue surrounding important issues in law and society.

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

This Court has not been spared the crisis of confidence in public institutions. Recognizing Congress's prerogatives in enacting Section 1983 by abolishing qualified immunity would help restore it.

What's more, Congress's failure to correct the Court's misinterpretation of § 1983 to create immunity where Congress did not provides an insubstantial basis for allowing that error to persist in the Court's jurisprudence. As explained below, it is a mistake to conflate legislative inaction—especially with respect to a judicially created policy that benefits a powerful interest group by shifting the costs of that policy to victims of official misconduct—with democratic preference or legitimacy. The Court should reverse the decision below.

ARGUMENT

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

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

"Statutory interpretation . . . begins with the text . . . ." *Ross v. Blake*, 578 U.S. 632, 638 (2016). Few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. As currently codified and in relevant part, Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983.

Notably, "the statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language says that any person acting under state authority who causes the violation of a protected right "shall be liable to the party injured."

This unqualified textual command makes sense in light of the statute's historical context. Section 1983 was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, itself "part of a

suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[2] This statutory purpose would have been undone by qualified immunity. The Fourteenth Amendment itself had only been adopted three years earlier, in 1868, and the full implications of its broad provisions were not "clearly established law" by 1871. If Section 1983 had been understood to incorporate qualified immunity, then Congress's attempt to address rampant civil rights violations in the post-war South would have been toothless. The codified text of Section 1983 provides no basis for qualified immunity.

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

There is an even greater historical flaw undermining the legitimacy of qualified immunity: the Supreme Court has been construing the wrong statutory text. Shortly after Congress enacted the Civil Rights Act of 1871, the First Reviser of Statutes erroneously removed a sixteen-word clause from the statute during the codification process. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 235 (2023). These sixteen crucial words afford a cause of action "notwithstanding" any "law, statute, ordinance, regulation, custom, or usage of the State to the contrary."[3] *Id.* This clause clearly and unambiguously abrogates common-law immunities.

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

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

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

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

The Supreme Court's qualified immunity precedent follows from the premise that "Congress by

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

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

Qualified immunity is a generalized good-faith defense for all public officials, shielding "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. But the relevant legal history does not justify importing any such defense into Section 1983; on the contrary, the sole historical defense in constitutional-tort suits was *legality*.[4]

In the early years of the Republic, constitutional claims typically arose as part of suits to enforce common-law rights. For example, an individual might sue a federal officer for trespass, the defendant would claim legal authorization as a federal officer, and the plaintiff would in turn claim the trespass was

[4] *See* Baude, *supra*, at 55–58.

unconstitutional in order to overcome this defense.[5] Such Founding-era lawsuits did not permit a good-faith defense.[6]

The clearest example of this principle is Chief Justice Marshall's opinion in the statutory case *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).[7] The federal law at issue authorized seizure only of a ship going *to* a French port, but President Adams had issued broader instructions to also seize ships coming *from* French ports. *See id.* at 178. The question was whether a captain's reliance on these instructions was a defense against liability for a seizure that violated the federal law.

This Court seriously considered—but ultimately rejected—such a defense, which was based on the very rationales that now support qualified immunity. Chief Justice Marshall explained that "the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages." *Id.* at

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

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

[7] *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 . . . .").

179. He noted that the defendant had acted in good faith and "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.*

This "strict rule of personal official liability, even though its harshness to officials was quite clear,"[8] persisted throughout the nineteenth century. Its severity was mitigated by congressional indemnification.[9] But judicially, courts did not adopt a good-faith defense. *See, e.g.*, *Miller v. Horton*, 26 N.E. 100, 100–01 (Mass. 1891) (per Holmes, J.) (holding liable officials for killing an animal they mistakenly thought diseased, even though they were ordered to do so by commissioners).

Most importantly, this Court rejected a good-faith defense to Section 1983 liability. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Court considered a suit against election officers who had refused to register Black voters under an unconstitutional "grandfather clause" statute. *Id.* at 377–78. The defendants argued that they could not be liable for money damages under Section 1983 because they acted in good faith.[10] The *Myers* Court noted that "[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in argument," but it held that the matter was "disposed of" by the ruling holding such statutes

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

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

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

unconstitutional "and by the very terms" of Section 1983. *Id.* at 378–79. The defendants violated the plaintiffs' constitutional rights, so they were liable—period.

Such rejection of any general good-faith defense "is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983's enactment."[11]

D. In the nineteenth century, good faith was relevant, at most, to merits.

The Court's primary rationale for qualified immunity is the purported existence of similar immunities in the common law of 1871. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). But although there is some disagreement regarding the extent to which "good faith" was relevant in common-law suits, no possible reading of that precedent could justify modern qualified immunity.

Nineteenth-century common law did account for "good faith" in many instances, but those defenses were generally incorporated into the elements of particular torts.[12] Good faith might be relevant to *merits*, but it was not the sort of freestanding immunity for all public officials that characterizes the doctrine today.

For example, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826), held that a naval officer was not

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

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

liable for capturing a ship that had attacked his schooner under an honest, but mistaken, belief of self-defense. *See id.* at 39. The Court found that the officer "acted with honourable motives" and declined to "introduce a rule harsh and severe in a case of first impression." *Id.* at 52, 56. But this judicial "conscientious discretion" was justified as a traditional part of admiralty jurisdiction. *Id.* at 54–55. Good faith was incorporated into the substantive rules of capture and maritime tort law. It was not a separate and freestanding defense.

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

Even this first extension of the good-faith shield was questionable. As discussed above, the baseline historical rule at the Founding and in 1871 was strict liability for constitutional violations. *See Anderson*, 182 F. at 230 (holding that whoever enforces an unconstitutional statute "does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law").[13] And of course,

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[13] *See also* Engdahl, *supra*, at 18 (noting that a public official "was required to judge at his peril whether his contemplated act was actually authorized" and whether "the state's authorization-in-fact . . . was constitutional"); Max P. Rapacz, *Protection of Officers Who Act under Unconstitutional Statutes*, 11 MINN. L. REV. 585,

the Court had already rejected incorporation of a good-faith defense into Section 1983 in the *Myers* case—which *Pierson* failed to mention, much less discuss.

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

A recent article by Scott Keller does argue that executive officers in the mid-nineteenth century enjoyed a more general, freestanding immunity for discretionary acts not done in bad faith.[14] But Keller himself acknowledges that the modern "clearly established law" standard is at odds even with his historical interpretation because "qualified immunity at common law could be overridden by showing an officer's subjective improper motive."[15] Even the

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.").

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

[15] Keller, *supra*, at 1346. Additionally, Will Baude has rejected Keller's historical interpretation outright. *See generally* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115 (2022).

foremost academic *defenders* of qualified immunity, then, recognize that the modern doctrine is historically flawed in this key regard. *See also* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1868 (2018) ("We agree that, as a historical matter, the objective standard is harder to defend than a good-faith standard.").

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

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

Qualified immunity not only misunderstands Section 1983 and works unlawful injustices to the victims of official misconduct, it undermines the legitimacy of public institutions by reinforcing the perception that government officers are held to a far lower standard of accountability than ordinary citizens.

Police misconduct—like the tear-gassing of politically motivated observers monitoring a protest *of other police conduct*, as is at issue in this case—is the

context most often associated with how qualified immunity undermines the public's trust in government. Perhaps especially when it causes unnecessary loss of life. Though only a small proportion of law-enforcement officers each year are involved in a fatal confrontation, even those few generate a shocking number of fatalities. From 2015 to 2017, law-enforcement officers fatally shot, on average, nearly a thousand Americans each year. *See* Julie Tate et al., *Fatal Force*, WASH. POST DATABASE.[16] Tens of thousands more were wounded or injured. *See* Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, NEWSWEEK (Apr. 19, 2017).[17]

Given the ubiquity of smartphones, citizens are documenting these encounters more frequently than ever, making them harder to ignore and further raising the stakes for a judiciary that too often ensures that the conduct depicted goes without adjudication or remedy. In the aftermath of many high-profile police killings—most notably, the video-recorded murder of George Floyd at by Minnesota police in May 2020—Gallup reported that trust in police officers had reached a 27-year low. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020).[18] For the first time, fewer than half of Americans reported placing confidence in the

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

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

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

police. *See id.* Confidence in the police has not recovered.[19]

Public opinion has been driven by the perception that officers who commit misconduct are rarely held accountable, a perception reinforced by the decision below.[20] Remarkably, a majority of police agree with this basic perception: according to a recent survey of more than 8000 police officers, 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable." Rich Morin et al., PEW RSCH. CTR., *Behind the Badge* 40 (2017).[21] Between 2005 and 2021, despite thousands of police shootings, only "142 officers have been arrested for murder or manslaughter, but only seven have been convicted of murder. An additional 37 were convicted of lesser offenses, and 53 were not convicted." Rick Rouan, *Fact check: Police Rarely Prosecuted for On-Duty Shootings*, USA TODAY (June 21, 2021).[22] Many more are never indicted at all. *See, e.g.*, J. David Goodman & Al Baker,

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

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

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

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

Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case, N.Y. TIMES (Dec. 3, 2014).[23]

The inability to remedy rights-violations contributing to the loss of human life—and the lack of a need to determine whether there was a rights violation in the first place—are qualified immunity's rotten fruit. Qualified immunity affords federal courts the discretion to avoid deciding whether alleged misconduct even violated federal rights in the first place and to dispose of potentially meritorious claims solely on the ground that any possible violation was not "clearly established." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The *Pearson* escape hatch creates a vicious cycle: violations must be clearly established for plaintiffs to survive qualified immunity, but qualified immunity itself stunts the development of the law and prevents rights from becoming clearly established.

Such a lack of accountability has dire social consequences. "[W]hen a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness." Fred O. Smith, *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018); *accord* U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 80 (Mar. 4, 2015) (a "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and

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

investigate crime.").[24] The facts here present a particularly dire threat to the legitimacy of policing: officers lied that they never fired the tear gas that afflicted the Petitioners. *See* Pet. App'x A at 3a.

When properly trained and supervised, the majority of police and corrections officers who follow their constitutional obligations will benefit if the legal system reliably holds rogue officers accountable. But under the status quo, "[g]iven the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated." Inst. on Race & Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 21 (2008).[25] Qualified immunity unhelpfully—and unlawfully—shields the minority of officers who bring discredit upon the entire vocation and flout the law, and so erodes relationships between communities and law enforcement.

In a recent survey, a staggering 93 percent of law-enforcement officers reported increased concerns about their safety following high-profile police shootings. *See* PEW RSCH. CTR., *supra*, at 65. Responding officers also strongly supported more transparency, and—most importantly for this case—did not think that problematic officers were held accountable. *See id.* at 40, 68.

Unfortunately, "accountability" often serves as nothing more than a rhetorical cloak for unchecked

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

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

abuse thanks to qualified immunity. Then-U.S. Attorney General William Barr recently told citizens facing potentially unlawful commands from police to meekly comply because there is "a time and place to raise . . . concerns or complaint." Adam Shaw, *Barr Sounds Call to Push Back against Anti-Cop Attitudes, Adopt 'Zero Tolerance' to Resisting Police*, FOX NEWS (Feb. 27, 2020).[26] A Los Angeles police officer similarly warned: "if you don't want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you"—and if a citizen is abused anyway, "Feel free to sue the police!" Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me.*, WASH. POST (Aug. 19, 2014).[27] Words of "assurance" like these come cheap, because qualified immunity substantially reduces the likelihood that victims of police misconduct will have their day in court on the merits of their claims.

Qualified immunity has undermined society's trust in law enforcement and government institutions more generally. By clarifying that defendants who violate constitutional rights should be held accountable, the Court can take a significant step toward restoring public confidence.

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

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

III. *STARE DECISIS* SHOULD NOT PREVENT THIS COURT FROM REVISITING QUALIFIED IMMUNITY.

A. Maintaining qualified immunity harms judicial legitimacy.

Stare decisis is no bar to the overdue course correction urged by Petitioners and *Amicus*. Regrettably, the American public lacks confidence in this Court. *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022).[28] The way to restore it is not by unquestioningly following erroneous precedent, nor by being directed by "public opinion, but . . . [by] deciding by [the Court's] best lights" what the law requires. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2278 (2022) (citation omitted); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu*, another case that denied Americans their rights and so foreclosed any judicial remedy for violations).

A proper understanding of Section 1983 requires abolishing qualified immunity. That doctrine's legal and practical infirmities have been noticed by members of this Court. *See Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute."); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the

[28] Available at https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

historical standards."); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (contending that the Court's "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment").

This Court should follow these careful assessments and abolish qualified immunity. Petitioners asks simply "who has the authority" to legitimately decide the reach of Section 1983: the Congress that crafted it, or the Court that rewrote "that statute from the ground up" when it invented qualified immunity. *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023). The answer is clear: such policy decisions of great "magnitude and consequence" are for Congress to make. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022). "[U]nswerving fidelity to the words Congress chose" when it enacted Section 1983, as Judge Willett put it, would go a long way toward reinforcing judicial legitimacy. *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring). By contrast, a selective approach to which past wrongs to correct and which to leave in place could deepen the crisis.

B. Qualified immunity rests upon faulty empirical assumptions.

Faulty empirical assumptions behind qualified immunity support its abolition as well. *See Crawford-El v. Britton*, 523 U.S. 574, 606 (1998) (Rehnquist, C.J., dissenting) ("In crafting our qualified immunity doctrine, we have always considered the public policy implications of our decisions."). The stated rationale for qualified immunity assumes, among other things, that public officials personally bear the cost for Section 1983 judgments against them and that judicial

decisions "clearly establishing" rights put officials on "fair notice" to change or avoid unconstitutional behavior. A growing body of evidence indicates that both of those assumptions are—and have always been—mistaken.

Despite the growing recognition that qualified immunity harms the very officials it seeks to protect by justifiably undermining public confidence in their accountability, this Court has asserted—with a notable lack of empirical support—that qualified immunity prevents over-deterrence because "there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 814 (cleaned up and citation omitted); *see also Forrester*, 484 U.S. at 223.

This concern was largely premised on the faulty assumption that individual officers pay their own judgments. But in the vast majority of cases they do not. The widespread availability of indemnification already protects individual police and other public officials from ruinous judgments. *See, e.g.*, Cornelia T. L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under* Bivens, 88 GEO. L.J. 65, 78 (1999). As Professor Joanna Schwartz, a leading authority on qualified immunity, has documented, government employers contributed 99.98 percent of all dollars paid out for civil rights claims against police officers. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

Far from threatening individual officers with financial ruin, then, replacing qualified immunity

with the fully remedial legal regime actually enacted by Congress would simply ensure that the victims of rights violations are not done the further injustice of being saddled with the cost of those harms. Indeed, departments facing more frequent judgments may also invest in better training, hiring, disciplinary, and other salutary programs. *See* Kimberly Kindy, *Insurers Force Change on Police Departments Long Resistant to It*, WASH. POST (Sept. 14, 2022).[29] Lawsuits can serve as "a valuable source of information about police-misconduct allegations," and police departments that "use lawsuit data—with other information—to identify problem officers, units, and practices" are better equipped to "explore personnel, training, and policy issues that may have led to the claims." Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 844–45 (2012).

Lawsuits can prompt institutional learning when they carry real consequences for defendant agencies. But qualified immunity wrongly assumes that ordinary officials meaningfully change their actions based on their knowledge of the entire universe of judicial precedent. Qualified immunity has been justified in part on the grounds that an official has the right to "fair notice" regarding whether conduct is unconstitutional, and that binding decisional law finding a rights violation based on "materially similar" facts provides such notice. *Hope v. Pelzer*, 536 U.S. 730, 739–41 (2002).

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

The second assumption is baseless. While agencies may instruct officials about "watershed decisions," "officers are not regularly or reliably informed about court decisions interpreting those decisions in different factual scenarios—the very types of decisions that are necessary to clearly establish the law." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 610 (2021). Officials lack the capacity to "learn the facts and holdings of the hundreds or thousands of cases that clearly establish the law and, even if they learned about some of these cases, they would not reliably recall their facts and holdings while doing their jobs." *Id.* at 612. Besides, as noted above, qualified immunity keeps rights violations from becoming "clearly established at all." *See Pearson*, 555 U.S. at 236.

Stare decisis is weak when precedent stands in the way of "lawful prerogatives." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096–97 (2018). Immunity doctrines do this by definition. "Every time a privilege is created or an immunity extended, it is understood that some meritorious claims will be dismissed that otherwise would have been heard." *Crawford-El*, 523 U.S. at 606 (Rehnquist, C.J., dissenting). Official immunity in particular "comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation," contravening "the basic tenet that individuals be held accountable for their wrongful conduct." *Westfall v. Ervin*, 484 U.S. 292, 295 (1988). Sweeping immunity should not be maintained when it rests upon little more than mistaken factual assumptions and faulty legal reasoning.

Qualified immunity frustrates the remedy Congress enacted for violations of Americans' rights. It

undermines government accountability. It lacks a sound basis in reality. And it should be abolished.

IV. CONGRESSIONAL INACTION DOES NOT INDICATE ACQUIESCENCE.

This Court should take care not to misconceive congressional inaction as support of qualified immunity. Congressional silence is "a poor beacon to follow"—a "quicksand" for the unwary.[30] First, "there is no way to tell what [Congress] intended except" looking to the text it actually enacted—not drawing inferences based on imagined text it did not.[31] Second, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[32] Whatever intent later Congresses may (or may not) have had in failing to slow the advent of qualified immunity cannot be attributed to the Congress that originally passed Section 1983.[33]

Third, congressional inaction "is biased in favor of well-organized (and frequently wholly unrepresentative) groups" rather than driven by any legitimate democratic will.[34] Legislative priorities favor organized groups with clearly defined

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[30] *Zuber v. Allen*, 396 U.S. 168, 185 (1969); *Helvering v. Hallock*, 309 U.S. 106, 121 (1940).

[31] Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012).

[32] *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980) (*quoting United States v. Price*, 361 U.S. 304, 313 (1960)).

[33] *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 95 (1988).

[34] *Id.* at 105.

interests.[35] Interest groups are systematically able to "skew public decision making" in favor of their preferred policies—including reduced accountability.[36] Prof. Eskridge writes: "Groups that are formally organized and willing to spend money to obtain or block legislation will tend to monopolize the attention of legislators, at the expense of groups that are not organized."[37]

Politically influential public employees have a strong interest in maintaining the status quo around qualified immunity. Public-sector unions representing police officers and school officials benefit disproportionately from the doctrine, and police unions in particular provide key lobbying support for it.[38] By contrast, Congress rarely acts affirmatively to

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[35] *See id.*

[36] William N. Eskridge Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 283 (1988).

[37] *Id.* at 287.

[38] *See* Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill.*, WASH. POST (Oct. 7, 2021), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html; Jay Schweikert, *Blatant Misrepresentations of Qualified Immunity by Law Enforcement*, CATO AT LIBERTY (Oct. 6, 2020), https://www.cato.org/blog/blatant-misrepresentations-qualified-immunity-law-enforcement; Mark Walsh, *Curbing Immunity for Police Could Affect School Employees as Well*, EDUCATIONWEEK (June 11, 2020), https://www.edweek.org/policy-politics/curbing-immunity-for-police-could-affect-school-employees-as-well/2020/06 (noting that education unions "likely would be reluctant to have the protections of qualified immunity stripped from their members"

protect the interests of unorganized groups—such as the Petitioners and other Americans whose constitutional rights are violated.[39] Congress is institutionally primed to preserve qualified immunity at the behest of special interests and not because doing so truly represents the democratic preferences of the general public. This Court should not treat legislative inaction as a reason to preserve qualified immunity.

CONCLUSION

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

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and that education officials invoke qualified immunity "regularly").

[39] *See* Eskridge, *supra*, at 105.

Respectfully submitted,

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