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For The Eighth Circuit
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Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
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May 25, 2021

Mr. Jay Remington Schweikert
CATO INSTITUTE
1000 Massachusettes Avenue, N.W.
Washington, DC 20001

RE: 21-1071 Marcus Mitchell v. Kyle Kirchmeier, et al

Dear Counsel:

The amicus curiae brief of the Cato Institute has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

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Enclosure(s)

cc: Mr. Amir H. Ali
Ms. Easha Anand
Ms. Jennifer S. Baker
Mr. Grant Bakke
Mr. Randall J. Bakke
Ms. Elise M. Baranouski
Ms. Anya Bidwell
Ms. Shoney Blake
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Mr. Shawn A. Grinolds

Mr. Patrick M. Jaicomo
Ms. Sarah Ludington
Ms. Marie L. Miller
Ms. Mary Kathryn Nagle
Mr. Clark M. Neily III
Mr. James E. Nicolai
Ms. Meaghan McLaine Vergow
Mr. Bradley Neuman Wiederholt
Mr. Edward Williams
Ms. Tiffany R. Wright

District Court/Agency Case Number(s): 1:19-cv-00149-DMT

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 21-1071

MARCUS MITCHELL,
Plaintiff-Appellant,

v.

MORTON COUNTY SHERIFF KYLE KIRCHMEIER, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of North Dakota,
Case No. 1:19-CV-149
The Honorable Judge Daniel M. Traynor

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

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

Counsel for the Cato Institute

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Amicus's interest in this case arises from the lack of legal justification for qualified immunity, the deleterious effect it has on the ability of people to vindicate their constitutional rights, and the subsequent erosion of accountability among public officials that the doctrine encourages.

[1] Fed. R. App. P. 29 Statement: All parties were notified and consented to the filing of this brief. No counsel for either party authored this brief in whole or in part. No one other than *amicus* and its members made monetary contributions to its preparation or submission.

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SUMMARY OF THE ARGUMENT

Over the last half-century, the doctrine of qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based. The text of 42 U.S.C. § 1983 ("Section 1983") makes no mention of immunity, and the common law of 1871, when the statute was originally passed, did not include the sort of across-the-board defense for all public officials that characterizes qualified immunity today. With limited exceptions, the baseline assumption at the founding and throughout the nineteenth century was that public officials were strictly liable for unconstitutional misconduct. Judges and scholars of all stripes have thus increasingly arrived at the conclusion that the contemporary doctrine of qualified immunity is unmoored from any lawful justification—and in serious need of correction.[2]

Amicus recognizes, of course, that this Court is obligated to follow Supreme Court precedent with direct application, whether or not that precedent is well reasoned—and for the reasons given in Appellant's merits brief, faithful application

[2] *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) (noting "disquiet over the kudzu-like creep of the modern [qualified] immunity regime"); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

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of that precedent requires reversal. But the Court should also acknowledge and address the maturing contention that qualified immunity itself is unjustified. The Supreme Court has previously indicated unusual readiness to reconsider aspects of its qualified immunity jurisprudence, especially in light of express criticism by appellate courts. *See Pearson v. Callahan*, 555 U.S. 223, 235 (2009) (citing cases). And while the Supreme Court recently declined to grant a handful of petitions calling for qualified immunity to be reconsidered,[3] whether it should do so in a future case remains an open and pressing question.[4]

Moreover, the fact that qualified immunity itself is so deeply at odds with the text and history of Section 1983 should make appellate courts especially wary about countenancing extensions of the doctrine beyond the contours of existing precedent—and the district court's decision below is exactly such an extension. The district court effectively defied this Court's clearly established case law regarding the use of more-than-de-minimis physical force against nonthreatening suspected misdemeanants, and its narrow construction of "clearly established law" runs contrary to the Supreme Court's recent clarification and affirmation that prior cases

[3] *See Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (cert petition denied); *Corbitt v. Vickers*, No. 19-679, 2020 U.S. LEXIS 3152 (June 15, 2020) (same); *Zadeh v. Robinson*, No. 19-676, 2020 U.S. LEXIS 3170 (June 15, 2020) (same).

[4] *See Baxter*, 140 S. Ct. at 1865 (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition.").

with identical facts are unnecessary to defeat qualified immunity. *See Taylor v. Riojas*, 141 S. Ct. 52 (2020).

Unfortunately, the sort of misapplication of qualified immunity employed by the district court—construing "clearly established law" to effectively require a case with identical facts—is no isolated error, but rather part of an all-too-common practice in lower courts. That persistent misunderstanding of qualified immunity not only gets the law wrong, but its application to police officers has exacerbated a growing crisis of accountability for law enforcement officers generally. In light of the difficulties posed to police by deteriorating public trust, this Court should be especially vigilant in correcting such errors. Ensuring lower courts take the correct approach to evaluating clearly established law is necessary not only for victims of police misconduct to find justice, but also for police forces who depend on the trust of their communities to operate effectively.

Finally, even if the Court were to find that the rights at issue in this case were not "clearly established," it should still exercise its discretion under *Pearson* to first decide the constitutional questions on the merits, so as to prevent the stagnation of the law in such crucial areas of First, Fourth, and Fourteenth Amendment jurisprudence.

ARGUMENT

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

A. The text of 42 U.S.C. § 1983 does not provide for any kind of immunity.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Yet few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. As currently codified, Section 1983 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 . . . ***to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured*** . . . .

42 U.S.C. § 1983 (emphases added).

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

This unqualified textual command makes sense in light of the statute's historical context. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, itself part of a "suite of 'Enforcement Acts' designed to help combat

lawlessness and civil rights violations in the southern states."[5] This purpose would have been undone by anything resembling modern qualified immunity jurisprudence. The Fourteenth Amendment itself had only been adopted three years earlier, in 1868, and the full sweep of its broad provisions was obviously not "clearly established law" by 1871. If Section 1983 had been understood to incorporate qualified immunity, then Congress's attempt to address rampant civil rights violations in the post-war South would have been toothless.

Of course, no law exists in a vacuum, and a statute will not be interpreted to extinguish by implication longstanding legal defenses available at common law. *See Forrester v. White*, 484 U.S. 219, 225-26 (1988). In the context of qualified immunity, the Supreme Court correctly frames the issue as whether or not "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, 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, 554-55 (1967)). But the historical record shows that the common law of 1871 did not, in fact, provide for such immunities.

[5] Baude, *supra*, at 49.

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B. From the founding through the nineteenth century, courts recognized that good faith was not a general defense to constitutional torts.

The doctrine of qualified immunity is akin to a kind of generalized good-faith defense for all public officials, as it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. But the relevant legal history does not justify importing any such freestanding good-faith defense into the operation of Section 1983; on the contrary, the sole historical defense against constitutional violations was *legality*.[6]

In the early years of the Republic, constitutional claims typically arose as part of suits to enforce general common-law rights. For example, an individual might sue a federal officer for trespass; the defendant would claim legal authorization to commit the alleged trespass in his role as a federal officer; and the plaintiff would in turn claim that the trespass was unconstitutional, thus defeating the officer's defense.[7] As many scholars over the years have demonstrated, these founding-era lawsuits did not permit a good-faith defense to constitutional violations.[8]

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[6] *See* Baude, *supra*, at 55-58.

[7] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506-07 (1987). Of course, prior to the Fourteenth Amendment, "constitutional torts" were almost exclusively limited to federal officers.

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

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The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[9] which involved a claim against an American naval captain who captured a Danish ship off the coast of France. Federal law authorized seizure only if a ship was going *to* a French port (which this ship was not), but President Adams had issued broader instructions to also seize ships coming *from* French ports. *Id.* At 178. The question was whether Captain Little's reliance on these instructions was a defense against liability for the unlawful seizure.

The *Little* Court seriously considered but ultimately rejected Captain Little's defense, which was based on the very rationales that would later come to support the doctrine of qualified immunity. Chief Justice Marshall explained that "the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages." *Id.* at 179. He noted that the captain had acted in good-faith reliance on the President's order, and that the ship had been "seized with pure intention." *Id.* Nevertheless, he held that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* In other words, the officer's only defense was legality, not good faith.

[9] *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863 (2010) ("No case better illustrates the standards to which federal government officers were held than *Little v. Barreme*.").

This "strict rule of personal official liability, even though its harshness to officials was quite clear,"[10] was mitigated somewhat by the prevalence of successful petitions to Congress for indemnification.[11] But indemnification was purely a legislative remedy; on the judicial side, courts continued to hold public officials liable for unconstitutional conduct without regard to any sort of good-faith defense, well into the nineteenth century. *See, e.g.*, *Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891) (Holmes, J.) (holding liable members of a town health board for mistakenly killing an animal they thought diseased, even when ordered to do so by government commissioners).

Most importantly, the Supreme Court originally rejected the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Supreme Court considered a suit against election officers that had refused to register black voters under a "grandfather clause" statute, in violation of the Fifteenth Amendment. *Id.* at 380. The defendants argued that they could not be liable for money damages under Section 1983, because they acted on a good-faith belief that the statute was constitutional.[12] The *Myers* Court noted that "[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in

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

[11] Pfander & Hunt, *supra*, at 1867 (noting that public officials succeeded in securing private legislation providing indemnification in about sixty percent of cases).

[12] *See* Br. for Pls. in Error at 23-45, *Myers v. Anderson*, 238 U.S. 368 (1915) (Nos. 8-10).

argument," but it ultimately rejected these arguments, noting that they were "disposed of by the ruling this day made in the *Guinn* Case [which held that such statutes were unconstitutional] and by the very terms of [Section 1983]." *Id.* at 378. In other words, the defendants were violating the plaintiffs' constitutional rights, so they were liable—period.

While the *Myers* Court did not elaborate much on this point, the lower court decision it affirmed was more explicit:

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910).

This forceful rejection of any general good-faith defense "is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983's enactment."[13]

C. Contemporary qualified immunity doctrine is plainly at odds with any plausible reading of nineteenth-century common law.

The Supreme Court's primary rationale for qualified immunity is the purported existence of similar immunities that were well-established in the common law of 1871. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified

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

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immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). But while there is some disagreement and uncertainty regarding the extent to which "good faith" was relevant in common-law suits, no possible reading of that common law could justify qualified immunity as it exists today.

There is no dispute that nineteenth-century common law did account for "good faith" in many instances, but those defenses were generally incorporated into the elements of particular torts.[14] In other words, a government agent's good-faith belief in the legality of the challenged action might be relevant to the *merits*, but there was not the sort of freestanding immunity for all public officials that characterizes the doctrine today.

For example, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826), held that a U.S. naval officer was not liable for capturing a Portuguese ship that had attacked his schooner under an honest but mistaken belief in self-defense. *Id.* at 39. The Supreme Court found that the officer "acted with honourable motives, and from a sense of duty to his government," *id.* at 52, and declined to "introduce a rule harsh and severe in a case of first impression," *id.* at 56. But the Supreme Court's exercise of "conscientious discretion" on this point was justified as a traditional component of admiralty jurisdiction over "marine torts." *Id.* at 54-55. In other words, the good faith

[14] *See generally* Baude, *supra*, at 58-60.

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of the officer was incorporated into the *substantive* rules of capture and adjudication, not treated as a separate and freestanding defense.

Similarly, as the Supreme Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." *Id.* at 556-57. But this defense was not a protection from liability for unlawful conduct. Rather, at common law, an officer who acted with good faith and probable cause simply did not commit the tort of false arrest in the first place (even if the suspect was innocent).[15]

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity.[16] *Pierson* involved a Section 1983 suit against police officers who arrested several people under an anti-loitering statute that the Supreme Court subsequently found unconstitutional. Based on the common-law elements of false arrest, the *Pierson* Court held that "the defense of good faith and probable cause . . . is also available to [police] in the action under [Section] 1983." *Id.* Critically, the Supreme Court extended this defense to include not just a good-faith belief in

[15] *See* RESTATEMENT (SECOND) OF TORTS § 121 (AM. LAW. INST. 1965).

[16] Baude, *supra*, at 52.

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probable cause for the *arrest*, but a good-faith belief in the legality of the *statute* under which the arrest itself was made. *Id.* at 555.

Even this first extension of the good-faith aegis is questionable as a matter of constitutional and common-law history. Conceptually, there is a major difference between good faith as a factor that determines whether conduct was unlawful in the first place (as with the tort of false arrest), and good faith as a defense to liability for admittedly unlawful conduct (as with enforcing an unconstitutional statute). As discussed above, the baseline historical rule both at the founding and in 1871 was strict liability for constitutional violations. *See Anderson*, 182 F. at 230 (anyone who enforces an unconstitutional statute "does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law").[17]

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue—false arrest—admitted a good-faith defense at common law. But subsequent qualified immunity cases soon discarded even this loose tether to history. By 1974, the Supreme Court had abandoned the analogy to those common-law torts that permitted a good-faith defense. *See Scheuer v. Rhodes*, 416

[17] *See also* Engdahl, *supra*, at 18 (a public official "was required to judge at his peril whether his contemplated act was actually authorized . . . [and] judge at his peril whether . . . the state's authorization-in-fact . . . was constitutional"); Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927) ("Prior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts.").

U.S. 232, 247 (1974). And by 1982, the Supreme Court disclaimed reliance on the actual good faith of the defendant, instead basing qualified immunity on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

A forthcoming article by Scott Keller does argue, in contrast to what he calls "the modern prevailing view among commentators," that executive officers in the mid-nineteenth century enjoyed a more general, freestanding immunity for discretionary acts, unless they acted with malice or bad faith.[18] But even if Keller is correct about the general state of the common law,[19] there is strong reason to doubt whether Section 1983 itself was understood to incorporate any such immunity. The defendants in *Myers v. Anderson* made *exactly* the sort of good-faith, lack-of-malice argument Keller says was well established at common law[20]—but the Supreme Court refused to apply any such defense to Section 1983. *Myers*, 238 U.S. at 378.

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[18] Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN L. REV. (forthcoming 2021), at 4.

[19] Will Baude has responded to Scott Keller's forthcoming piece, in which he argues that Keller's sources at most establish a common-law basis for "quasi-judicial immunity," which only protected quasi-judicial acts like election administration and tax assessment, not ordinary acts of law enforcement, and which was only a legal defense, not an immunity from suit. Therefore, the historical "immunity" Keller identifies has very little in common with modern qualified immunity. William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?* (December 9, 2020), SSRN, https://papers.ssrn.com/ sol3/papers. cfm?abstract_id=3746068.

[20] *Myers*, 238 U.S. at 375 (defendants argued that "[t]he declarations filed in these cases are insufficient in law, because they fail to allege that the action of the defendants in refusing to register the plaintiffs was corrupt or malicious" and that "[m]alice is an essential allegation in a suit of this kind against registration officers at common law").

Moreover, Keller himself acknowledges that the contemporary "clearly established law" standard is at odds even with his historical interpretation because "qualified immunity at common law could be overridden by showing an officer's subjective improper purpose."[21]

The Supreme Court's qualified immunity jurisprudence has therefore diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support, and the relevant history establishes a baseline of strict liability for constitutional violations—at most providing a good-faith defense against claims analogous to common-law torts. Yet qualified immunity functions today as an across-the-board defense, based on a "clearly established law" standard that was unheard of before the late twentieth century. In short, the doctrine has become exactly what the Supreme Court has said it was trying to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

[21] Keller, *supra*, at 1.

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II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S GRANT OF QUALIFIED IMMUNITY.

A. The district court's grant of qualified immunity defies this Court's case law and Supreme Court precedent that defeating qualified immunity does not require a prior case with identical facts.

Notwithstanding that the Supreme Court's qualified immunity doctrine is at odds with the text and history of Section 1983, the district court's decision still failed to apply that doctrine correctly, by fundamentally misunderstanding what it means for a right to be "clearly established." Admittedly, the Supreme Court has not always spoken with perfect clarity on how to apply the "clearly established law" standard. The Supreme Court has instructed lower courts "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and stated that "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

But the Court has also emphasized that its case law "does not require a case directly on point for a right to be clearly established," *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White*, 137 S. Ct. at 551), and that "'general statements of the law are not inherently incapable of giving fair and clear warning.'" *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). While "earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to

such a finding." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). In this case, however, the district court effectively required what the Supreme Court has always insisted was unnecessary—a prior case with functionally identical facts.

As Appellant explains in detail, roughly a dozen Eighth Circuit decisions have held, in a different variety of specific factual scenarios, that it is clearly established that officers are not permitted to use more-than-de-minimis physical force against nonthreatening suspected misdemeanants. *See* Br. at 40-41 & n.10 (citing cases). That rule plainly applies to the facts as alleged in this case. Appellant alleges that he was about 20 feet away from the officers when they fired on him, that he kept his hands above his head to make clear he was unarmed, and that he was not threatening anyone. *Id.* at 5. Nevertheless, the four officers aimed their shotguns at him, counted down to coordinate fire, and shot several lead-filled "bean-bag" rounds at him. *Id.* Moreover, these officers had been instructed to single out Mr. Mitchell because he had been deemed an "agitator." *Id.*

The district court did not offer much explanation for its grant of qualified immunity, but it seemed to be disclaiming reliance on the many cases cited by Appellant because there were other protestors on the bridge with Mr. Mitchell. As Appellant explains in more detail, many prior Eighth Circuit cases also involved groups of people, and the specific case cited by the district court—*Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012)—did involve a protest, but was otherwise

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dissimilar to Mr. Mitchell's case. *See* Br. at 42-46. But more generally, this approach to the "clearly established law" inquiry falls into the trap of confusing the "particularity" requirement with a "the facts must be practically identical" requirement, which is not and has never been the law.

The Supreme Court's most recent qualified immunity decision, *Taylor v. Riojas*, 141 S. Ct. 52 (2020), is instructive on the boundary that constitutes an overly-narrow reading of "clearly established law." In that case, the Fifth Circuit had granted qualified immunity to corrections officers who held a man in utterly inhumane conditions—one cell covered floor to ceiling in human feces, and another kept at freezing temperatures with sewage coming out of a drain in the floor—for six days. *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019). The panel reasoned that, "[t]hough the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end, we hadn't previously held that a time period so short violated the Constitution." *Id.* (citations omitted).

But the Supreme Court summarily reversed. In its brief per curiam opinion, the Court explained that the Fifth Circuit "erred in granting the officers qualified immunity" on the grounds that prior case law had not addressed a situation where a prisoner was kept in similar conditions "for only six days." *Taylor*, 141 S. Ct. at 53. The Court also reaffirmed the basic principle that "'a general constitutional rule

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already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'" *Id.* at 53-54 (quoting *Hope*, 536 U.S. at 741).

The district court below committed the same sort of error as the panel in *Taylor*. As Appellant thoroughly explains, there has never been any doubt that officers are not permitted to use more-than-de-minimis force against nonthreatening misdemeanants. *See* Br. at 42-4. *That* is the proper level of generality for deciding whether prior case law is "particularized" to the facts of a given case, which the district court failed to recognize.

B. Misapplying qualified immunity to shield police officers from liability is exacerbating a crisis of accountability in law enforcement.

Last year, Gallup reported that trust in police officers had reached a twenty-seven-year low. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020)[22] (Source: GALLUP). For the first time ever, fewer than half of Americans place confidence in their police force. *Id.* This drop in confidence has, of course, been driven in large part by high-profile police violence against unarmed suspects like Mr. Mitchell. *Id.*

The widespread perception that police officers are rarely held accountable for their misconduct is one of the major drivers of this crisis of accountability, and that perception is due in large part to the kind of legal errors the district court committed

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

in this case. The lower court's decision shielding from liability the officers who specifically targeted Mr. Mitchell for needless severe force is not just legally incorrect; it effectively tells the public that police officers are held to a lower standard of accountability than ordinary citizens and will be excused for even egregious misconduct on the basis of facile technicalities.

This lack of accountability harms not just the victims of police misconduct, but law enforcement officers themselves. Policing is dangerous, difficult work. Without the trust of their communities, officers cannot safely and effectively carry out their responsibilities. "Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness." Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20-21 (2008). In other words, "when a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness." Fred O. Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018); U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 80 (Mar. 4, 2015) (A "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.").

When properly trained and supervised, the vast majority of officers follow their constitutional obligations, and they will benefit if the legal system reliably holds rogue officers accountable for their misconduct. Indeed, "[g]iven the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated." Inst. on Race and Justice, *supra* at 21. But applications of qualified immunity like that in this case prevent law-enforcement officers from overcoming those negative perceptions about policing.

In a recent survey, a staggering nine in ten law-enforcement officers reported increased concerns about their safety in the wake of high-profile incidents of police violence. Rich Morin et al., Pew Research Ctr., *Behind the Badge* 65 (2017). Eighty-six percent agreed that their jobs have become more difficult as a result. *Id.* at 80. Many looked to improved community relations for a solution, and more than half agreed "that today in policing it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public." *Id.* at 72. Responding officers also showed strong support for increased transparency and accountability, for example, by using body cameras, *id.* at 68, and—most importantly for these purposes—by holding wrongdoing officers more accountable for their actions, *id.* at 40.

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Again, *amicus* obviously recognizes that this Court's job is to resolve this appeal in accordance with existing precedent, not the ideals of optimal policing reform. But it is nevertheless worth acknowledging that the district court's misapplication of qualified immunity doctrine was no mere technical error. Rather, it is exactly the sort of error that is fueling a crisis of confidence in law enforcement, hurting both the victims of police misconduct and police officers themselves, and which this Court should be especially vigilant about correcting.

C. Even if the Court were to affirm the grant of qualified immunity, it should still hold that Mr. Mitchell's constitutional rights were violated.

As Appellant explains in detail, and as *amicus* explains above, the constitutional rights that the defendant officers violated in this case were clearly established at the time of their violation. But even if the Court were to disagree and decide the officers were entitled to qualified immunity, the Court still has an opportunity to curb one of the worst excesses of the qualified immunity doctrine, by first holding that the defendants *did* violate Mr. Mitchell's rights (even if those rights were not "clearly established").

Under *Pearson v. Callahan*, lower courts have the discretion to decide that a right was not "clearly established," without ever ruling on whether a constitutional violation occurred at all. 555 U.S. at 236. But when courts persistently resolve qualified immunity cases in this manner, "the inexorable result is 'constitutional

stagnation'—fewer courts establishing law at all, much less *clearly* doing so," *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part).

Indeed, if courts grant qualified immunity without at least deciding the merits question, then the same defendant could continue committing exactly the same misconduct indefinitely, and never be held accountable. *See, e.g.*, *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (per curiam) ("This is the fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation. . . . Continuing to resolve the question at the clearly established step means the law will never get established."). As one judge on this Court recently explained: "There is a better way. We should exercise our discretion at every reasonable opportunity to address the constitutional violation prong of qualified immunity analysis, rather than defaulting to the 'not clearly established' mantra . . . ." *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (en banc) (Grasz, J., dissenting).

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiff-Appellant, the Court should reverse the district court decision.

Respectfully submitted,

DATED: May 24, 2021. */s/ Jay R. Schweikert*

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Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

Counsel for the Cato Institute

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I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

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