No. 24-

IN THE

Supreme Court of the United States

DONNA CHISESI,

Petitioner,

v.

MATTHEW HUNADY, HUEY "HOSS" MACK, JR.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JACK SAMUEL TENENBAUM
NORTHWESTERN BLUHM LEGAL CLINIC
COMPLEX CIVIL LITIGATION AND INVESTOR PROTECTION CENTER
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-4808

JEFFREY T. GREEN*
TOBIAS S. LOSS-EATON
DANIELLE HAMILTON
THE CARTER G. PHILLIPS/ SIDLEY AUSTIN LLP SUPREME COURT CLINIC
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486
jeff@greenlawchartered.com

Counsel for Petitioner

* Counsel of Record

November 8, 2024

QUESTIONS PRESENTED

After a police officer fatally shot Jonathan Victor, Victor's estate sued the officer and his supervisor, Sherriff Huey Mack, under 42 U.S.C. § 1983. The claim against Mack was based on his failure to train the officer on how to deal safely with injured people who show signs of an altered state of mind. The district court held that genuine factual issues precluded summary judgment for Mack on qualified-immunity grounds, but the Eleventh Circuit reversed.

The questions presented are:

1. Whether, on a defendant's interlocutory appeal asserting qualified immunity, a court of appeals can decide whether any genuine factual disputes exist.

2. Whether qualified immunity should be abrogated or restricted to its common-law origins.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Donna Chisesi, as independent administratrix of the estate of Jonathan Victor.

Respondents are Matthew Hunady and Huey "Hoss" Mack, Jr.

There are no corporate parties involved in this case.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Southern District of Alabama and the United States Court of Appeals for the Eleventh Circuit:

Chisesi v. *Hunady*, 2024 WL 1638587, No. 21-11700 (11th Cir. Apr. 16, 2024), *reh'g en banc denied*, No. 21-11700 (July 11, 2024).

Chisesi v. *Hunady*, 2021 WL 2099580, No. 19-0221-C (S.D. Ala. Apr. 19, 2021).

A petition for a writ of certiorari has been filed on behalf of Matthew Hunady arising from the proceedings below:

Hunady v. *Chisesi*, No. 24-406 (docketed October 11, 2024).

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

Donna Chisesi, as independent administratrix of the estate of Jonathan Victor, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit's opinion (Pet. App. 1a–16a) is not reported but is available at 2024 WL 1638587. The district court's opinion (Pet. App. 17a–47a) is not reported but is available at 2021 WL 2099580.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered judgment on April 16, 2024. Petitioner timely filed a petition for rehearing en banc, which was denied on July 11, 2024. On October 1, 2024, Justice Thomas extended the deadline for this petition to November 8, 2024. 28 U.S.C. § 1254(1) supplies jurisdiction.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

The Civil Rights Act of 1871 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

INTRODUCTION

This petition raises two important and recurring questions that have divided courts, judges, and commentators: (1) whether, on a defendant's interlocutory appeal asserting qualified immunity, a court of appeals can decide whether any genuine factual disputes exist, and (2) whether qualified-immunity doctrine should be abrogated or pared back to match its common-law origins.

After Jonathan Victor was injured in a single car accident, first responders found him "spaced out" and nonresponsive inside the car. They summoned police. Sheriff's Deputy Matthew Hunady arrived, trained his rifle on Victor's car, and began shouting commands. After roughly 10 minutes, Victor exited his car and slowly walked towards Hunady with his hands visible. Without warning, Hunady shot Victor four times, killing him.

Hunady's supervisor, Sherriff Huey Mack, Jr., was responsible for training him. But Mack did not train his officers on dealing with mentally distressed people or on de-escalating confrontational situations—despite the obvious need for police officers to receive such training.

When Victor's estate sued Hunady and Mack under § 1983, the District Court denied summary judgment for both defendants. But the Eleventh Circuit reversed

in part, granting Mack qualified immunity. That decision warrants review for two reasons.

First, the Eleventh Circuit is an outlier on the scope of appellate jurisdiction over interlocutory appeals in qualified-immunity cases. Most circuits hold that the courts of appeals must take as given the factual basis for the district court's immunity denial and cannot review the district court's determination of what facts a reasonable factfinder could find. That is true even if the defendant also disputes whether any constitutional violation was clearly established. But the Eleventh Circuit holds that "when . . . an interlocutory appeal presents both evidence sufficiency and clearly established law issues, we may decide both questions." *E.g.*, *Nelson* v. *Tompkins*, 89 F.4th 1289, 1296 (11th Cir. 2024) (cleaned up), *cert. denied*, No. 23-1374, 2024 WL 4426712 (U.S. Oct. 7, 2024). In such cases, the Eleventh Circuit thus considers itself free to decide "whether the evidence is sufficient to create a jury question about whether [a defendant] violated [the plaintiff's] constitutional right." *Id.*

This outlier approach is especially glaring in failure-to-train cases like this one. Other circuits recognize that such claims are inherently fact-intensive, and thus are poorly suited for resolution at summary judgment—let alone on a summary-judgment appeal. *E.g.*, *Valdez* v. *Macdonald*, 66 F.4th 796, 818–19 (10th Cir. 2023). But the Eleventh Circuit resolved the failure-to-train claim against Sheriff Mack itself, declaring that while the "evidence shows the possibility of recurring situations involving those suffering mental health crises," it was too "equivocal" to establish "an obvious need for more or different training." Pet. App. 15a. The court so held despite—and without addressing—

the district court's finding that, given the "conflicting evidence" on this issue, "genuine disputes of material fact remain," so "whether Sheriff Mack was deliberately indifferent is a question that should [be] left to a jury." *Id.* at 44a. In other circuits, that finding would have foreclosed review.

The Eleventh Circuit's approach is a "mistaken end-run around the normal limits on qualified-immunity appeals." See Bryan Lammon, *The Eleventh Circuit's "Both-Questions" Path Around* Johnson *v.* Jones, Final Decisions (Feb. 11, 2024), https://tinyurl.com/mstjrv6r. It conflicts with this Court's rule that "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996).

Second, this case provides an ideal opportunity to revisit qualified-immunity doctrine more broadly. "[R]ecent scholarship details that the 1871 Civil Rights Act included language abrogating common-law immunities that was, for unknown reasons, omitted from the first compilation of federal law." *Price v. Montgomery Cnty.*, 144 S. Ct. 2499, 2500 & n.2 (2024) (Sotomayor, J., respecting the denial of certiorari). And there is ample reason to revisit the doctrine now, which has proven increasingly unworkable and produced inconsistent and unjust results in countless cases. At a minimum, the Court should pare back qualified immunity to match its common-law origins. See *Ziglar* v. *Abbasi*, 582 U.S. 120, 160 (2017) (Thomas, J., concurring in part and concurring in the judgment).

STATEMENT OF THE CASE

I. Factual background.

After Jonathan Victor's car hydroplaned into the Interstate 10 median, first responders found him injured, disoriented, and exhibiting an "altered state of mind." Pet. App. 19a. Soon thereafter, Victor retrieved an unknown item from the backseat and then sat in his car, refusing medical assistance. *Id*. at 20a. First responders called 911 for assistance, and Deputy Hunady responded to what he understood was a "welfare concern." *Id*. at 19a–20a. Victor had not committed a crime, not assaulted anyone with a weapon, was not a fleeing felon, was not wanted for any crime, and had no criminal record. *Id*. at 33a.

It took Deputy Hunady over seventeen minutes to arrive to the scene. After arriving, Hunady immediately loaded his rifle. Pet. App. 22a. He did not ask first responders any questions. *Id*. at 21a. He made no effort to confirm whether Victor was armed. *Id*. He ordered other armed officers to surround Victor's car, escalating the situation by shouting unclear and ambiguous commands at officers and first responders without a clear plan of action. *Id*. at 21a. Deputy Hunady told Victor to "come on out" and "we're here to help you." *Id*. at 21a-22a.

Hunady admitted that he never saw Victor holding a weapon, nor did he see physical evidence that Victor had a weapon. Pet. App. 25a. Video footage from the scene demonstrates that Victor progressed slowly towards officers after Hunady repeatedly ordered him to exit his vehicle, and that Victor's posture was inconsistent with that of an armed shooter:

Hunady was carrying a Taser, and Victor was within the functional range of this non-lethal weapon when Hunady shot him four times. *Id.*

At the time of the shooting, the Baldwin County Sheriff's Office lacked training in critical areas. The department did not train officers in crisis intervention, de-escalation, or responding to situations involving mental distress or suicide. Pet. App. 27a.

Police training in dealing with subjects in mental health crises is essential: Citizens with mental health conditions account for between 7 and 10% of all police-citizen encounters.[1] Police officers are 1.4 to 4.5 more likely to use force during encounters with individuals who have a mental health condition compared to those

---

[1] M. Deane, *Emerging Partnerships Between Mental Health and Law Enforcement*, Nat'l Libr. of Med. (Jan. 1999), https://tinyurl.com/35vtt2f9; J. Janik, *Dealing With Mentally Ill Offenders,* Law Enf't Bulletin (1992), https://tinyurl.com/5y6hz5w9.

without one.[2] From 2015 to 2018, roughly 25% of fatalities resulting from police shootings were people with mental illness.[3]. The BCSO had a negotiations team that is trained to deal with barricaded subjects. *Id*. at 22a. At no time was that negotiations team called to the scene or otherwise contacted to ascertain its availability to assist in defusing the situation. *Id*. Yet, Sheriff Mack failed to provide *any* training for his other officers, including Deputy Hunady, in situations involving mental distress or suicide, de-escalation scenarios, and crisis intervention. Pet. App. 40a

Sherriff Mack was the department's chief supervisor and policymaker. Pet. App. 40a. There is no dispute that Mack was responsible for training his officers and setting policies. *Id*. He was also responsible for addressing training and policy deficiencies. *Id*. Mack admitted that his department did not train officers in these situations.

II. Procedural background.

Victor's mother, Donna Chisesi, sued Hunady and Mack under 42 U.S.C. § 1983, alleging Fourth Amendment violations.[4] As to Mack, Chisesi alleged that his

---

[2] Robin Engel, Eric Silver, *Policing mentally disordered suspects: A reexamination of the criminalization hypothesis*, Criminology (Mar. 7, 2006) https://tinyurl.com/4nkr23fa

[3] Michael S. Rogers., et al. *Effectiveness of Police Crisis Intervention Training Programs*, The Journal of American Academy of Phychiatry and the Law (Sept. 24, 2019), https://tinyurl.com/2ak2jpwh.

[4] Her counts include claims against Hunady for wrongful death (Count I), against Hunady for excessive force (Count II), against Mack for *Monell* liability (Count III), and against Mack for supervisory liability (Count IV). Only Count IV is at issue here.

failure to adequately train his deputies evinced deliberate indifference to constitutional rights. Pet. App. 6a.

As relevant, the district court denied the defendants' summary-judgment motions asserting qualified immunity. The court concluded that Mack was not entitled to qualified immunity because the shooting "is the kind of recurring situation presenting an obvious, highly predictable potential for violation that can trigger liability for failure to train, even in the absence of a pattern of violations." Pet. App. 44a. And given "the conflicting evidence in this case," viewed "in the light most favorable to" the plaintiff, "a finding of deliberate indifference can attach to Sheriff Mack's failure to provide training to [his] deputies in the specified areas." *Id.*

On interlocutory appeal, the Eleventh Circuit dismissed Hunady's appeal for lack of jurisdiction but reversed the denial of summary judgment as to Mack. The court held that it had jurisdiction over Mack's appeal because, it said, the "facts underlying that claim are not in dispute." See Pet. App. 11a–12a. But the court concluded that "Chisesi failed to demonstrate that Sheriff Mack had actual or constructive notice that the particular omissions in the training program were likely to result in constitutional violations"; "Although [the] evidence shows the possibility of recurring situations involving those suffering mental health crises, the evidence is far more equivocal on whether there was an obvious potential for the violation of constitutional rights and an obvious need for more or different training." *Id.* at 15a–16a.

The Eleventh Circuit then denied Chisesi's timely petition for rehearing en banc. Pet. App. 48a–49a.

REASONS FOR GRANTING THE PETITION

III. The Eleventh Circuit is an outlier on the scope of appellate jurisdiction in interlocutory qualified-immunity appeals.

This Court has "limit[ed] interlocutory appeals of qualified immunity matters to cases . . . presenting neat abstract issues of law." *Johnson* v. *Jones*, 515 U.S. 304, 317 (1995) (cleaned up). Such legal questions do not include "a determination about 'genuine' issues of fact for trial." *Id.* In other words, "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." *Behrens*, 516 U.S. at 313.

Most circuits follow this Court's clear instructions: Questions of evidentiary sufficiency—of whether a genuine factual dispute exists—are not appealable on an interlocutory basis. But the Eleventh Circuit holds that such questions are appealable, so long as the defendant *also* disputes an associated legal question. The Eleventh Circuit's outlier approach is wrong. And its error is especially glaring in failure-to-train cases like this one.

A. Most circuits reject interlocutory review of genuine factual disputes.

Outside the Eleventh Circuit, the law is clear: Whether or not the defendant also disputes a violation of clearly established law, the courts of appeals lack jurisdiction to decide whether genuine factual disputes exist.

For example, the Fifth Circuit will not consider interlocutory appellate arguments that "the district

court erred in finding a genuine dispute of fact existed." *Garcia* v. *Orta*, 47 F.4th 343, 349 (5th Cir. 2022). "This court has jurisdiction for this interlocutory appeal if it challenges the materiality of factual issues, but we lack jurisdiction if it challenges the district court's genuineness ruling—that genuine issues exist concerning material facts." *Id.* (cleaned up). Thus, the Fifth Circuit will not entertain arguments "about what inferences a jury could appropriately draw" from the record. *Brown* v. *Strain*, 663 F.3d 245, 250 (5th Cir. 2011); see also *Dilley* v. *Domingue*, 118 F.4th 671, 673–74 (5th Cir. 2024) (on interlocutory appeal, if "some genuine factual dispute persists," the court will consider "the legal question of whether that fact dispute is material," but not its "genuineness").

Likewise, the Sixth Circuit will exercise "jurisdiction only to the extent that the defendant limits his argument to questions of law premised on facts taken in the light most favorable to the plaintiff." *Adams* v. *Blount Cnty.*, 946 F.3d 940, 948 (6th Cir. 2020) (cleaned up). "In other words, a defendant may not appeal a denial of a motion for summary judgment based on qualified immunity insofar as that order determines whether or not the pretrial record sets forth a genuine issue of fact for trial." *Id.* (cleaned up). Thus, the Sixth Circuit will "separate an appellant's reviewable challenges from its unreviewable," and will thus "ignore the defendant's attempts to dispute the facts" or "the inferences that the district court draws from those facts." *Id.* That is true even if the defendant also argues that "he did not violate any 'clearly established' constitutional right." *Id.* at 950.

The Seventh Circuit similarly holds that "[a]n interlocutory appeal of a qualified immunity denial is appealable *to the extent that* it turns on issues of law." *Stewardson* v. *Biggs*, 43 F.4th 732, 735 (7th Cir. 2022) (emphasis added), *reh'g denied,* No. 21-3118, 2022 WL 16954354 (7th Cir. Nov. 15, 2022). That court's "review is therefore confined to abstract issues of law at th[e] interlocutory stage, and [its] appellate jurisdiction is secure only if the relevant material facts are undisputed or (what amounts to the same thing) when the defendant accepts the plaintiff's version of the facts as true for now." *Id.* at 735–36 (cleaned up). To assess its jurisdiction, the Seventh Circuit thus asks "whether [a defendant's] qualified immunity arguments turn on legal issues *only*." *Id.* at 736 (emphasis added). Arguments that are "inseparable from the questions of fact identified by the district court" are not reviewable. *Id.* at 737.

In the Ninth Circuit, too, "a public official may not immediately appeal a *fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *E.g.*, *Est. of Anderson* v. *Marsh*, 985 F.3d 726, 731 (9th Cir. 2021) (cleaned up). The court's "interlocutory review jurisdiction is limited to resolving a defendants *purely legal* contention that his or her conduct did not violate the Constitution and, in any event, did not violate clearly established law." *Id.* (cleaned up) (emphasis added). "In other words, we have jurisdiction to review an issue of law determining entitlement to qualified immunity—even if the district court's summary judgment ruling also contains an evidence-sufficiency determination—but not to accede to a defendant's request that we review that evidence-sufficiency determination on appeal." *Id.*

This carefully limited approach is especially important in failure-to-train cases, which are highly fact-intensive. For example, the Tenth Circuit rejected a defendant's appellate argument that "the 'need for more or different training'" in a single-incident failure to train case "should not have gone to trial." *Valdez*, 66 F.4th at 818–19. Such an argument "is not a purely legal question"; "because that issue is at least partly factual . . . we do not review it on an appeal from the denial of summary judgment." See *id.*

B. The Eleventh Circuit reviews genuine factual disputes on interlocutory appeal.

The Eleventh Circuit's approach is very different. The court acknowledges that, under *Johnson* and *Behrens*, it "do[es] not have interlocutory jurisdiction to review the denial of summary judgment where the only issues appealed are evidentiary sufficiency issues." *E.g.*, *Cottrell* v. *Caldwell*, 85 F.3d 1480, 1484 (11th Cir. 1996). But that rule, according to the Eleventh Circuit, "does not affect our interlocutory jurisdiction in qualified immunity cases where the denial is based *even in part* on a disputed issue of law." *Id.* at 1485 (emphasis added). Thus, the court believes it has "authority to decide, in the course of deciding the interlocutory appeal, those evidentiary sufficiency issues that are part and parcel of the core qualified immunity issues, *i.e.,* the legal issues." *Id.* at 1486.

The Eleventh Circuit has repeatedly applied this outlier standard, reviewing "whether the evidence is sufficient to create a jury question about whether [a defendant] violated [the plaintiff's] constitutional right." *E.g.*, *Nelson*, 89 F.4th at 1296 (cleaned up); see

also *Dempsey* v. *Sheriff, Bay Cnty.*, No. 23-10825, 2024 WL 95441, at *4 (11th Cir. Jan. 9, 2024) (per curiam).

This case exemplifies the Eleventh Circuit's erroneous standard. The district court found that Chisesi had produced "evidence . . . that circumstances like Victor's are both common and recurring in law enforcement officers' daily activities, and that there is an obvious potential for a subject's federal rights to be violated in that situation." Pet. App. 43a. After reviewing this evidence in detail, the court concluded: "[G]iven . . . the conflicting evidence in this case, whether Sheriff Mack was deliberately indifferent is a question that should [be] left to a jury. In viewing the evidence in the light most favorable to Chisesi, the nonmovant, . . . genuine disputes of material fact remain on this element." *Id.* at 44a (cleaned up).

In other circuits, that finding would preclude both summary judgment and interlocutory review. See, *e.g.*, *Valdez*, 66 F.4th at 818–19 (because "the 'need for more or different training' . . . is at least partly factual," it is not reviewable "on an appeal from the denial of summary judgment"). But not in the Eleventh Circuit. Without addressing the district court's finding of a genuine factual dispute, the Eleventh Circuit decided on its own that the evidence did not suffice to show "an obvious potential for the violation of constitutional rights and an obvious need for more or different training." Pet. App. 15a.

C. The Eleventh Circuit's approach is wrong.

The Eleventh Circuit's approach "cannot [be] reconcile[d] . . . with *Johnson* and *Behrens*." Lammon, *supra*. Those cases hold "that denials of qualified im-

munity at the summary-judgment stage are appealable *to the extent* they raise abstract legal issues concerning the existence or clarity of a constitutional violation." *Id.* Thus, "challenging the existence or clarity of a constitutional violation does not open the door to other issues." *Id.*

The Eleventh Circuit's error flows from *Johnson* v. *Clifton*, 74 F.3d 1087 (11th Cir. 1996). Soon after this Court decided *Johnson* v. *Jones*, the Eleventh Circuit held in *Clifton* that, when a clearly-established-law ruling is appealable, the underlying evidentiary sufficiency ruling "may be addressed by an appellate court because it is a part of the core qualified immunity analysis." 74 F.3d at 1091. Thus, "the court of appeals can conduct its own review of the record in the light most favorable to the nonmoving party." *Id.*

That is exactly what *Johnson* and *Behrens* forbid. *Johnson* addressed this scenario, noting that "if the District Court in this case had determined that [the defendants] violated clearly established law, [they] could have sought review of *that* determination." 515 U.S. at 318. But—responding to the suggestion that such an appeal would "create a reviewable summary judgment order"—the Court expressed skepticism that it would "be appropriate to exercise 'pendent appellate jurisdiction' . . . to review the underlying factual matter." See *id.* In other words, it "does not automatically follow" that appealing the clearly-established-law issue would encompass the "determination that there was a genuine issue of fact." *Id.* That the Court identified this scenario as requiring the exercise of "pendent appellate jurisdiction" makes clear that an evi-

dentiary-sufficiency issue is not, as the Eleventh Circuit would have it, part and parcel of the legal qualified-immunity question.

And the next Term, *Behrens* underscored that "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision.'" 516 U.S. at 313. Thus, the court of appeals must "assume the same facts as the district court." Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Rev.*, 93 Wash. L. Rev. 1809, 1846 (2018).

There are good practical reasons for this rule. "Record review can be time consuming, slowing down the interlocutory appeal and thus further delaying district court proceedings." *Id.* What's more, "appellate courts have no comparative advantage in determining which facts a summary judgment record supports," so "[t]he need for immediate appellate review is thus low." *Id.* at 1847–47.

IV. Qualified immunity should be abrogated or pared back to its common-law roots.

The decision below also provides the Court an opportunity to dispense with the flawed doctrine of qualified immunity altogether, or at least to limit the doctrine to its original scope in which it protected officers and officials acting in good faith and not those demonstrating deliberate indifference to common and obvious risks.

D. Qualified immunity should be abrogated because § 1983 was intended to abolish common-law defenses.

New scholarship shows that courts have been construing an incomplete version of § 1983 since its inception. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Found.*, 111 Cal. L. Rev. 201 (2023); See also *Price* v. *Montgomery Cnty.*, 144 S. Ct. 2499, 2500 & n.2 (2024) (Sotomayor, J., respecting the denial of certiorari).

When enacted, Section 1 of the Civil Rights Act of 1871 (now known as § 1983), had an additional sixteen words, called the "notwithstanding" clause:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding,* be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ."

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (emphasis added); Reinert, *supra*, at 235. But this language does not appear in the version of the statute courts have applied for decades.

This omission was an unauthorized change (and one of many errors) by the Federal Reviser of Statutes, not a legislative decision. Reinert, *supra*, at 207, 237. The legislative history shows that "custom or usage" was generally understood at the time to mean common law,

meaning the "notwithstanding" clause displaces common-law defenses. Reinert, *supra*, at 235. Moreover, "history, in combination with the absence of any language in Section 1983 regarding immunity, offers a strong indication that Congress meant to abrogate all common law immunities, even without the Notwithstanding Clause." *Id.* at 239.

This new research negates the "original justification for qualified immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language." *Rogers* v. *Jarrett*, 63 F.4th 971, 980 (5th Cir.) (Willet, J., concurring), *cert. denied*, 144 S. Ct. 193 (2023). Indeed, these findings are "game-changing . . . particularly in this text-centric judicial era when jurists profess unswerving fidelity to the words Congress chose." *Id.*

E. Qualified immunity should be pared back to match its common law roots.

This case demonstrates the continual expansion of modern qualified immunity towards blanket immunity of police officers, moving away from the common law foundation of qualified immunity, which was intended to offer limited protection to public officials acting in good faith. See *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (per curiam) (Sotomayor, J., dissenting) (arguing that modern qualified immunity has become an "absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment").

This Court has "not attempted to locate [the current qualified-immunity] standard in the common law as it existed in 1871 . . . and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine." *Ziglar*, 582 U.S. at 159 (Thomas, J., concurring in part

and concurring in the judgment) (citing Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 51–62 (2018)). Indeed, the modern doctrine of qualified immunity reflects "judicial control of matters that the early republic had assigned to the legislative branch." See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Priv. Bills: Indemnification and Gov't Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862 (2010).

What's more, modern qualified immunity has become unworkable. See *Zadeh* v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring) ("courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" to clearly establish law). That fact is exemplified by circuit panels reaching different conclusions regarding qualified immunity in identical cases. Samuel Brandao, *Qualified Immunity—Obviousness Standard—Taylor v. Riojas*, 135 Harv. L. Rev. Vol.421, 427 n. 73-77 (2021) (citing a case in which one Sixth Circuit panel affirmed denial of qualified immunity, and a second panel reversed the denial in the same case). Other circuits have standards that are obviously different from one another. See *id.* (citing Tenth and Eleventh Circuit reaching similar holdings related to clearly obvious that prisoners being exposed to human waste; whereas, the Fifth Circuit found no similar precedent to put officers on notice). The disparity across Circuits is best highlighted by the qualified immunity pattern jury instructions between the Circuits. Notably, the Eleventh Circuit has no pattern jury instructions on

qualified immunity.[5] Thus, it is even more difficult to ascertain the standards to meet.

The Eleventh Circuit's use of qualified immunity oversteps the original bounds of the doctrine, allowing Sheriff Mack to avoid liability for the preventable death of Victor; a death that could have been avoided had Sheriff Mack trained his officers in de-escalation strategies, crisis intervention, and mental distress situations.

V. The questions presented are important and recurring.

Both questions presented are important. Whether and how qualified immunity should shield government agents from liability is a vitally important question—for injured plaintiffs, for defendant officers, and for the public more broadly. Expansive applications of qualified immunity can produce unjust results and undermine confidence in the rule of law. Likewise, the scope of interlocutory appellate jurisdiction in such cases is important; interlocutory qualified-immunity appeals add significant delay and expense for parties and courts alike. And both issues arise around the country every day. That is true in the Eleventh Circuit too, which is entrenched in its outlier approach.

Finally, this case is a good vehicle to address these questions. They are squarely presented, potentially dispositive, and were preserved below.

---

[5] *See, e.g.*, Pattern jury instructions for the Fifth, Sixth, and Eleventh, Circuits; https://www.lb5.uscourts.gov/juryinstructions/; https://www.ca6.uscourts.gov/pattern-jury-instructions; https://www.ca11.uscourts.gov/pattern-jury-instructions.

CONCLUSION

The petition should be granted.

Respectfully submitted,

JACK SAMUEL TENENBAUM
NORTHWESTERN BLUHM LEGAL CLINIC
COMPLEX CIVIL LITIGATION AND INVESTOR PROTECTION CENTER
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-4808

JEFFREY T. GREEN*
TOBIAS S. LOSS-EATON
DANIELLE HAMILTON
THE CARTER G. PHILLIPS/ SIDLEY AUSTIN LLP SUPREME COURT CLINIC
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486
jeff@greenlawchartered.com

Counsel for Petitioner

November 8, 2024

* Counsel of Record