No. 24-504

In the Supreme Court of the United States

JOSEPH M. HOSKINS,

Petitioner,

v.

JARED WITHERS, ET AL.,

Respondents.

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

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

Clark M. Neily III
Counsel of Record
Christine Marsden
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 425-7499
cneily@cato.org

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QUESTION PRESENTED

The questions presented are:

1. Whether qualified immunity shields government officials from liability even in cases where they retaliate against a person for exercising a clearly established constitutional right.

2. Whether, even assuming a plaintiff must show that retaliatory conduct is clearly unlawful, qualified immunity should have been denied because the retaliatory conduct here was clearly unlawful.

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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 focuses on the scope of criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Amicus's interest in this case arises from the lack of legal justification for qualified immunity, the confusion it inevitably sows when it interacts with other doctrines such as constitutional retaliation, and the way qualified immunity undermines accountability and legitimacy by empowering judges to decide questions involving the alleged abuse of official power that the Constitution itself commits to juries.

SUMMARY OF ARGUMENT

Though not plausibly derived from—and in all likelihood, expressly foreclosed by—statutory law, the judicially created doctrine of qualified immunity was designed to protect government employees from liability for understandable mistakes, including particularly by police officers making snap decisions under conditions of risk and uncertainty. But today it shields a plethora of government officials from liability

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[1] Rule 37 statement: All parties were timely notified 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.

for egregious, malicious, and sometimes even criminal misconduct. To take just a few illustrations, a Maryland police officer received qualified immunity after "blindly" shooting through a kitchen wall and grievously injuring a five-year-old child whom he knew was in the room but could not see, *see Cunningham v. Baltimore County*, 487 Md. 282, 290–91 (2024); Brief for Petitioner at 9–10, *Cunningham v. Baltimore County*, No. 24-578 (U.S. Nov. 22, 2024); police officers received qualified immunity after stealing more than $225,000 in cash and rare while executing a search warrant at a private residence, *see Jessop v. City of Fresno*, 936 F.3d 937, 939–40 (9th Cir. 2019); and a deputy sheriff received qualified immunity after accidentally shooting a child—who was following officers' orders by lying face down in the grass less than two feet from the officer—while repeatedly firing shots at a nonthreatening pet dog, *Corbitt v. Vickers*, 929 F.3d 1304, 1308 (11th Cir. 2019).

Over the last half-century, the doctrine of qualified immunity has sharply diverged from the statutory and historical framework on which it is supposed to be based. The codified text of 42 U.S.C. § 1983, which gave rise to the doctrine of qualified immunity, makes no mention of immunity. The modern "clearly established law" standard lacks historical support and is indefensibly broad. Moreover, as originally enacted by Congress, the text of § 1983 most plausibly forecloses qualified immunity entirely. *See infra*, Part I.B.

As public trust in government institutions erodes, it is vital not to further undermine that trust by applying a doctrine that lacks any plausible foundation in law and that engenders as much

confusion and disarray as qualified immunity does. This is particularly important given that § 1983 is often the only recourse for victims of constitutional violations by government officials. But qualified immunity often bars even those plaintiffs who have indisputably suffered a violation of rights protected by the Constitution and made actionable by § 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 § 1983 by abolishing qualified immunity would help restore it. At a minimum, the Court should grant review to clarify the scope of qualified immunity in constitutional retaliation cases and begin remediating at least some of the confusion the doctrine continues to sow among lower courts.

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, § 1983 provides:

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

42 U.S.C. § 1983.[2]

Notably, "the statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language just says that any person acting under state authority who causes the

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

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

This unqualified textual command makes sense in light of the statute's historical context. Section 1983 was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, itself "part of a suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[3] This statutory purpose would have been undone by qualified immunity. The Fourteenth Amendment itself had only been adopted three years earlier, in 1868, and the full implications of its broad provisions were not "clearly established law" by 1871. If § 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 common-law legal defenses. *See Forrester v. White*, 484 U.S. 219, 225–26 (1988). But the common law of 1871 did not, in fact, provide for qualified immunity.

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

The codified version of § 1983 erroneously omits sixteen crucial words that afford a cause of action "notwithstanding" any "law, statute, ordinance, regulation, custom, or usage of the State to the contrary." Alexander A. Reinert, *Qualified Immunity's*

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

Flawed Foundation, 111 CALIF. L. REV. 201, 235 (2023). Qualified immunity in particular is derived from the Court's (flawed) understanding of historical state common law. *See id.* at 236; *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967); *Wood v. Strickland*, 420 U.S. 308, 318–20 & nn. 9, 12 (1975). As such, it is foreclosed entirely by the "Notwithstanding Clause." Reinert, *supra*, at 236.

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*, 582 U.S. 120, 160 (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 § 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. The lower court's doctrinal errors have especially grave consequences for the law-enforcement community.

Police misconduct is the context most often associated with how qualified immunity undermines

the public's trust in government. 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.[4] Tens of thousands more were wounded or injured, to say nothing of those harmed without obvious physical effects. *See* Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, NEWSWEEK (Apr. 19, 2017).[5]

Public opinion has been driven by incidents like these, and also by the perception that officers who commit such misconduct are rarely held accountable.[6] While public confidence in police has recovered somewhat since the 2020 killing of George Floyd, it has not returned to pre-pandemic levels and remains lower than historical levels. *See* Megan Brenan, *U.S. Confidence in Institutions Mostly Flat, but Police Up*, GALLUP (July 15, 2024).[7] Examples abound of incidents where police officers have pointed firearms at unarmed citizens without reasonable justification. *See, e.g.*, Tanner Gilmartin*, 'I Will F------ Shoot You,'*

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

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

[6] *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.

[7] Available at https://news.gallup.com/poll/647303/confidence-institutions-mostly-flat-police.aspx.

Monongah Officer Pulls Gun on Woman in Traffic Stop Gone Wrong, WDTV (Aug. 4 2024)[8]; Christine Clarridge, *Motorcyclist Sues King County Detective Who Pulled Gun on Him at Traffic Stop*, SEATTLE TIMES (Aug. 3, 2018)[9]; Lisa Fernandez *Rohnert Park Police Officer Who Pulled Gun Out on Man Acted 'Reasonably,' City Finds*, NBC BAY AREA (Oct. 29, 2015).[10] Fatal or nonfatal, these encounters frequently spark debate, dominate news cycles, and highlight the frustration that many feel over a perceived lack of consequences for officers who commit egregious constitutional violations. *See Tense Traffic Stop Caught on Camera; Former Sheriff Says Officers Played It by the Book*, CBS NEWS (Sept. 9, 2019).[11]

The inability to remedy rights violations that threaten or even take human life—and the lack of a need to determine whether there even was a rights violation in the first place—are qualified immunity's rotten fruit. 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

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[8] Available at https://www.wdtv.com/2024/08/04/i-will-f-shoot-you-monongah-officer-pulls-gun-woman-traffic-stop-gone-wrong/.

[9] Available at https://www.seattletimes.com/seattle-news/motorcyclist-sues-king-county-detective-who-pulled-gun-on-him-at-traffic-stop/.

[10] Available at https://www.nbcbayarea.com/news/local/rohnert-park-police-find-officer-who-pulled-gun-out-on-man-acted-reasonably/1981508/.

[11] Available at https://www.cbsnews.com/sacramento/news/tense-traffic-stop-gun-pulled-sacramento/.

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 investigate crime.").[12]

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 & JUST., NE. UNIV., *Promoting Cooperative Strategies to Reduce Racial*

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

Profiling at 21 (2008).[13] Qualified immunity unhelpfully—and unlawfully—shields the minority of officers who bring discredit upon the entire vocation and flout the law, and so it erodes relationships between communities and law enforcement.

Unfortunately, "accountability" often serves as nothing more than a rhetorical cloak for unchecked abuse thanks to qualified immunity. Then-U.S. Attorney General William Barr recently told citizens facing potentially unlawful commands from police to meekly comply because there is "a time and place to raise . . . concerns or complaint." Adam Shaw, *Barr Sounds Call to Push Back against Anti-Cop Attitudes, Adopt 'Zero Tolerance' to Resisting Police*, FOX NEWS (Feb. 27, 2020).[14] 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).[15] Words of "assurance" like these come cheaply, because qualified immunity in fact removes the federal judiciary as a venue for raising most complaints with any hope of remedy. As a result, officers have been given virtually free rein to, say, pull their firearms and point them at

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

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

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

distressed citizens during routine traffic stops for exclaiming, "fuck your mom," as in this case.

Qualified immunity has undermined society's trust in law enforcement and government institutions more generally. This lack of trust makes encounters with police more dangerous for all parties. By clarifying that defendants who violate constitutional rights, regardless of their status as a government official, should be held accountable, the Court can take a significant step toward restoring public confidence.

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 necessary to remedy the injustices flowing from misapplication of qualified immunity. 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).[16] 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.*, 597 U.S. 215, 291 (2022) (citation omitted).

A proper understanding of § 1983 requires abolishing qualified immunity. That doctrine's legal and practical infirmities have been noticed by

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

members of this Court. *See Ziglar*, 582 U.S. at 157 (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 historical standards."); *see also Kisela v. Hughes*, 584 U.S. 100, 121 (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. It is the role of Congress to determine the reach of § 1983, not the courts. Such policy decisions are of great "magnitude and consequence," and the courts are not the appropriate venue for overhaul and reinterpretation of duly enacted laws that leave little question as to their scope. *West Virginia v. EPA*, 597 U.S. 697, 735 (2022). Precedent substituting for Congress's judgment judicial policies like qualified immunity "must be overruled, and the authority to" remedy violations of federally protected rights "must be returned to the people and their elected representatives." *Dobbs*, 597 U.S. at 292.

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."). Qualified immunity wrongly assumes that officials personally bear the cost for § 1983 judgments against them and that judicial decisions "clearly establishing" rights put officials on "fair notice" to change their unconstitutional behavior.

Despite the growing recognition that qualified immunity harms the very officials it seeks to protect by justifiably undermining public confidence in their accountability, 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 v. Fitzgerald*, 457 U.S. 800, 814 (1982) (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 they don't. The widespread availability of indemnification already protects individual public officials from ruinous judgments. *See, e.g.*, Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under* Bivens, 88 GEO. L.J. 65, 78 (1999). For one example, a recent study shows that governments paid approximately 99.98 percent of all dollars paid out for civil rights claims against police officers. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

Far from threatening individual officers with financial ruin, then, replacing qualified immunity with the fully remedial legal regime actually enacted

by Congress would simply ensure that the victims of rights violations are not done the further injustice of being saddled with the cost of those harms, rather than them being justly placed upon perpetrators. Indeed, departments facing more frequent judgments may also invest in better training, hiring, disciplinary, and other salutary programs. *See* Kimberly Kindy, *Insurers Force Change on Police Departments Long Resistant to It*, WASH. POST (Sept. 14, 2022).[17] 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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[17] 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.

Faulty empirical assumptions have led this Court to adopt qualified immunity, at a heavy price to victims of government wrongdoing. *Stare decisis* is weak when precedent stands in the way of "lawful prerogatives." *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 182–83 (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. LOWER COURTS' APPLICATION OF THE "CLEARLY ESTABLISHED" STANDARD IN RETALIATION CASES IS INCONSISTENT AND INCOHERENT.

As demonstrated by Petitioner, lower courts' application of qualified immunity to constitutional retaliation cases is in complete disarray. See Pet. at 9-22 (collecting and describing cases). This confusion about how to apply the "clearly established" test to retaliation cases produces inconsistent outcomes, with the result that whether victims of the exact same act of official retaliation will have any remedy—or even their day in court—is an entirely arbitrary function of the particular jurisdiction where the misconduct occurred.

When police officers retaliate without consequence against citizens for exercising their constitutional rights, public trust in government institutions is further eroded, and important rights are left unprotected and unvindicated. While police officers must sometimes make difficult judgements on the spur of the moment, the risk to citizens is unnecessarily increased when a police officer unreasonably escalates a minor traffic stop by pointing a weapon at a distressed motorist who is upset by the gratuitous damage of their vehicle. *See* Pet. App. 77a, 79a.

Petitioner plausibly alleges that it was his protected speech rather than his physical actions that

provoked Officer Withers to point a gun at him. *See* Pet. at 6; Pet. App. 36a. This is further supported by dashcam footage of the officer complaining that he didn't like Petitioner because Petitioner's insult was "below the belt." If the constitutionally designated fact-finder determines that Officer Withers drew his gun in response to Petitioner's admittedly coarse but nevertheless constitutionally protected speech, that is where the inquiry into qualified immunity must end—not with an inquiry into whether the rule against threatening people with a deadly weapon for exercising their First Amendment rights was or was not clearly spelled out by existing Tenth Circuit judicial precedent.

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 § 1983. For the foregoing reasons and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

Clark M. Neily III
Counsel of Record
Christine Marsden
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 425-7499
cneily@cato.org

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