No. 24-130

In the Supreme Court of the United States

DESIREE MARTINEZ,

Petitioner,

v.

CHANNON HIGH, OFFICER,

Respondent.

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

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to a jury trial, to due process of law, and to have laws made by the nation's elected legislators through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, executive branch officials, administrative agencies, and even some courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints against the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is highly disturbed by how current qualified immunity jurisprudence violates the constitutional rights of American citizens. The judge-made doctrine was ostensibly created to balance "the importance of a

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[1] No party's counsel authored any portion of this brief, and no party, party counsel, or person other than *amicus curiae* made a monetary contribution intended to fund this brief's preparation or submission. All parties received timely notice of intent to file this brief. *See* S. Ct. R. 37.2.

damages remedy to protect the rights of citizens" with "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). The qualified immunity of today abandons this stated objective and obliterates any semblance of balance. Indeed, current qualified immunity jurisprudence, including certain of this Court's precedents, effectively insulates government officials from liability for even the most obvious or egregious constitutional violations, so long as an official can show that his or her constitutional misconduct did not violate "clearly established law." In practice, this judge-made standard amounts to a get-out-of-jail-free card for most government officials—even those judicially determined to have unambiguously violated constitutional rights. They are deemed safe from legal accountability as long as there exists even the slightest reasonable ambiguity that the law was not "clearly established" at the time of the constitutional violation.

Key to the "clearly established law" inquiry is whether the state of the law at the time of the misconduct would have provided a reasonable official with "fair notice" that the action was unconstitutional. However, as Petitioner rightly points out, what is "fair" under one set of circumstances (*e.g.*, a law enforcement officer making a time-pressured decision to use force) may significantly differ from another set of circumstances (*e.g.*, a low-level official with ample time and opportunity to deliberate). Yet increasingly—and alarmingly—courts across the country approach the "clearly established law" standard as a rigid, highly exacting test applicable to all cases, regardless of context, the official's role, or the nature and circumstances of the official's conduct, which requires that plaintiffs present nearly identical case precedent in order to show that an

official had "fair notice" that his conduct was unconstitutional at the time of the rights violation.

This case presents a crucial opportunity for the Court to rectify the manifold defects in current qualified immunity jurisprudence and to clarify the level of specificity required for a constitutional right to be "clearly established law"—in particular, with respect to claims against officials who were not making split-second decisions at the time of the rights-violative conduct. As a staunch defender of Americans' constitutional rights, NCLA has an interest in the outcome of this case and the potential impact it might have on the constitutionally infirm doctrine that today's qualified immunity has become.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over 150 years ago, Congress passed § 1983 of the Civil Rights Act of 1871 "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Nowhere in its text does the statute refer to immunity. To the contrary, the language "is absolute and unqualified," with "[n]o mention … made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980).

In 1982, however, the modern qualified immunity doctrine emerged—not through Congressional enactment, but via this Court's decree. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The judge-made doctrine imputes § 1983 with meaning that is reflected nowhere in the statutory text and requires that courts assess whether a defendant "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known" at the time that the action

occurred. *Harlow*, 457 U.S. at 818. According to the *Harlow* Court, shielding state officials from financial liability and the burden of litigation is necessary to avoid deterring "able citizens from acceptance of public office" and "dampen[ing] the ardor" of officials executing their duties. *Id.* at 814. Qualified immunity was intended to "balance competing values": both "the importance of a damages remedy to protect the rights of citizens" and "the need to protect officials who are required to exercise their discretion." *Id.* at 807. It is not for this Court to strike that balance. That is a job for Congress.

Worse, today's qualified immunity jurisprudence largely fails to fulfill the policy objectives used to justify the doctrine at its inception. Rather than preserve any semblance of balance between the protection of American citizens' constitutional rights and the interest in shielding government officials from frivolous litigation, the exacting "clearly established law" standard of qualified immunity ensures that—even in the most obvious and egregious cases of unconstitutional misconduct—officials will likely be safely shielded from liability by qualified immunity, and injured plaintiffs will thus be barred from any meaningful form of relief. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018) [hereinafter "*Against Immunity*"].

Today's imbalanced approach to qualified immunity serves no valid interest and contravenes Congressional design. Should the Court decline to abolish the "clearly established law" standard in its entirety, the Court should at least make clear that the lower courts must apply a more flexible standard to constitutional claims against officials who, from a position of safety and remove, enjoy the benefit of thinking before acting, as opposed to officers forced to make a split-second decision to use force in a dangerous setting. Indeed, it rotates "qualified immunity backwards" to grant it to officials

who, as in this case, had time to deliberate before acting and were not "mak[ing] split-second, life-and-death decisions to stop violent criminals." *Gonzalez v. Trevino*, 60 F.4th 906, 912 (5th Cir. 2023) (mem.) (Ho, J., dissenting from denial of en banc review), *cert. granted*, 144 S. Ct. 325 (2023).

Furthermore, the "clearly established law" standard has proven unworkable, with the question of whether conduct has violated "clearly established" law presenting "a mare's nest of complexity and confusion." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*? 62 Fla. L. Rev. 851, 852 (2010). This confusion has compelled the Court to repeatedly use *certiorari* to correct the mistakes of the lower courts, while providing little more than "I know it when I see it" guidance. *See, e.g.*, *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021); *Taylor v. Riojas*, 141 S. Ct. 52 (2020); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019); *Kisela v. Hughes*, 584 U.S. 100 (2018) (Sotomayor, J., dissenting); *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (all issued *per curiam*).

Rather than safeguarding dedicated civil servants' ardor, the dramatic one-sidedness of modern qualified immunity hamstrings any deterrent effect that § 1983 might have otherwise had on officers inclined to abuse their authority and flout the constitutional rights of Americans. It also conveys a clear message to government officials that they can get away with even the most egregious constitutional violations unless a plaintiff can meet the exacting specificity requirements of the "clearly established law" standard by presenting nearly identical case precedent that would unambiguously provide "fair warning" to every reasonable officer of the particular conduct's unconstitutionality. Perhaps unsurprisingly, this has proven to be an exceedingly difficult standard to satisfy.

Indeed, nearly all qualified immunity cases come out the same way: by finding immunity for the government official. *See* William Baude, *Is Qualified Immunity Unlawful?* 106 Calif. L. Rev. 45, 82 (2018).

Current qualified immunity jurisprudence also undermines government accountability by stunting the development of constitutional law. When courts sidestep constitutional questions by dismissing § 1983 claims on the basis of qualified immunity, state officials, who base their practices, policies, and training on judicial decisions, lack a reason to take corrective action. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 69–70 (2017) [hereinafter "*Immunity Fails*"]. Further, "if courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue will never become clearly established." *Id.* at 65–66.

At a minimum, it is imperative for the Court to clarify whether the "clearly established law" standard should apply as robustly when the constitutional violation is a product of an official's deliberation, made with ample time to reflect before acting, as it does when officials must make split-second decisions under high-risk circumstances. As Petitioner points out, the lower courts hold divergent views on this question, with many, including the Ninth Circuit in this case, treating the standard as a rigid, "one-size-fits-all" test, requiring of plaintiffs the same exacting degree of specificity no matter the context, and regardless of whether the rights-violative conduct was the product of a law enforcement officer's time-pressured decision made under life-or-death circumstances or a bureaucrat's deliberative decision made from a position of safety.

The decision below exemplifies both the sheer senselessness of a one-size-fits-all approach to the

"clearly established law" test, as well as the grave injury that the judge-made standard causes to Americans' constitutional rights. It also illustrates the dire need for this Court to step in and clarify that officials who have time to reflect and "make calculated choices" prior to acting should not "receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting[.]" *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of *certiorari*).

In its ruling below, the Ninth Circuit panel definitively concluded that Respondent Officer High violated Petitioner Ms. Martinez's Fourteenth Amendment due process rights after disclosing a confidential domestic violence report to Ms. Martinez's abuser over the phone while fully aware that Ms. Martinez was in the same room as her abuser at the time of the disclosure. Pet.App. 3a–5a. The panel pointed out that Officer High had "also shared other information [with the abuser] endangering Ms. Martinez," including "comments that Ms. Martinez was lying and also had a relationship with [the abuser's] colleague." Pet.App. 16a. The panel described how, as a result of Officer High's conduct, Ms. Martinez's abuser—a friend of Officer High's and a fellow police officer who Officer High knew was on leave and under investigation for domestic violence—proceeded to inflict "horrific, severe additional abuse" on Ms. Martinez, including "both physical and sexual abuse." Pet.App. 7a–8a, 17a.

The panel detailed the reasons why Officer High's conduct constituted a clear constitutional violation of Ms. Martinez's rights, finding that Officer High had "acted with deliberate indifference toward the risk of future abuse," that the "danger was obvious," that a

reasonable jury could find that Officer High "put Ms. Martinez at risk for violent retaliation," and that the "assaults Ms. Martinez suffered after Officer High's disclosure were objectively foreseeable as a matter of common sense." Pet.App. 15a–17a.

The panel described comparable case precedent, in which the Ninth Circuit similarly found constitutional violations where officials possessed prior knowledge of an individual's "violent predilections," yet, "with deliberate indifference," exposed the victims to a "known or obvious danger" posed by the violent individual. Pet.App. 18a. One of the cases, *Kennedy v. City of Ridgefield*, specifically held that a police officer violates the Constitution when he discloses a police complaint to its subject and places the complainant "in danger that she otherwise would not have faced." 439 F.3d 1055, 1063 (9th Cir. 2006).

Yet, notwithstanding the panel's finding of a clear constitutional violation and its recognition of extremely similar case precedent, the panel granted Officer High qualified immunity. Pet.App. 22a. The panel noted that, since *Kennedy*, the Ninth Circuit and this Court had "explained that clearly established law should not be defined at a high level of generality." Pet.App. 21a (internal quotations omitted). The panel therefore concluded that *Kennedy* did not "involve sufficiently similar circumstances to put the constitutional violation beyond debate here." Pet.App. 22a (concluding *Kennedy* was not sufficiently similar to provide Officer High with "fair warning" because the police in *Kennedy* failed to patrol the neighborhood after assuring the victim they would, which was not a factor in the action against Officer High). Thus, the panel held that the law was not "clearly established." As a result, the only consequence that Officer High received for violating

Ms. Martinez's constitutional rights was an award of qualified immunity. If any case illustrates the need for this Court's guidance and unequivocal renunciation of the extreme and illogical lengths that many courts, including the Ninth Circuit, have taken to enforce the "clearly established law" standard's purported requirements, it is this one.

Without this Court's guidance, courts across the country will continue to interpret the "clearly established law" standard as a greenlight for government officials to violate rights so long as the unreasonableness of an officer's violation might be deemed "reasonable." *See Anderson v. Creighton*, 483 U.S. 635, 643 (1987). This approach to qualified immunity ensures that even the worst of bad actors among government officials will, in most cases, evade the consequences of their actions. *See, e.g.*, *Gilmore v. Georgia Dep't of Corrs.*, 111 F.4th 1118 (11th Cir. 2024) (granting prison officials qualified immunity because no "clearly established law" violation where officers conducted suspicionless strip-search of woman, fondled her breasts and buttocks, "visually inspected" her vagina, and threatened that she could never visit husband again if she refused to comply); *Latits v. Phillips*, 878 F.3d 541 (6th Cir. 2017) (granting police officers qualified immunity despite finding of Fourth Amendment violation where officers rammed driver off road, shot driver three times despite driver posing no threat, and later made false statements about the incident—because the law was not "clearly established.").

This Court should revisit the modern qualified immunity doctrine and, at a minimum, refine the perilously pro-government and fatally-flawed "clearly established law" standard. Unfortunately, the only truly "clearly established" element of today's qualified immunity doctrine is that it conveys a message to

government officials that they may violate constitutional rights with impunity, insulated by judge-made immunity from the Congressional remedy expressly designed to combat and deter just such misconduct. That is not a message that this Court, nor any other court, should send, and it is certainly not the message that Congress conveyed when it passed § 1983.

ARGUMENT

I. THE "CLEARLY ESTABLISHED LAW" STANDARD SHOULD BE OVERRULED OR, AT A MINIMUM, REFINED

A. The Judge-Made "Clearly Established Law" Standard Lacks Any Textual or Historical Basis

Congress enacted § 1983 of the Civil Rights Act of 1871 "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. at 161. The history of the Act is "replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982). Notwithstanding the clear congressional design and statutory language, this Court's precedent deprives constitutionally-injured Americans of the remedy that Congress expressly authorized by affording qualified immunity—a *court*-created doctrine—to government officials unless their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

Section 1983 provides a direct cause of action against:

> [e]very 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.

This statutory language makes no reference to immunity. To the contrary, the language "is absolute and unqualified," with "[n]o mention … made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. at 635. *See also Malley v. Briggs*, 475 U.S. 335, 339 (1986) ("[T]he statute on its face admits of no immunities."). Instead, the plain text's language is mandatory and applies "categorically to [every] deprivation of constitutional rights under color of state law." *Baxter v. Bracey*, 140 S. Ct. 1862, 1862–63 (2020) (Thomas, J., dissenting from denial of *certiorari*) (cleaned up).

"[S]tatutory interpretation … begins with the text[.]" *Ross v. Blake*, 578 U.S. 632, 638 (2016). And yet, notwithstanding § 1983's unequivocal requirement that state actors "*shall* be liable" for constitutional violations, 42 U.S.C. § 1983 (emphasis added), in *Pierson v. Ray*, the Supreme Court imputed meaning to the statute that is reflected nowhere in the text, and held that the defense of good faith and probable cause available to officials in common-law actions for false arrest and imprisonment was also an available defense in § 1983 actions. 386 U.S. 547 (1967).

Although *Pierson* poses problems of its own, it was at least grounded in the common law of 1871, which

undoubtedly served as a background to contemporaneous Congressional legislation. *See Ziglar v. Abbasi*, 582 U.S. 120, 157 (2017) (no mention of defenses or immunities in text of § 1983, but because certain tort defenses and immunities were so well established at common law in 1871, the Court made such defenses available to officials in § 1983 actions) (Thomas, J., concurring). Fifteen years following *Pierson*, however, the Court cast aside *Pierson*'s common-law foundation in *Harlow v. Fitzgerald*, 457 U.S. 800. Whereas *Pierson* adopted a "good faith" defense based on the elements of the torts at issue in that case—false arrest and imprisonment—*Harlow* recast *Pierson*'s "good faith" defense as an "across-the-board" immunity. *See Anderson*, 483 U.S. at 642–643. The now-controlling standard for qualified immunity no longer looks to whether a particular defense was available in common law. Instead, it colors § 1983 with court-created policy and requires that courts assess whether a defendant "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known" at the time that the action occurred. *Harlow*, 457 U.S. at 818.

Thus, not only does the current "clearly established law" standard lack any textual support, but it also departs from "the common-law backdrop against which Congress enacted [§ 1983]." *Hoggard*, 141 S. Ct. at 2421–22. In sum, the "clearly established law" standard supplants the judgment of Congress with judge-made doctrine that impermissibly favors the immunity of government officials over the constitutional rights of American citizens. The standard is fatally flawed and should be refined, if not abandoned in its entirety.

B. The Court Improperly Assumed a Legislative Function by Balancing Policy Concerns in Adopting the "Clearly Established Law" Standard

Harlow's adoption of the "clearly established law" standard also constituted an improper incursion by the Court into the legislative sphere from which the Court should retreat. The Court has sometimes framed its "clearly established law" standard as emanating from § 1983 itself, as opposed to some "freewheeling policy choice." *Malley*, 475 U.S. at 342.. These assertions do not withstand scrutiny. While acknowledging that it lacks the "license" to grant immunities to § 1983 liability based on the interests of what the Court "judge[s] to be sound public policy," *id.*, the Court did precisely that in *Harlow* and its progeny. *Ziglar*, 582 U.S. at 159–60 (Thomas, J., concurring).

The *Harlow* Court justified the "clearly established law" standard by claiming it to be the "best attainable accommodation of competing values"—the need to redress violations of federal law on the one hand, and "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" on the other. *Harlow*, 457 U.S. at 814. According to the Court, shielding state officials from financial liability and the burden of litigation is necessary to avoid deterring "able citizens from acceptance of public office" and "dampen[ing] the ardor" of officials executing their duties. *Id.* at 814.

But it was not for this Court to strike that balance. That job belongs to Congress. "It is never [the Court's] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have" wanted. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).

The historical context of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, (which eventually became

§ 1983) confirms that Congress did not intend to provide immunity to those acting under color of law, but rather sought to *abrogate* various state law defenses.

Congress passed that historic law in the aftermath of the Civil War "for the express purpose of 'enforc(ing) the Provisions of the Fourteenth Amendment.'" *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (alteration in original) (quoting 17 Stat. 13). At the time of enactment, "[a] condition of lawlessness existed in certain of the States, under which people were being denied their civil rights." *Pierson*, 386 U.S. at 559 (Douglas, J., dissenting). "Armed with its new [Fourteenth Amendment] enforcement powers, Congress sought to respond to 'the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.'" *Baxter*, 140 S. Ct. at 1862. In response to the violence, Congress sought to establish the federal government as the "guarantor of basic federal rights against state power." *Mitchum*, 407 U.S. at 239.

To achieve this goal, Congress opened "the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution[.]" *Id.* Indeed, the "very purpose" of the Act "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law[.]" *Id.* at 242. *See also* Alexander Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 239 (2023) (The "legislative record is replete with evidence that supporters of the Civil Rights Act did not trust state courts to protect constitutional rights.").

The original text of Section 1 of the Civil Rights Act, as debated and passed by Congress, further confirms that Congress intended to abrogate rather than preserve

common law defenses for government officials accused of violating citizens' federal constitutional rights.

As originally enacted, that statute provided:

> [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, 42 Cong. ch. 22, § 1, 17 Stat. 13 (emphasis added).

By including the above bolded and italicized language in Section 1, Congress made clear that the person acting "under color" of law, "*shall* be liable," *notwithstanding* contrary State laws or custom and usage. To the extent that "good faith" or other immunities were available defenses in other contexts, Congress thus intended liability to attach in § 1983 actions, *notwithstanding* the existence of such defenses or immunities. *See* Reinert, *supra*, at 235–36.

Soon after the passage of the Civil Rights Act of 1871, Congress undertook the first codification of federal law—a process which culminated in the passage of the Revised Statutes of 1874.[2] The now-codified Section 1 of the Civil Rights Act of 1871 dropped the "notwithstanding"

[2] Section 5596 of the Revised Statutes repealed all prior federal statutes covered by the revision.

language clause. But for two reasons the change in the language does not signify any changes in the substance of the remedial provision.

First, the codification process sought merely to consolidate and simplify the law, rather than to substantively change it. *See* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1013 (1938). Thus, the excision of the "notwithstanding" clause as part of that process strongly suggests that the clause never served a substantive purpose. Rather, the "notwithstanding" verbiage served as mere "surplusage," the deletion of which did not alter the meaning of the law. *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 n.29 (1968) (concluding Congress dropped identical "notwithstanding" language from § 1982 in the codification process because it was mere "surplusage"). In other words, § 1983's codified version, which provides that any person acting under color of state law "shall be liable," is no less absolute than the original language which contained the "notwithstanding" clause, with neither version contemplating a qualified immunity defense.

Second, to the extent that § 1983's text is ambiguous, the "notwithstanding" clause confirms that the "shall be liable" language was always understood to trump state law defenses, including common law immunity. Shortly after Congress first codified the federal statutes, this Court addressed the relevance of the original statutory language in interpreting the newly codified Revised Statutes of 1874. *United States v. Bowen*, 100 U.S. 508 (1879). The Court explained that, "where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information." *Id.* at 513. Indeed, resort to the original text is not only *permissible* in such cases, but *mandatory* because, where the text of the reenacted statute is "fairly susceptible" of two meanings, "the argument from the

provision of the statute as it stood before the revision [is] *conclusive*." *Bowen*, 100 U.S. at 513 (emphasis added).

Insofar as there is any ambiguity in whether § 1983's "shall be liable" language allows for state law immunity defenses, the predecessor language of the statute provides "conclusive" evidence that the "shall be liable" directive trumps conflicting state law. *Id.*; *see Rogers v. Jarret*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring) ("The [original text of § 1983] underscore[s] that 'what the 1871 Congress meant for state actors who violate Americans' federal rights is not immunity, but liability—indeed, liability notwithstanding any state law to the contrary.").

The historical record is clear and leaves no room to conclude that Congress sought to preserve rather than abrogate various state-level defenses to claims of violations of federally guaranteed rights. The Court should now return to its lane by granting *certiorari* and reconsidering the judge-made "clearly established law" standard of qualified immunity.

C. The "Clearly Established Law" Standard Undermines Government Accountability and Prioritizes Government Immunity for Employees over Americans' Rights and Other Public Policy Concerns

Abolishing—or, at a minimum, refining—the "clearly established law" standard is also necessary because it undermines government accountability, prioritizing the insulation of government officials from liability for damages at the expense of American citizens' constitutional rights. Indeed, the court-created standard works as a one-two punch in favor of the government, with the deprivation of a citizen's rights being the first jab and the denial of relief for patently unconstitutional misconduct landing the coup de grâce. The standard fails to preserve any semblance of balance or fairness between

the protection of American citizens' constitutional rights and the interest in shielding government officials from "frivolous" litigation.

This one-sided approach to qualified immunity sends an "alarming signal" that "palpably unreasonable conduct will go unpunished." *Kisela*, 584 U.S. at 121 (Sotomayor, J., dissenting). Rather than safeguarding dedicated civil servants' ardor, qualified immunity incentivizes unconstitutional conduct by gutting § 1983's deterrent effect.

Current qualified immunity jurisprudence also undermines government accountability by stunting the development of constitutional law. When courts sidestep constitutional questions by dismissing § 1983 claims based on qualified immunity, state officials, who base practices, policies, and training on judicial decisions, lack a reason to take corrective action. Schwartz, *Immunity Fails*, *supra*, at 69–70. Further, "if courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue will never become clearly established." *Id.* at 65–66.

Moreover, the availability of this defense actually *adds* to the time and expense of the proceedings, with both qualified immunity and the merits litigated, often separately and sequentially. Schwartz, *Against Immunity*, *supra*, at 1824. Thus, rather than "avoid[ing] excessive disruption of government" by making it easier to resolve "insubstantial claims on summary judgment," *Malley*, 475 U.S at 341, more time elapses and more delays occur. Schwartz, *Against Immunity*, *supra*, at 1824.

Nor does the interest in protecting law enforcement officers forced to make split-second decisions in volatile situations save the "clearly established law" standard. Even absent qualified immunity, § 1983 does not require

officers to be perfect—it merely requires them to act reasonably, as no liability attaches for the use of reasonable force. Finally, indemnification and insurance eliminate litigation and liability costs from the equation. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). Indeed, granting qualified immunity where there is indemnification is the functional equivalent of giving the government immunity to which it is not entitled. *Owen*, 445 U.S. at 638.

Thus, public policy does not support the "clearly established law" standard, even for those state officials for whom qualified immunity is arguably the most necessary.

And even if policy concerns could justify the "clearly established law" standard in the context of high-risk, heat-of-the-moment situations, the same cannot be said for government officials making calculated decisions, free from the stresses of split-second, life-or-death decision-making. The Court has "never offered a satisfactory explanation" as to why officers "who have time to make calculated choices" prior to acting "receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting[.]" *Hoggard*, 141 S. Ct. at 2422. Nor could it.

Under the "fair warning" prong of the "clearly established law" standard, modern qualified immunity appears to rest on the notion that, regardless of context, government officials can never be held accountable ("fairly warned") for negligent, or even reckless, mistakes that result in the violation of constitutional rights—so long as the mistakes were "reasonable." *See Malley*, 475 U.S. at 341 (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). Lower courts have translated the "fair warning" rationale to require a "high degree of specificity" that is

"beyond debate" in order for a plaintiff to show that the law was "clearly established" and that the defendant-official should thus be denied qualified immunity. *See District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018).

As Petitioner points out, the circuits are split as to whether this "demanding standard" requires the same degree of exacting specificity in all cases, regardless of context, the official's position, or the nature of the official's particular actions. *Id.* It is imperative for this Court to clarify the level of specificity required under the "clearly established law" prong of qualified immunity in circumstances like those presented in this case (assuming that the Court does not abolish the prong in its entirety). In the deliberative decision-making context, where officials have sufficient time to reflect and deliberate before acting, the risk of uncertainty must be placed on the government officials who hold the power to weigh the decision and then act—or not act—rather than on the innocent individual whose rights are involuntarily and illegally infringed. Balancing the equities in this manner promotes the protection of important rights by encouraging preventative maintenance of them and incentivizing care in decision-making.

II. THE LEVEL OF SPECIFICITY REQUIRED FOR A RIGHT TO BE CLEARLY ESTABLISHED IS NOT THE SAME IN ALL CONTEXTS

Should the Court decline to abolish the "clearly established law" standard of qualified immunity, the Court should nevertheless grant *certiorari* to clarify that government officials "who have time to make calculated choices" are not entitled to the same level of protection as "a police officer who makes a split-second decision to use force in a dangerous setting." *Hoggard*, 141 S. Ct. at 2422.

Since the Court announced the "clearly established law" standard in *Harlow*, lower courts—and even this Court—have struggled to give meaning to the standard. Efforts to provide clarity have also failed, with the amorphous guidance and Delphic pronouncements creating an untenable tension between two lines of precedent, one of which warns lower courts not to "define clearly established law at a high level of generality[,]" *al-Kidd*, 563 U.S. at 742, while the other stresses that "general statements of the law are not inherently incapable of giving fair and clear warning," at least in certain "obvious" cases. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

The Court simultaneously requires "clearly established" law to be "'particularized' to the facts of the case[,]" *White*, 137 S. Ct. at 552 (quoting *Anderson*, 483 U.S. at 640), but also cautions that case law need not be "directly on point for a right to be clearly established[.]" *Kisela*, 584 U.S. at 104 (quoting *White*, 137 S. Ct. at 551). Most recently, the Court even called into question whether a Circuit's own precedent "can clearly establish law." *Rivas-Villegas*, 142 S. Ct. at 6 ("Even *assuming* that Circuit precedent can clearly establish law for purposes of § 1983…") (emphasis added). It is no wonder that lower courts remain hopelessly divided and that this Court's intervention is routinely required. The Ninth Circuit's decision below illustrates the need for this Court to clarify the interplay between these lines of precedent.

A grant of *certiorari* would provide the Court the opportunity to make expressly clear that officials "who have time to make calculated choices" are not owed the same level of protection from liability for constitutional

infractions as officials, such as police officers forced to make split-second decisions "in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

Even if the Court will not jettison today's "clearly established law" standard, it should clarify that a lower level of specificity is required to meet that standard in situations involving decisions made by an official who had ample time to reflect before acting (and to seek legal counsel if necessary to ascertain what lines cannot be crossed)—yet whose calculated conduct nevertheless violated an American citizen's constitutional rights.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the Court grant the petition.

Respectfully submitted,

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