No. 20-951

In the Supreme Court of the United States

MARY STEWART, AS ADMINISTRATOR OF THE ESTATE OF LUKE O. STEWART, SR.,

Petitioner,

v.

CITY OF EUCLID, OHIO, ET AL.,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, Karen M. Blum, Erwin Chemerinsky, Alan K. Chen, Barry Friedman, Sheldon H. Nahmod, David Rudovsky, Joanna C. Schwartz, Martin A. Schwartz, and Fred O. Smith Jr. respectfully move for leave to file the accompanying brief as *amici curiae* in support of petitioner. All parties were timely notified of amici's intent to file a brief, in accordance with Rule 37.2(a). Petitioner consented to the filing of the brief, but respondents did not.

This case presents an important question regarding the scope of municipal liability under 42 U.S.C. § 1983—in particular, whether municipal liability is precluded when the municipal employee who committed the unconstitutional act is protected against damages liability by the qualified immunity standard adopted by this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

Amici are law professors who have engaged in detailed study of the Section 1983 qualified immunity doctrine and its practical effects. See, *e.g.*, Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, U. Chi. L. Rev. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659540; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887 (2018).

They seek to file this brief in order to put before the Court the elements of their scholarship relevant to the question presented here.

Indeed, a number of *amici* previously have participated at the certiorari stage by filing briefs in support of petitions presenting questions relating to the Court's Section 1983 qualified immunity doctrine. See *West* v. *Winfield*, No. 19-899; *Baxter* v. *Bracey*, No. 18-1287.

For these reasons, the Court should grant the motion and permit the filing of the *amicus* brief.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

FEBRUARY 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, RULES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

INTEREST OF THE *AMICI CURIAE*

Amici curiae, listed below, are scholars at universities across the United States with expertise in the law of qualified immunity. They submit this brief to explain why the Court should grant the petition and hold that qualified immunity standards should play no role in determining whether a municipality is subject to liability under 42 U.S.C. § 1983.[1]

Amici curiae are:[2]

Karen M. Blum, Professor Emerita and Research Professor of Law, Suffolk University Law School

Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, Berkeley Law School

Alan K. Chen, Thompson G. Marsh Law Alumni Professor, University of Denver Sturm College of Law

Barry Friedman, Jacob D. Fuchsberg Professor of Law, New York University School of Law

Sheldon Nahmod, University Distinguished Professor of Law Emeritus, IIT Chicago-Kent College of Law.

---

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

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

David Rudovsky, Senior Fellow, University of Pennsylvania Carey Law School

Joanna C. Schwartz, Professor of Law, UCLA School of Law

Martin A. Schwartz, Professor Emeritus, Touro College Jacob D. Fuchsberg Law Center

Fred O. Smith Jr., Associate Professor of Law, Emory University School of Law

INTRODUCTION AND SUMMARY OF ARGUMENT

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

This Court held in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), that Congress subjected municipalities to Section 1983 liability, albeit on a limited basis: local governments are not subject to *respondeat superior* liability based on the acts of their employees, but they can be held liable if a municipal policy, practice, or custom caused the employee's constitutional violation.

Individual government employees are protected against damages liability by qualified immunity, which applies "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). But this Court has expressly held that quali-

fied immunity is not available to municipal defendants. See *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

Notwithstanding that decision, some lower courts have concluded that municipalities are automatically immune from Section 1983 liability if the employee who committed the constitutional violation is protected by qualified immunity. Other lower courts have reached the opposite conclusion. This Court should grant review and hold that the "clearly established law" standard is irrelevant to municipal liability.

That result is compelled by this Court's holding in *Owen*. And it is supported by the fundamental differences between the municipal liability standard and the qualified immunity test.

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

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

ARGUMENT

The Court Should Grant Review And Hold That The Qualified Immunity Standard Is Not Relevant To Determining Municipal Liability Under Section 1983.

This Court has significantly limited municipal liability under Section 1983. "[A] municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983." *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989). Therefore, "'[i]t is only when the "execution of the government's policy or custom . . . inflicts the injury" that the municipality may be held liable under § 1983.'" *Ibid.* (citations omitted); see also *Monell*, 436 U.S. at 694 ("it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983").

The court below, and other courts of appeals, have further limited municipal liability—holding that, at least in some circumstances, even when the "policy or custom" standard is satisfied, a local government nonetheless is not subject to liability if the individual government employee who committed the unconstitutional act is protected by qualified immunity because the constitutional right was not "clearly established," the standard set forth in *Harlow* and its progeny. Other courts of appeals have rejected that contention. See Pet. 11-20.

This Court should grant review to resolve the conflict—and hold that officials' entitlement to qualified

immunity is not relevant to municipal liability. The Court has already held that municipalities are not entitled to qualified immunity, and nothing in the qualified immunity determination is dispositive of the distinct municipal liability test. Moreover, the qualified immunity standard itself lacks any basis in Congress's enactment of Section 1983. And expanding to municipalities the broad protection against liability resulting from the qualified immunity standard would significantly erode the Constitution's protections against abuse of government power. The Court therefore should not expand that illegitimate standard to limit municipal liability.

A. *Owen*'s Rejection Of Qualified Immunity For Municipalities Controls This Case.

This Court in *Owen* squarely addressed the interaction of municipal liability and qualified immunity, holding that governmental entities are not entitled to qualified immunity:

> [T]here is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the [municipal defendant] by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.

445 U.S. at 638. An official's qualified immunity by itself therefore cannot preclude liability for the municipality that employs him or her.

That result is consistent with common sense. A municipality can act only through its employees. A rule extending an individual's immunity to his or her

municipal employer would greatly reduce the scope of municipal liability—shielding local governments from liability if their officers are granted qualified immunity, and making local governments liable only in cases in which their employees were already subject to suit.

In addition, a court's determination that an official's conduct did not violate "clearly established law"—because extant judicial decisions did not "g[i]ve [the government official] fair warning that their alleged [conduct] was unconstitutional," *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002)—provides no logical reason for concluding that the municipality cannot be subject to liability under the *Monell* standard.

First, a plaintiff often will contend that municipal liability is based on the municipality's express or implicit policy, practice, or custom—such as the policy at issue in *Monell*, which required pregnant employees to take unpaid leave. See 436 U.S. at 660. In that situation, whether or not the law is "clearly established" is irrelevant: if the policy, practice, or custom violated the Constitution, the municipality is liable.

Second, plaintiffs sometimes argue that a municipality is liable because it failed adequately to train its officials. This Court recognized that theory of liability in *City of Canton*, stating that "the inadequacy of police training may serve as the basis for § 1983 liability" where "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388 (footnote omitted).

There too, whether the particular constitutional violation was "clearly established" bears no logical connection to the deliberate indifference test. Failure to train at all, or adoption of a training program that

is so deficient that it is "deliberately indifferent," does not depend on the particular constitutional violation. For example, the fact that a training program fails to include any material regarding constitutional limits on police use of force should be more than sufficient to show deliberate indifference given that police officers confront use-of-force issues every day.

In addition, the overwhelming majority of police training materials that do address excessive force do not focus on the particular fact situations identified as unconstitutional in "clearly established" case law. Thus, a review of policy training materials found that "police departments regularly inform their officers about watershed decisions like [*Tennessee* v. *Garner*, 471 U.S. 1 (1985), and *Graham* v. *Connor*, 490 U.S. 386 (1989)]. But officers are not regularly or reliably informed about court decisions interpreting those decisions in different factual scenarios—the very types of decisions that are necessary to 'clearly establish' the law about the constitutionality of uses of force." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, U. Chi. L. Rev. at 6 (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id-=3659540.

Thus, "[m]ore than three-fourths of the * * * training outlines * * * reviewed referenced no court decision applying *Graham* and/or *Garner*. Even when training outlines do reference such cases, the outlines suggest that trainers do not educate officers about the underlying facts and holdings of the cases. Instead, these cases are introduced for broad principles that build on *Graham* and *Garner*: the notion, for example, that an officer does not need to use the least force possible." *Qualified Immunity's Boldest Lie*, *supra*, at 6 (footnote omitted). "Trainings do, regularly, incorporate hypotheticals as a way to help officers develop an

understanding about whether [force] is appropriate in various scenarios. But these scenarios are not drawn from court cases." *Ibid.*

In sum, law enforcement officers "are not actually educated about the facts and holding of court decisions that clearly establish the law. Instead, they are taught broad principles from watershed cases like *Graham* and *Garner*, and then are given experience applying those frameworks to varying factual situations not based on court decisions." *Qualified Immunity's Boldest Lie*, *supra*, at 63.

For that reason, whether or not a particular act violated clearly established law will virtually never be relevant to an assessment of the propriety of the training materials. When training materials do not incorporate the particular facts of previously-decided cases, looking to clearly established law to measure the sufficiency of training materials makes no sense: a previously-decided case—even if it did exist—would not be included in the training materials. Instead, the question should be whether the training materials used by the municipality provided so little guidance to police officers regarding the constitutional limits on (here) the use of force that they demonstrated the municipality's deliberate indifference to whether its employees complied with the Constitution.

This case provides a perfect example of the irrelevance of clearly established law. As the district court explained, the City of Euclid had a "blasé attitude toward excessive force training." Pet. App. 75a. "[T]he City's training seems to consist initially of simply reading the excessive force policy after advising officers to 'pay attention,'" followed "with a barebones yearly test (which is the same every year) and yearly scenarios that each focus on a single genre of facts

that might require the use of force." *Ibid*. (footnotes omitted). Importantly, "the City does not seem to make any serious effort to track which scenarios individual officers were exposed to or ensure that the scenarios (over the course of several years) cover a comprehensive range of instances that might require the use of force." *Ibid*. (footnote omitted).

In addition, "the presentation materials used during at least one of the Euclid Police Department's in-service trainings display a disturbing tendency to trivialize the use of excessive force." Pet. App. 75a. They included statements mocking the beating of suspects as well as a link to a Chris Rock video including numerous clips of officers beating suspects. As the district court put it, these materials were "grossly inappropriate in the context of a police department's use of force training." *Id*. at 78a.

The City did not provide any training at all about how to remove civilians from vehicles—an issue that officers frequently confront. That training would have been directly relevant to the officers' actions here, which involved the removal of Mr. Stewart from his car—and might have saved his life.

Whether the City's materials provide so little guidance to police officers that they evidence deliberate indifference to officers' use of excessive force has nothing to do with whether or not the specific context confronting the officers here had been addressed in a prior decision. It is the City's lack of any relevant training—not the existence or absence of a case with facts virtually identical to those confronted by the officers here—that should be the critical focus of the deliberate indifference inquiry. A court can, and should, assess these materials and conclude that they exhibit the necessary deliberate indifference.

Third, lower courts reaching a contrary conclusion have pointed to *Connick* v. *Thompson*, 563 U.S. 51 (2011)—but their reliance on that decision is wholly misplaced. *Connick* addressed a very specific type of deficient training claim, the failure to train prosecutors with respect to the obligations imposed by *Brady* v. *Maryland*, 373 U.S. 83 (1963). Because prosecutors are attorneys, who are subject to a "regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law." 563 U.S. at 67. Therefore, the Court concluded, a failure to provide training could not satisfy the deliberate indifference standard in the absence of proof of a pattern of prior violations.

The Court specifically distinguished training for police officers regarding the use of force, stating that such a claim could be asserted, even in absence of proof of prior violations. It pointed out that "[g]iven the known frequency with which police attempt to arrest fleeing felons and the 'predictability that an officer lacking specific tools to handle that situation will violate citizens' rights,' the [*City of Canton*] Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the 'highly predictable consequence,' namely, violations of constitutional rights." *Connick*, 563 U.S. at 63-64 (citation omitted). In particular, "[a]rmed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for

novice officers to obtain the legal knowledge they require." *Id.* at 64.

Because the present case involves police officers, the very situation distinguished in *Connick*, the Court's conclusion in that case regarding the unavailability of municipal liability is wholly inapposite here.

The same conclusion applies with respect to the alternative failure-to-train claim recognized in *Connick*—when "city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." 563 U.S. at 61. There is no reason that the prior constitutional violations must be identical to the one injuring the plaintiff. Rather, "notice that a course of training is deficient in a particular respect," *id.* at 62, is provided when the training is producing a range of constitutional violations—particularly where, as in the excessive force context, the training is based on general principles and not case-specific precedents.

Connick thus provides no support for the contention that a lack-of-training claim is precluded unless the plaintiff can provide a violation of "clearly established" law.

B. The Qualified Immunity Rule Has No Basis In Section 1983—And Therefore Should Not Be Extended To Restrict Municipal Liability.

Extension of the qualified immunity standard to the municipal liability context is not warranted for an additional reason: that standard cannot be justified by reference to Section 1983's text or legislative context.

Indeed, several current and former Members of this Court have questioned the current qualified immunity standard. See *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871-1872 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Wyatt* v. *Cole*, 504 U.S. 158, 171-172 (1992) (Kennedy, J., joined by Scalia, J., concurring); see also *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (Sotomayor, J., joined by Ginsburg, J., dissenting). So too have a number of lower court judges.[3]

Given the unstable foundation for the qualified immunity standard, the Court should not extend that standard into the separate realm of municipal liability.

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

---

[3] See, *e.g.*, *Horvath* v. *City of Leander*, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part); *Zadeh* v. *Robinson*, 928 F.3d 457, 478-81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part), cert. denied, 141 S. Ct. 110 (2020); *Shannon* v. *County of Sacramento*, 2019 WL 2715623, at *3 n.2 (E.D. Cal. June 28, 2019) (Mueller, J.); *Spainhoward* v. *White Cty., Tennessee*, 2019 WL 6468583, at *9 n.10 (M.D. Tenn. Feb. 1, 2019) (Crenshaw, J.); *Ganley* v. *Jojola*, 402 F. Supp. 3d 1021, 1063 n. 26 (D.N.M. 2019) (Browning, J.); *Ventura* v. *Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) (Drozd, J.), aff'd, 978 F.3d 1088 (9th Cir. 2020; *Thompson* v. *Clark*, 2018 WL 3128975, at *10 (E.D.N.Y. June 26, 2018) (Weinstein, J.).

But recent scholarship has demonstrated that "there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment." William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 55 (2018); see also John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 250-58 (2013); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863-1887 (2010); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14-21 (1972).

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

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

Indeed, Chief Justice Marshall, in his opinion for the Court, "confess[ed]" that "the first bias of [his] mind was very strong in favor of the opinion that

though the instructions of the executive could not give a right, they might yet excuse from damages," but he was "convinced that [he] was mistaken" and concluded that good-faith reliance on the orders could not prevent the imposition of damages liability. 6 U.S. at 179. That "personal aside" shows "the deep roots of" the liability principle. Baude, 106 Cal. L. Rev. at 56.

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

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

Myers v. *Anderson*, 238 U.S. 368 (1915), involved a damages claim against government officials who had refused to register the plaintiffs to vote because state law barred registration of African Americans. The defendants argued that the damages judgment should be set aside because—among other reasons—they had acted with the good-faith belief that the statute was constitutional. This Court noted that argument, but upheld the judgment against the state officials. See Baude, 106 Cal. L. Rev. at 57-58.

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

describe the individual elements of particular common-law torts." Baude, 106 Cal. L. Rev. at 58-59.

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

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

18 Iowa at 156-157.

In other contexts, courts modified substantive rules of liability to circumscribe liability. Thus, in *Marianna Flora*, 24 U.S. 1, 52 (1825), the Court held that an official's decision to retain a captured ship for adjudication would not subject him to liability where "he acted with honourable motives, and from a sense of duty to his government" and not "with gross negligence or malignity, [or] a wanton abuse of power." A

similar process led courts to hold that law enforcement officers could not be held liable in tort for an arrest as long as the officer acted with probable cause—even if the arrestee was subsequently exonerated. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 634-639 (1999).[4]

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

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

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

---

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

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

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

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

In sum, the current qualified immunity rule simply cannot be justified by reference to the intent of the Congress that enacted Section 1983 or any principle of statutory interpretation. And there accordingly is no basis whatever for extending that rule to limit municipal liability.

C. Expanding The Reach Of The Qualified Immunity Standard Will Erode Constitutional Protections Against Abuse Of Government Power.

The practical effect of the qualified immunity rule is to erode critical constitutional protections. Expanding that rule to preclude municipal liability would compound that adverse effect.

First, many lower courts today dismiss Section 1983 claims on immunity grounds without first determining whether the plaintiff has alleged a violation of her constitutional rights, as permitted by *Pearson* v. *Callahan*, 555 U.S. 223, 227 (2009). See *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1893 & n.36, 1896 & n.57 (2018).

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

Holding that qualified immunity for an employee precludes municipal liability as well will increase the number of cases in which the constitutional issue cannot be adjudicated.

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

By their nature, Fourth Amendment claims are fact-specific: whether an officer possessed probable

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

Third, municipalities already are protected against Section 1983 by the elimination of *respondeat superior* liability and the requirement that a plaintiff show "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton*, 489 U.S. at 385. Prohibiting liability in every case in which a municipal employee is protected by qualified immunity would reduce significantly the cases in which municipalities would be liable for constitutional violations.

Fourth, there are particular reasons why the qualified immunity standard is particularly unjustified with respect to Fourth Amendment claims such as the one asserted here.

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

The Founding generation's aversion to general warrants was rooted in the celebrated *Wilkes* and *En-*

tick cases,[5] described by one scholar as "the most famous colonial-era cases in all America—the O.J. Simpson and Rodney King cases of their day." Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53, 65 (1996). In these tort actions seeking damages for trespass for officers acting pursuant to general warrants, the English courts held that the warrants did not provide a defense against liability.

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

> [S]uppose for instance, that an officer of the United States should force the house, the asylum of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the [C]onstitution of the United States? * * * [N]o remedy has yet been found equal to the task of deterring and curbing the insolence of office, but a jury—[i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression. * * * [By contrast,] an American judge, who will be judge and jury too[,] [will

---

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

> probably] spare the public purse, if not favour a brother officer.

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

That is precisely how the Amendment was enforced:

> [A]ny official who searched or seized could be sued by the citizen target in an ordinary trespass suit—with both parties represented at trial and a jury deciding between the government and the citizen. If the jury deemed the search or seizure unreasonable—and reasonableness was a classic jury question—the citizen plaintiff would win and the official would be obliged to pay (often heavy) damages. Any federal defense that the official might try to claim would collapse, trumped by the finding that the federal action was unreasonable, and thus unconstitutional under the Fourth Amendment, and thus no defense at all.

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

Barring liability for both employees and the municipality based on the Court's qualified immunity

standard context is thus particularly unwarranted in the Fourth Amendment context presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

FEBRUARY 2021