UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHARLES HAMNER,

Plaintiff-Appellant,

v.

DANNY BURLS, et. al,

Defendant-Appellee.

No. 18-2181
Appeal from the United States District Court for the Eastern District of Arkansas
(No. 5:17-CV-79 JLH-BD)

MOTION OF THE CATO INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING BY PANEL AND REHEARING EN BANC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Cato Institute is a nonprofit public policy research foundation operating under § 501(c)(3) of the Internal Revenue Code. The Cato Institute is not a subsidiary or affiliate of a publicly owned corporation, and it does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amicus*'s participation.

Pursuant to Fed. R. App. P. 29(b)(2), the Cato Institute respectfully moves for leave to file a brief as *amicus curiae* in support of Plaintiff-Appellant's petition for rehearing by panel and rehearing en banc.

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 was founded in 1999, and focuses on the scope of substantive 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. Toward these ends, Cato publishes books and studies, conducts conferences, issues the annual Cato Supreme Court Review, and files *amicus* briefs with courts across the nation. Recent cases in which Cato filed *amicus* briefs in this Court include *Telescope Media Group. v. Lucero,* 936 F.3d 740 (8th Cir. 2019), and *United States v. Metcalf*, 881 F.3d 641 (8th Cir. 2018).

The Cato Institute has particular expertise in cases concerning the defense of qualified immunity. Cato has filed multiple *amicus* briefs on this subject, both in the Supreme Court and in the U.S. Courts of Appeals. *See, e.g.*, Brief of the Cato Institute as *Amicus Curiae* Supporting Petitioner, *Baxter v. Bracey*, No. 18-5102 (U.S. Sup. Ct., May 30, 2019); *Rafferty v. Trumbull County*, No. 17-4223, Dkt. #42

(6th Cir. Oct. 10, 2018) (granting Cato's motion for leave to file *amicus* brief pertaining to qualified immunity); *Estate of Williams v. Cline*, No. 17-2603, Dkt. #32 (7th Cir. Apr. 17, 2018) (same). And many courts have recognized Cato's role in litigation and other advocacy pertaining to qualified immunity. *See, e.g.*, *Ventura v. Rutledge*, No. 1:17-cv-00237-DAD-SKO, 2019 U.S. Dist. LEXIS 119236, at *26 n.6 (E.D. Cal. Jul. 17, 2019) (citing a Cato forum in support of the proposition that "one of the most debated civil rights litigation issues of our time is the appropriate scope and application of the qualified immunity doctrine"); *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1294 n.10 (D. N.M. 2018) (discussing and quoting from Cato's *amicus* brief in *Pauly v. White*, No. 17-1078 (U.S. Sup. Ct. Mar. 2, 2018)); *Baldwin v. City of Estherville*, 915 N.W.2d 259, 290 (Iowa 2018) (Appel, J., dissenting) (discussing and quoting from Cato's *amicus* brief in *Williams*).

The proposed brief of the Cato Institute in this case will provide the Court with a unique perspective that will assist in the resolution of the petition for reconsideration. Our brief does not merely duplicate the arguments made in Plaintiff-Appellant's petition, but rather places the questions presented in the petition in the context of the legal, historical, and doctrinal background of qualified immunity more generally. The brief explains how the panel opinion below not only is in direct conflict with both Supreme Court and Eighth Circuit precedent, but also exacerbates

the already serious problems created by the doctrine itself. And the brief develops arguments about how the Court can resolve the petition in a manner that is consistent with binding Supreme Court precedent, but nevertheless attuned to the serious legal and practical infirmities of qualified immunity.

For the foregoing reasons, Cato respectfully requests that the Court grant its motion for leave to file an *amicus* brief in support of Plaintiff-Appellant's petition for rehearing.

Respectfully submitted,

DATED: October 23, 2019.

/s/ Jay R. Schweikert

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this motion complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 565 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

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/s/ *Jay R. Schweikert*

October 23, 2019

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/s/ *Jay R. Schweikert*

October 23, 2019

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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 interest in this case arises from the lack of legal justification for qualified immunity and the deleterious effect it has on the ability of citizens to vindicate their constitutional rights.

SUMMARY OF THE ARGUMENT

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 did not include an across-the-board defense for all public officials. Judges and scholars alike have thus increasingly concluded that qualified immunity is unmoored from any lawful justification—and in serious need of correction.[2]

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[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* and its members made a monetary contribution to its preparation or submission.

[2] *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1152, 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."); 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).

Of course, this Court must apply binding Supreme Court precedent, whether or not that precedent is well reasoned. But the panel's opinion defied that precedent by raising qualified immunity sua sponte, even though defendants had waived the defense. In doing so, the panel not only created severe intra- and inter-circuit splits, but also compounded the already serious problems created by qualified immunity more generally. The Court should grant rehearing to correct a serious mistake, ensure uniformity of Circuit law, and address the maturing contention that qualified immunity itself is unjustified.

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 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 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 (emphases added). Notably, "the statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

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 has correctly framed the issue as whether "[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 did not, in fact, provide for any such immunities.

B. From the founding through the passage of Section 1983, good faith was not a defense to constitutional torts.

The doctrine of qualified immunity is 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*.[3]

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

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), 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* decision makes clear that the Court seriously considered but ultimately rejected 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, the Court 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.

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).

This strict rule of personal official liability persisted through the nineteenth century,[4] and courts continued to hold public officials liable for unconstitutional conduct without regard to a good-faith defense.[5] 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 Court held that a state statute violated the Fifteenth Amendment's ban on racial discrimination in voting. *Id.* at 380. The defendants argued they could not be liable for money damages under Section 1983, because they acted on a good-faith belief that the statute was constitutional. The Court noted that "[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in argument," but it ultimately rejected any such good-faith defense. *Id.* at 378.

C. The common law of 1871 provided limited defenses to certain torts, not general immunity for all public officials.

The Supreme Court's primary rationale for qualified immunity has been 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). But to the extent contemporary common law included any such protections, these defenses were simply incorporated into the elements of particular torts.[6] In other words, a good-

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

[5] Baude, *supra*, at 57.

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

faith belief might be relevant to the *merits*, but there was nothing like the freestanding immunity for all public officials that characterizes the doctrine today.

For example, 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 historically 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.[7]

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity.[8] *Pierson* involved a Section 1983 suit against police officers who arrested several people under an anti-loitering statute that the Court subsequently found unconstitutional. Based on the common-law elements of false arrest, the 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 Court extended this defense to include not just a good-faith belief in probable cause for the *arrest*, but a good-faith belief in the legality of the *statute* under which the arrest was made. *Id.* at 555. Even this first extension of the good-faith aegis was legally and historically questionable,

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

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

as there is an important difference between good faith as a factor that determines whether conduct was unlawful in the first place (as with false arrest), and good faith as a defense to liability for admittedly unlawful conduct (as with enforcing an unconstitutional statute). 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 the Court's 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 U.S. 232, 247 (1974). And by 1982, the Court disclaimed reliance on the subjective 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).

The Supreme Court's qualified immunity jurisprudence has therefore diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support for the doctrine, and the relevant history establishes a baseline of strict liability for constitutional violations—at most providing a good-faith defense against claims analogous to some 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 Court assiduously sought to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

II. THE COURT SHOULD GRANT THE PETITION TO PREVENT THE ERRONEOUS EXPANSION OF QUALIFIED IMMUNITY AND TO ADDRESS THE FAILURES OF THE DOCTRINE MORE GENERALLY.

Amicus recognizes that this Court is obliged to follow Supreme Court precedent with direct application. And for all the reasons given in the petition, the panel opinion is in conflict with that precedent, as well as with the precedent of this Court. *See* Pet. for Reh'g at 9-13. Qualified immunity is an affirmative defense that must be raised by the defendant, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), and federal courts generally lack the authority to consider waived defenses, *Wood v. Milyard*, 566 U.S. 463, 470-72 (2012). In *Angarita v. St. Louis County*, 981 F.2d 1537 (8th Cir. 1992), this Court straightforwardly applied these principles to a belated assertion of qualified immunity, holding that "[b]y failing to raise this issue with the district court, appellants failed to preserve this issue for appeal." *Id.* at 1548.

Nevertheless, the legal and practical infirmities of qualified immunity itself are relevant to this petition, for three main sets of reasons:

First, the panel's opinion below was not simply a misapplication of qualified immunity, but a transformative *expansion* of the doctrine. By raising the issue of immunity sua sponte, the panel essentially treated qualified immunity as a

jurisdictional element. The implication is that courts, instead of neutrally adjudicating claims and defenses under traditional rules of civil and appellate procedure, should instead take it upon themselves to render one-sided aid to government defendants against civil rights plaintiffs, by identifying and developing defenses that the defendants themselves failed to raise. This Court should be especially vigilant against countenancing such a practice with respect to a defense that itself lacks any proper legal basis, and regularly denies relief to victims whose rights were violated.

Second, Judge Erickson's reluctant concurrence below relates to a crucial problem that plagues the doctrine more generally—the persistent practice of courts granting immunity, without even deciding upon the merits of the constitutional claim at issue. Although lower courts have the *discretion* to resolve qualified immunity cases in such a manner, *see Pearson v. Callahan*, 555 U.S. 223 (2009), "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). As one member of 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). The petition presents exactly such a “reasonable opportunity.”

Third, it is both appropriate and useful for judges to candidly acknowledge the shortcomings of present case law, even as they adhere to it for purposes of actual disposition of cases. This criticism-and-commentary function is especially important in the realm of qualified immunity, as several members of the Supreme Court have recently expressed an interest in reconsidering the doctrine. *See Kisela v. Hughes*, 138 S. Ct. 1152, 1162 (2018) (Sotomayor, J., dissenting, joined by Ginsburg, J.) (describing how 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.”).

It is thus unsurprising that many lower-court judges have also begun to register concerns with the doctrine. *See, e.g.*, *Cole v. Carson*, 935 F.3d 444, 470 (5th Cir. 2019) (en banc) (Willett, J., dissenting) (“I repeat what I said last month: The entrenched, judge-invented qualified immunity regime ought not be immune from thoughtful reappraisal.”); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 U.S. Dist. LEXIS 132455, at *46 n.174 (D. Kan. Aug. 7, 2018) (“[T]he court is troubled by the continued march toward fully insulating police officers from trial—

and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment."). *Amicus* respectfully requests that this Court grant the petition, so that it might add its voice to the larger dialogue on this crucial and timely issue.

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiff-Appellant, the Court should grant the petition.

Respectfully submitted,

DATED: October 23, 2019.

/s/ Jay R. Schweikert

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