IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 20-10830

TERRENCE HARMON, SHERLEY WOODS, AS ADMINISTRATRIX FOR THE ESTATE OF O'SHEA TERRY,
Plaintiffs-Appellants,

v.

CITY OF ARLINGTON, TEXAS; BAU TRAN,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Texas,
Civil Action No. 4:19-CV-00696-O

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

In addition to the persons and entities previously identified by the parties, undersigned counsel certifies that the following persons and entities have an interest in the outcome of this case:

A. Cato Institute;

B. Clark M. Neily III and Jay R. Schweikert, counsel for *amicus curiae*.

SO CERTIFIED, this 14th day of December, 2020.

/s/ Jay R. Schweikert

Counsel for *Amicus Curiae*

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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' 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.

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 Appellants' merits brief, faithful application 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 already indicated unusual readiness to reconsider aspects of its qualified immunity

[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).

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 a 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 defied this Court's established precedent that an officer may not use lethal force against a suspect fleeing in a motor vehicle who poses no threat to the officer or others, and its narrow construction of "clearly established law" runs contrary to the Supreme Court's recent clarification and affirmation that prior cases with identical facts are unnecessary to defeat qualified immunity. *See Taylor v. Riojas*, 208 L.Ed.2d 164 (2020).

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 question on the merits, so as to prevent the stagnation of the law in such a crucial area of Fourth Amendment jurisprudence.

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[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.").

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

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

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.

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 amounts 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]

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

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]

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

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[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).

[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*.").

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.

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.

[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).

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 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.

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

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

See, e.g., *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified 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 of the officer was incorporated into the *substantive* rules of capture and adjudication, not treated as a separate and freestanding defense.

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

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 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

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

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

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 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

[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.").

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

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. 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

[19] Will Baude has already posted an article responding to Scott Keller 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").

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

was trying to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

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

A. The district court's grant of qualified immunity defies this Court's case law and Supreme Court precedent that obvious misconduct can defeat qualified immunity without a 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.

Over a decade ago, this Court held that "[i]t has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle v. Bexar Cnty. Tex.*, 560 F.3d 404, 417 (5th Cir. 2009) (citing *Estate of Kirby v. Duva*, 530 F.3d 475 (6th Cir. 2008); *Tennessee v. Garner*, 471 U.S. 1 (1985)). But even though the district court recognized that "[b]oth *Garner* and *Lytle* hold that an officer may not use deadly force to prevent the escape of a non-threatening suspect fleeing in a motor vehicle," the court failed to treat this precedent as controlling for purposes of qualified immunity because "the facts here differ." ROA.349. Specifically, the district court noted that no prior case involved the exact factual scenario presented here, where an officer "is on the side of a vehicle while the driver is driving away in blatant disregard of his instructions." *Id.*

As Appellants explain in more detail, one problem with the district court's fine parsing of the factual details between this case and prior cases is that, to the extent the facts here differ from *Lytle*, they differ in a manner that made Officer Tran's use of deadly even *less* reasonable the force used by the officer in *Lytle*. *See* Br. at 31-33. 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*, 208 L.Ed.2d 164 (2020), is instructive on the boundary that constitutes an overly-narrow reading of "clearly established law." In that case, a panel of this Court 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*, 208 L.Ed.2d at 164. The Court also reaffirmed the basic principle that "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'" *Id.* at 165 (quoting *Hope*, 536 U.S. at 741).

The district court below committed the same sort of error as the panel in *Taylor*. Instead of asking whether prior case law would have put a reasonable officer on notice that their actions were unlawful, the court rested its conclusion on the *ipse dixit* that some facts in this case were different than the facts of prior cases. But as Appellants thoroughly explain, this Court has long had a clear rule about the use of force against suspects fleeing

in a motor vehicle, which has never depended on what side of a vehicle an officer was on when they shot a fleeing suspect, or whether the officer happened to give verbal instructions *not* to flee. *See* Br. at 29-37. Most notably, this Court's decision in *Lytle* was not some abstract articulation of Fourth Amendment principle, but rather an application of those principles to the "specific context of shooting a suspect fleeing in a motor vehicle." 560 F.3d at 418. *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. Even if the Court were to affirm the grant of qualified immunity, it should still hold that O'Shae Terry's and Terrence Harmon's constitutional rights were violated.

As Appellants explain in detail, and as *amicus* explains above, the constitutional rights that Officer Tran violated in this case were clearly established at the time of their violation. But even if the Court were to disagree and decide Officer Tran were entitled to qualified immunity, the Court still has the opportunity to curb one of the worst excesses of the qualified immunity doctrine, by first holding that Officer Tran *did* violate O'Shae Terry's and Terrence Harmon's Fourth Amendment 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 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 Plaintiffs-Appellants, the Court should reverse the district court decision.

Respectfully submitted,

DATED: December 14, 2020. */s/ Jay R. Schweikert*

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,835 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 12-point Book Antiqua typeface.

/s/ Jay R. Schweikert
December 14, 2020

CERTIFICATE OF SERVICE

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.

/s/ *Jay R. Schweikert*
December 14, 2020