No. 18-1287

In the Supreme Court of the United States

ALEXANDER L. BAXTER,

Petitioner,

v.

BRAD BRACEY AND SPENCER R. HARRIS,

Respondents.

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

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae, listed below, are scholars at universities across the United States with expertise in the law of qualified immunity. They submit this brief to demonstrate that in light of the legal and practical justifications advanced in support of qualified immunity and the current state of this Court's qualified immunity jurisprudence, the Court should reconsider the standards governing qualified immunity.[1]

Amici curiae are:[2]

William Baude, Professor of Law, The University of Chicago Law School

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least ten days prior to the due date of the intention of *amici* to file this brief. The parties' consents to the filing of this brief have been filed with the Clerk's office.

[2] Titles and institutions are listed for identification purposes only. The listing of these affiliations does not imply any endorsement by those institutions of the views expressed in this brief.

John F. Preis, Professor of Law and Associate Dean of Academic Affairs, University of Richmond School of Law

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INTRODUCTION AND SUMMARY OF ARGUMENT

Protecting Americans against abuses of government power was a critical concern of the Founding generation—reflected in the Bill of Rights. In the aftermath of the Civil War, and the adoption of additional constitutional amendments, Congress enacted 42 U.S.C. § 1983 to provide a remedy to vindicate those constitutional protections.

Nearly a century later, this Court recognized a qualified immunity defense to Section 1983 damages claims, holding that Congress's creation of the cause of action should be construed to incorporate the good-faith defense that, the Court stated, was then available to government officials at common law. See *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967).

Subsequently, in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court "replac[ed] the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987). *Harlow* held government officials immune "insofar as their conduct does not violate clearly established statutory or constitutional rights

of which a reasonable person would have known." 457 U.S. at 818.

In the thirty-seven years since *Harlow*, the Court has provided shifting guidance regarding the "clearly established law" standard. *Hope* v. *Pelzer* rejected the lower court's holding that the plaintiff must identify "cases that are 'materially similar'" to the case at bar to defeat qualified immunity, instead focusing on whether pre-existing law provided a "fair and clear warning" that the conduct at issue was unlawful, even if arising under "novel factual circumstances." 536 U.S. 730, 735-736, 741 (2002). More recently, however, the Court held in *Ashcroft* v. *al-Kidd* that plaintiffs must identify "existing precedent" that places the legal question "beyond debate" to "every" reasonable officer. 563 U.S. 731, 741 (2011); see also *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam); *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

Amici submit that—for multiple reasons—the time has come to reconsider this qualified immunity standard.

Recent scholarship demonstrates that the foundation of the immunity doctrine—the assertion that government officials enjoyed protection from damages liability at common law—is incorrect. No such immunity existed. Today's immunity rule compounds that initial error, moreover, because it is far broader than the one the Court (mistakenly) attributed to the common law.

Studies also have determined that the policy justification for the current rule simply is not true. The overwhelming majority of government officials are ei-

ther indemnified or protected by insurance, and immunity therefore is not required to ensure that they properly perform their duties. And far from reducing litigation costs, the complex procedural labyrinth constructed by immunity doctrine actually increases both the length and cost of Section 1983 lawsuits.

Most importantly, today's immunity rule has the inevitable real-world effect of diminishing constitutional protections. And in no context is that effect more pronounced, and more directly contrary to the intent of the Constitution's Framers, than with respect to Fourth Amendment guarantees such as those at issue in this case.

Many lower courts today dismiss Section 1983 claims on immunity grounds without first determining whether the plaintiff has alleged a violation of his constitutional rights. That significantly hampers development of the law, particularly in cases involving new technologies and new fact patterns. And it means that future constitutional violations will go unremedied for want of a prior precedent declaring the conduct unconstitutional.

Importantly, stare decisis principles do not bar reconsideration of the qualified immunity standard. Although this Court has stated that stare decisis generally has enhanced force with respect to statutory interpretation precedents, it also has held that this rule does not apply where Congress has left it to the courts to "'give shape to the statute's broad mandate by drawing on common-law tradition.'" *State Oil Co.* v. *Khan*, 522 U.S. 3, 20-21 (1997). The Court's qualified immunity doctrine rests on just such an exercise of judicial authority.

Finally, scholars have identified a number of alternative immunity rules that would ameliorate the adverse effects of the current standard. And Congress could of course act to address the issue, as it has in the past in response to this Court's resolution of an immunity issue.

ARGUMENT

The Court Should Reconsider The Standard For Qualified Immunity.

The current standard governing government officials' immunity from damages liability in Section 1983 actions should be reconsidered. It cannot be justified on the theory that Congress incorporated pre-existing immunity doctrine in enacting Section 1983 or by reference to the policy considerations invoked by the Court. And the immunity rule significantly diminishes the Constitution's protections against abuse of government authority.

Indeed, several current and former Members of this Court have questioned the current qualified immunity standard. See *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871-1872 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Wyatt* v. *Cole*, 504 U.S. 158, 171-172 (1992) (Kennedy, J., joined by Scalia, J., concurring); see also *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (Sotomayor, J., joined by Ginsburg, J., dissenting).

Justice Thomas stated that "[i]n an appropriate case," the Court "should reconsider our qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1872. The Court should grant the petition to address this important issue.

A. The Qualified Immunity Rule Has No Basis In Congress's Enactment Of Section 1983.

The Court has justified its immunity decisions principally by reference to the common-law background against which Congress enacted Section 1983: "Certain immunities were so well established in 1871 * * * that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)).

But recent scholarship has demonstrated that "there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment." William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 55 (2018); see also John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863-1887 (2010); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14-21 (1972).

Chief Justice John Marshall addressed the question of official liability in *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804). The case involved a suit in trespass for damages against a naval captain who had seized a Danish ship. The Court held that the relevant federal law authorized only seizure of ships headed to a French port, but Captain Little had acted in reliance on orders from the Secretary of the Navy to seize ships departing from—as well as sailing to—French ports.

The Court asked: "Is the officer who obeys [such orders] liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him." 6 U.S. at 178. Even though Captain Little had acted "with pure intention" in reliance on the orders (*id*. at 179), he nonetheless was liable for damages.

Indeed, Chief Justice Marshall, in his opinion for the Court, "confess[ed]" that "the first bias of [his] mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages," but he was "convinced that [he] was mistaken" and concluded that good-faith reliance on the orders could not prevent the imposition of damages liability. 6 U.S. at 179. That "personal aside" shows "the deep roots of" the liability principle. Baude, 106 Cal. L. Rev. at 56.

Little is not at all unique. Damages actions against executive officials were a staple of litigation—and damages were imposed when the official acted unlawfully. Engdahl, 44 U. Colo. L. Rev. at 16-21 (collecting cases); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506 (1987).

The general background principle of strict liability for executive officials' illegal and unconstitutional acts remained in force when Section 1983 was enacted in 1871.

Myers v. *Anderson*, 238 U.S. 368 (1915), involved a damages claim against government officials who had refused to register the plaintiffs to vote because state law barred registration of African Americans. The defendants argued that the damages judgment

should be set aside because—among other reasons—they had acted with the good-faith belief that the statute was constitutional. This Court noted that argument, but upheld the judgment against the state officials. See Baude, 106 Cal. L. Rev. at 57-58.

Common-law tort principles similarly fail to support a broadly applicable official immunity rule. "Even to the extent that [tort] cases could be imported to the cause of action under Section 1983, they generally do not describe a freestanding common-law defense, like state sovereign immunity. Instead, those cases mostly describe the individual elements of particular common-law torts." Baude, 106 Cal. L. Rev. at 58-59.

For example, *Wasson* v. *Mitchell*, 18 Iowa 153 (1864)—a case cited by this Court in addressing a qualified immunity question in *Filarsky* v. *Delia*, 566 U.S. 377, 383 (2012)—was a suit against a board of supervisors for approving the bond provided by a constable that subsequently was found to contain forged signatures of the sureties. The Iowa court recognized a rule of immunity limited to that particular factual context, analogizing the board's action to a judicial function:

> If, in the fair exercise of their judgment, they are of opinion that the sureties on a bond are solvent, they are not civilly liable if they should be mistaken; but would be thus liable if they approved a bond whose sureties were known to them to be worthless. * * * [W]e believe this to be the true rule, viz., exempting the board of supervisors, in the approval of bonds, from honest mistake and errors of judgment, whether of law or fact, but holding them

> at the same time personally liable for negligence, carelessness and official misconduct such as are alleged in the petition.

18 Iowa at 156-157.

In other contexts, courts modified substantive rules of liability to circumscribe liability. Thus, in *Marianna Flora*, 24 U.S. 1, 52 (1825), the Court held that an official's decision to retain a captured ship for adjudication would not subject him to liability where "he acted with honourable motives, and from a sense of duty to his government" and not "with gross negligence or malignity, [or] a wanton abuse of power." A similar process led courts to hold that law enforcement officers could not be held liable in tort for an arrest as long as the officer acted with probable cause—even if the arrestee was subsequently exonerated. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 634-639 (1999).[3]

But there was no immunity rule applicable across the board to all government officials and no rule that immunized officials who acted in bad faith. Baude, 106 Cal. L. Rev. at 60-61. Tort precedents therefore cannot justify today's immunity rule, which turns solely on objective factors and therefore can protect officials acting in bad faith, and which applies to all claims against all officials, without regard to whether the tort analog of the constitutional violation incorporated any sort of immunity defense.

Two other justifications for today's immunity rule are equally deficient.

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[3] This Court cited that principle in *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)—but relied on twentieth century authorities. See *ibid.* (referring to "the prevailing view in this country").

Justice Scalia, in his dissenting opinion in *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), recognized that the Court's qualified immunity rule could not be justified by reference to principles of non-liability at the time of Section 1983's enactment. See *id*. at 611-612. But he concluded that the rule was nonetheless appropriate because Section 1983 had been interpreted erroneously to reach acts not authorized by state law (in *Monroe* v. *Pape*, 365 U.S. 167 (1961)), and the "essentially legislative" immunity rule cabined what he viewed as *Monroe*'s overbroad interpretation of the law. 523 U.S. at 611-612 (Scalia, J., dissenting).

But *Monroe* was correct. The statutory phrase "under color of law" is best understood as a legal term of art encompassing both legal and illegal acts. See Baude, 106 Cal. L. Rev. at 64-65 & nn.110-114. And even if *Monroe* were wrong, the qualified immunity rule would not correct its supposed error. Under Justice Scalia's critique of *Monroe*, federal immunity is justified in cases where officers are not immunized by state law; there should generally be either state or federal liability for an illegal act. Instead, the current doctrine tracks state law closely—immunity is most easily denied, in other words, when an official is already liable under state law. Today's doctrine is thus the mirror image of what Justice Scalia's theory would dictate. See *id.* at 68.

The final justification for today's qualified immunity standard is the Court's observation in *Hope* v. *Pelzer* that Section 1983 defendants "have the same right to fair notice" as criminal defendants charged under 18 U.S.C. § 242, which criminalizes willful violations of constitutional rights. See 536 U.S. at 739.

But principles of "fair notice" and lenity do not apply to ordinary civil causes of action. And the exceptions to those rules—such as where the same statute has both civil and criminal application or where the civil statute imposes especially harsh consequences—are inapplicable here. Baude, 106 Cal. L. Rev. at 69-74.

In sum, the current qualified immunity rule simply cannot be justified by reference to the intent of the Congress that enacted Section 1983 or any principle of statutory interpretation.

B. Policy Considerations Do Not Justify The Qualified Immunity Standard.

The Court has frequently cited policy considerations in explaining the need for its qualified immunity rule. In particular, it has referenced the concern that government officials would not properly exercise their responsibilities for fear that they would be subject to damages liability, and that involvement in litigation would distract them from their official duties: "[P]ublic officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow*, 457 U.S. at 806; see also *Forrester* v. *White*, 484 U.S. 219, 223 (1988) (explaining that the immunity rule ensures that "the threat of liability" does not create "perverse incentives that operate to inhibit officials in the proper performance of their duties").

The threat of damages liability was not a concern in the early nineteenth century because government employees were indemnified. As this Court explained in 1836, "[s]ome personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a

superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship." *Tracy* v. *Swartwout*, 35 U.S. 80, 98-99 (1836).

Thus, a comprehensive study of the indemnification process at the federal level found that "nineteenth-century legislators viewed reimbursement of a well-founded claim more as a matter of right than as a matter of legislative grace." Pfander & Hart, 85 N.Y.U. L. Rev. at 1867. Accordingly, "[c]ourts were to decide whether the conduct in litigation was lawful and award damages against the officer if it was not"; Congress was "to decide whether the officer had acted for the government within the scope of his agency, in good faith, and in circumstances that suggested the government should bear responsibility for the loss." *Id*. at 1868. Courts "simply addressed the issue of legality and left Congress in charge of calibrating the incentives of government officials"—which Congress did by "offer[ing] government employees a mix of salary, fees, and forfeitures to ward off bribery and ensure zealous enforcement" and "by indemnifying from any liability only those government officials who acted in good faith." *Id*. at 1870.

Indemnification is similarly widespread today. A comprehensive study of indemnification in the context of claims against police officers over a five-year period (from 2006 to 2011) found that law enforcement officers "almost never contributed to settlements and judgments in police misconduct lawsuits during the study period." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912 (2014). In particular:

- "Approximately 9225 civil rights cases were resolved with payments to plaintiffs between

2006 and 2011 in the forty-four largest jurisdictions in [the] study. Officers financially contributed to settlements or judgments in approximately .41% of those cases."

- "Indemnification practices in the thirty-seven small and mid-sized jurisdictions in [the] study are consistent with practices in the larger departments. None of the 8141 officers employed by these thirty-seven jurisdictions contributed to a settlement or judgment in any type of civil claim resolved from 2006 to 2011."
- Among the few officers who made payments, the median amount was $2,250 and no individual paid more than $25,000.

Id. at 912, 915, 939.

Law enforcement officers are not unique. As Justice Breyer recognized, many states have statutes that authorize indemnification of state and local officials from damages for Section 1983 actions. See *Board of Cty. Comm'rs of Bryan Cty.* v. *Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting). Federal agencies have followed suit. Between 2007 and 2017, employees of the Federal Bureau of Prisons and their insurers paid only 0.32% of the entire amount paid to plaintiffs who brought claims against the employees pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, at 5-6 (forthcoming 2020), https://papers.ssrn.com/sol3/papers.-cfm?abstract_id=3343800. In total, "the federal government effectively held their officers harmless in over 95% of

the successful cases brought against them, and paid well over 99% of the compensation received by plaintiffs in these cases." *Id.* at 6. That means the current standard imposes significant costs on plaintiffs, costs that could discourage the filing of meritorious claims, without providing benefits.

There is accordingly every reason to believe that indemnification is the rule, not the exception, for public officials of all kinds. See Michael L. Wells, *Qualified Immunity After* Ziglar *v.* Abbasi*: The Case for a Categorical Approach*, 68 Am. U. L. Rev. 379, 404 & n.145, 406 (2018) (collecting studies on indemnification of public officials and "suspect[ing]" that findings specific to police officers "are valid across the whole field of constitutional tort litigation"); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 Notre Dame L. Rev. 2021, 2058-2059 (2018) (stating that "there is reason to believe that personal liability is just as mythical in prison cases as it is in police cases").

The Court has recognized that employee indemnification "reduces the employment-discouraging fear of unwarranted liability." *Richardson* v. *McKnight*, 521 U.S. 399, 411 (1997). There is little cause for concern about state officials' discretion and ardor in the field "when the damages award comes not from the official's pocket, but from the public treasury." *Owen* v. *City of Indep.*, 445 U.S. 622, 654 (1980). Indemnification therefore eliminates this justification for an immunity defense.

A second policy justification is the concern that the burdens associated with defending oneself in litigation will distract government officials from their duties. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009) (describing "basic thrust" of qualified immunity as

freeing officials from "the concerns of litigation," including "'disruptive'" discovery).

But the complex qualified immunity standard makes lawsuits more burdensome by creating multiple pre-trial proceedings in which the defense may be raised—as well as the possibility of multiple pre-trial appeals. Perhaps these costs would be merited if qualified immunity regularly achieved its intended goal of dismissing insubstantial cases before discovery or trial. But one study of almost 1,200 cases found that only 8.6% of qualified immunity motions resulted in dismissal. In the other 91.4% of cases, there were increased litigation costs without any benefit to the defendant. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 60 (2017).

Finally, there is substantial reason to doubt that anyone is deterred from becoming a public official, or from exercising their duties properly, because of the threat of litigation. Studies of law enforcement officers have shown that the threat of a lawsuit does not influence the way they perform in their jobs. See Schwartz, 93 Notre Dame L. Rev. at 1811-1813.

Thus, the policy considerations invoked by the Court do not justify the broad qualified immunity rule.

C. The Qualified Immunity Standard Is Eroding Constitutional Protections Against Abuse Of Government Power.

The practical effect of the qualified immunity rule is to erode critical constitutional protections.

First, many lower courts today dismiss Section 1983 claims on immunity grounds without first determining whether the plaintiff has alleged a violation of

his constitutional rights, as permitted by *Pearson* v. *Callahan*, 555 U.S. 223, 227 (2009). See *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1893 & n.36, 1896 & n.57 (2018).

That approach hampers development of the law, particularly in cases involving new technologies and new fact patterns. And it means that subsequent constitutional violations cannot be remedied due to the absence of a prior precedent declaring the conduct unconstitutional. Blum, 93 Notre Dame L. Rev. at 1902-1903; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1817-1818 (2018).

Second, this effect is particularly pronounced with respect to the protections provided by the Fourth Amendment.

By their nature, Fourth Amendment claims are fact-specific: whether an officer possessed probable cause; whether facts constituted exigent circumstances; or whether an officer used excessive force. When courts do not address whether particular allegations, or facts adduced at summary judgment, constitute a Fourth Amendment violation—and instead simply hold that there was no relevant "clearly established law"—that means there is no addition to the body of law circumscribing unlawful conduct.

Third, there are particular reasons to reconsider the qualified immunity standard as it applies to Fourth Amendment claims.

The Fourth Amendment "grew in large measure out of the colonists' experience with the writs of assis-

tance and their memories of the general warrants formerly in use in England" (*United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977), abrogated by *California* v. *Acevedo*, 500 U.S. 565 (1991))—and that history is highly relevant in interpreting the Amendment and configuring the remedies available when Fourth Amendment rights are violated.

The Founding generation's aversion to general warrants was rooted in the celebrated *Wilkes* and *Entick* cases,[4] described by one scholar as "the most famous colonial-era cases in all America—the O.J. Simpson and Rodney King cases of their day." Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53, 65 (1996). In these tort actions seeking damages for trespass for officers acting pursuant to general warrants, the English courts held that the warrants did not provide a defense against liability.

The Framers of the Fourth Amendment therefore anticipated that damages actions would be the means by which the Amendment was enforced. Indeed, the Anti-Federalists who agitated for an express amendment to the Constitution protecting against general warrants stated that damages awards by juries would be the mechanism by which that protection would be enforced:

> [S]uppose for instance, that an officer of the United States should force the house, the asylum of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the [C]onstitution of the United States? * * * [N]o remedy has yet been found equal to

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[4] *Wilkes* v. *Wood* (1763) 98 Eng. Rep. 489; *Entick* v. *Carrington* (1765) 95 Eng. Rep. 807.

> the task of deterring and curbing the insolence of office, but a jury—[i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression. * * * [By contrast,] an American judge, who will be judge and jury too[,] [will probably] spare the public purse, if not favour a brother officer.

Essays by a Farmer (I) (Feb. 15, 1788), reprinted in 5 *The Complete Anti-Federalist* 14 (Herbert J. Storing ed., 1981); see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 777 (1994) ("Notes from a speech delivered by Marylander Samuel Chase suggest that the future Justice likewise saw juries and warrants as linked and stressed the need for civil juries in trespass suits against government 'officers.'") (citing Notes of Samuel Chase (IIB), reprinted in 5 *The Complete Anti-Federalist* 82 (Herbert J. Storing ed., 1981))).

That is precisely how the Amendment was enforced:

> [A]ny official who searched or seized could be sued by the citizen target in an ordinary trespass suit—with both parties represented at trial and a jury deciding between the government and the citizen. If the jury deemed the search or seizure unreasonable—and reasonableness was a classic jury question—the citizen plaintiff would win and the official would be obliged to pay (often heavy) damages. Any federal defense that the official might try to claim would collapse, trumped by the finding that the federal action was unreasonable, and

> thus unconstitutional under the Fourth Amendment, and thus no defense at all.

Akhil Reed Amar, 107 Harv. L. Rev. at 774; see also William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1837-1841 (2016).

D. Stare Decisis Principles Permit Reconsideration Of The Qualified Immunity Standard.

Ordinarily, the Court has said, "stare decisis carries enhanced force when a decision * * * interprets a statute." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). But that rule need not apply with respect to the *Harlow* immunity standard for several reasons.

To begin with, *Harlow* itself overturned a settled precedent—the qualified immunity rule set forth in *Pierson* and reaffirmed in multiple decisions, which itself overturned earlier precedents. And *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), overruled the holding of *Monroe* v. *Pape*, 365 U.S. 167 (1961), regarding the Section 1983 liability of municipalities. That significantly reduces the role of stare decisis in this context.

In addition, the Court has stated that the statutory stare decisis rule does not apply if "Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'" *State Oil Co.* v. *Khan*, 522 U.S. 3, 20-21 (1997). The Court has "reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question." *Id.* at 21. Just as the Court has interpreted the Sherman Act to

delegate to the courts the authority to use the methods of the common law to shape the Act's prohibition, so too has it construed Section 1983 to delegate to the courts the task of shaping the contours of Section 1983's remedial scheme. Indeed, *Harlow* expressly did just that—significantly revising the qualified immunity standard prescribed in *Pierson* and its progeny based on the Court's perception of the relevant policy considerations.

While a full discussion of stare decisis should await merits briefing, it is clear that stare decisis is not a barrier to reconsideration of the qualified immunity standard if the theoretical underpinnings of those decisions are called into serious question.

E. Scholars Have Suggested A Variety Of Approaches To Qualified Immunity That Could Be Considered By This Court.

Recent years have seen a large quantity of empirical analysis and other scholarship relating to qualified immunity doctrine. That body of work provides the Court with a variety of possible approaches to the immunity question.

The Court could more clearly delineate the "clearly established" requirement, explaining that a reasonable officer would understand that what he is doing violates a right when the relevant decisions all point in that direction, even if there is no ruling directly on point. See *A.M.* v. *Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting) (concluding that prior decisions addressing punishment for student disruption in classroom provided clearly established law governing punishment of student who burped in classroom), cert. denied, 137 S. Ct. 2151 (2017).

Another approach could be to conform the immunity defense more closely to the common-law principles prevailing in 1871. That could include revisiting *Harlow*'s elimination of consideration of the defendant's subjective intent. Or the Court could limit the immunity defense to the particular claims for which it was available at common law. Or it could return to the rule of *Myers* v. *Anderson* that unlawful government action is sufficient to trigger liability.

To the extent policy concerns might dictate different or more expansive immunity protection than that available in 1871, "[t]he Constitution assigns this kind of balancing to Congress, not the Courts." *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment). And recent history demonstrates that Congress is willing and able to address such issues.

In *Westfall* v. *Erwin*, 484 U.S. 292, 300 (1988), the Court held that federal employees were immune from tort liability for acts within the scope of their employment only if the challenged conduct was discretionary in nature. Congress responded swiftly—the President signed the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, only ten months after this Court's ruling. The Act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties," substitutes the United States as a defendant, and provides that the litigation thereafter is governed by the Federal Tort Claims Act. *Osborn* v. *Haley*, 549 U.S. 225, 229 (2007).

If Congress concludes that a proper interpretation of Section 1983 does not provide appropriate immunity protection, it can similarly weigh the relevant policy concerns and prescribe the appropriate rule.

Alternatively, the Court could address some of the procedural rules relating to qualified immunity. It could encourage lower courts to address whether there has been a constitutional violation—or at least to consider the benefits of addressing that issue in each case, and to provide a case-specific justification for declining to do so. See Blum, 93 Notre Dame L. Rev. at 1905.

The Court also could reconsider whether the availability of interlocutory appeals does anything other than compound litigation costs for plaintiffs and litigation burdens for defendants. See Baude, 106 Cal. L. Rev. at 84; Blum, 93 Notre Dame L. Rev. at 1916-1917. The judgment below is directly premised on such an interlocutory appeal.

Finally, the *Harlow* Court justified its elimination of the bad-faith factor by pointing to the need to promote pre-trial termination of unjustified claims. But any contribution *Harlow* may have had to reducing litigation costs has been superseded by subsequent changes to pleading and summary judgment standards. See *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring); Schwartz, 93 Notre Dame L. Rev. at 1808-1811 (reviewing evidence confirming Justice Kennedy's view in *Wyatt* that changes to pleading, summary judgment, and other liability standards "largely obviate the need for qualified immunity doctrine to screen out cases before trial"); *id.* at 1831-1832 (reviewing evidence showing that qualified immunity fails as a prefiling filter). Thus, the only effect of the *Harlow* test

may be to make it harder for victims of constitutional violations to plead their case.

There are thus a variety of ways in which the Court could formulate an immunity rule that conforms to congressional intent and also strikes the appropriate balance between protecting government officials and providing redress for citizens injured by the abuse of government power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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