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For The Eighth Circuit
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June 11, 2024

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RE: 24-1285 Matthew Locke v. County of Hubbard, et al

Dear Counsel:

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

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

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District Court/Agency Case Number(s): 0:23-cv-00571-WMW

No. 24-1285

In the United States Court of Appeals for the Eighth Circuit

MATTHEW LOCKE,
Plaintiff–Appellant,

v.

COUNTY OF HUBBARD, et al.,
Defendants–Appellees.

On Appeal from the United States District Court for the District of Minnesota

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANT AND REVERSAL

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Dated: June 11, 2024

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice ("IJ") is a nonprofit public interest law firm committed to defending the essential foundations of a free society. Central to that mission is promoting accountability to the Constitution for government officials. To accomplish that, IJ launched its Project on Immunity and Accountability, which is devoted to a simple idea: If we the people must follow the law, our government must follow the Constitution. Section 1983 is a powerful way to sue individual government officials for violating constitutional rights. But immunity doctrines, such as qualified immunity, let officials avoid constitutional accountability. These immunity doctrines are not rooted in the text of Section 1983 or the common law, but in judge-made policy decisions.

To clear the thicket of immunity doctrines that prevent government accountability, IJ litigates its own cases and frequently files amicus briefs trying to limit qualified immunity. And recently, IJ published a detailed report explaining how qualified immunity shields a wide range

[1] No party's counsel authored any portion of this brief. No party or person—other than Amicus—contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

of government abuses, arbitrarily thwarts civil rights, and fails to fulfill its promise. Jason Tiezzi, et al., *Unaccountable*, Inst. for Just. (Feb. 2024), *available at* https://tinyurl.com/IJ-Unaccountable.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2021, Appellant Matthew Locke joined his first protest, which was located along the "Line 3 Replacement Project" in Minnesota. The project aimed to fix a 337-mile stretch of an aging crude oil pipeline, which would help stop leaks and oil spills. Much like the Dakota Access Pipeline, which this Court is well acquainted with, *see Mitchell v. Kirchmeier*, 28 F.4th 888 (2020), Line 3 was not a popular project.

But the company and local officials had learned their lesson from their neighbors in the Dakotas—so they had a plan to address the anticipated protests. Local officials formed the "Northern Lights Task Force" to pool resources. And if, as expected, protesters used lockbox devices like "sleeping dragons"[2] to chain themselves to construction

[2] Sleeping dragons are homemade devices typically made of a PVC pipe. Inside the pipe is a bolt that the protester uses to attach himself using a carabiner that is also locked to his wrist with a chain or rope. Another protester will do the same on the other side of the PVC pipe. The result is a human chain that takes officials longer to detach and remove.

equipment, the Task Force had a dedicated "cut team" on standby that would quickly respond and safely remove the devices and protesters.[3] *See* Northern Lights Task Force MN, X [hereinafter "NLTF Twitter"] (June 9, 2021, 4:16 PM), https://tinyurl.com/NLTF-Twitter (posting pictures of the Line 3 "cut team" removing several sleeping dragons).

Matthew was one such protester. When he joined the Line 3 protests, he used a "sleeping dragon" to chain himself to construction equipment. Matthew was attached to another protester and an excavator. Police eventually arrived and asked Matthew and the other protesters to voluntarily unclip themselves and leave. They refused. But rather than call the "cut team" and wait for them to arrive and safely

[3] Trained professionals or "cut teams" can safely remove sleeping dragons. To remove the device, the response crew need not cut to the arm. Rather, they only cut the middle of the PVC pipe to access and unlock the bolts. "Cut teams" are routinely used by federal and state agencies across the country. *See, e.g.*, Christine Clarridge, *Slaying the 'Sleeping Dragon': Seattle Police Change Tactics to Counter Traffic-Blocking Protesters*, Seattle Times (June 5, 2018, 7:28 P.M.), https://tinyurl.com/Seattle-Removal-Team (discussing Seattle's "Apparatus Removal Team"); Center for Domestic Preparedness, *Field Force Extrication Tactics*, FEMA, https://cdp.dhs.gov/training/course/PER-202 (last visited June 3, 2024) (providing a 3-day training on how to remove these protest devices).

remove the protesters and the sleeping dragons (which was the plan all along), the police went off script.

The police violently and repeatedly pressed on various pressure points on Matthew's and the other protesters' heads, including the torture techniques pictured below:

See App. 6 R. Doc. 1, at 3, ¶¶ 14–16 (describing the "mandibular angle technique" through the ear, pictured left), ¶¶ 18–19 (describing the "infra orbital technique" through the nose, pictured right, both of which Defendants used on Matthew).

The results were brutal. When the police did this to Matthew, they put so much pressure on his head that the right side of his face slumped. App. 6 R. Doc. 1, at 3, ¶ 20. Matthew could not blink his right eye, and the whole side of his face went numb. *See* App. 4 R. Doc. 1, at 1, ¶ 2 (citing More Perfect Union, *Police Use "Pain Compliance" Against Line 3*

Protesters, X, at 0:45–1:00, 1:53–2:01, 2:55–3:19 (Sept. 22, 2021, 4:50 PM), https://tinyurl.com/Twitter-MPU). In a video recording of the incident (shot from a distance), you can hear horrific screaming and pleading from the protesters as the police went protester-by-protester using the same torture techniques over and over and over. *See id.*

Matthew and the other protesters were eventually removed from the construction equipment by the "cut team," *see* App. 7 R. Doc. 1, at 4, ¶ 22, which is what should have happened all along. But because of the torture techniques used by the police, paramedics on scene required Matthew (and others) to be hospitalized. Matthew was officially diagnosed with Bell's palsy (facial paralysis) and tinnitus (ringing in the ear). *Id.* ¶ 29.

Matthew then brought claims for excessive force against the officers under Section 1983, but the district court granted qualified immunity and excused the officer's use of "pain compliance techniques." In doing so, however, the district court made two critical (and reversible) errors.

First, to overcome qualified immunity, a plaintiff needs to point to a previous case that is close enough on the facts to provide fair warning to officers that their conduct is unconstitutional. *Reichle v. Howards*, 566

U.S. 658, 664 (2012). The evaluation of the facts (and the constitutional right at issue) needs to be at the appropriate level of detail. Courts hold that if the right is defined "too broadly (as the right to be free of excessive force)," that defeats the qualified immunity analysis altogether. *Hagans v. Franklin Cnty. Sheriff's Off.*, 695 F.3d 505, 509 (6th Cir. 2012). But if defined "too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas)," that defeats the purpose of Section 1983 and virtually guarantees qualified immunity for police. *Id.* Within this framework, when police use weapons or employ force, like they did here, both the Supreme Court and this Court have warned that a "weapon-by-weapon" approach is too narrow. Put differently, qualified immunity does not apply simply because officers used a new weapon or found an innovative technique to employ force. But here, that's exactly what the district court did. It granted qualified immunity because, as the district court put it, no previous case addressed "the pain compliance techniques used in this case." App. 22 R. Doc. 23, at 5. That was wrong. Qualified immunity does not apply just because Defendants found a new way to torture protesters.

Second, as the Supreme Court has explained, qualified immunity is designed to protect officials who are making split-second decisions in a fast-moving environment. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). But when, as here, an officer's decision involves no emergency, no split-second decision, and no safety concerns, qualified immunity should not apply. For instance, when it came to removing Matthew, the officers didn't have to do anything at all. Rather, they should have just waited for the specialized "cut team" on standby to arrive and remove the protesters (which ultimately happened anyway). The officers didn't need to torture Matthew while they waited.

In sum, if the district court decision holds, officers would be entitled to qualified immunity even in non-emergency situations, where they are *not* making split-second decisions, so long as they use a new weapon or find an innovative technique to employ force. That is wrong under the Fourth Amendment. And it's wrong under the Supreme Court's qualified immunity cases. The Court should reverse.

ARGUMENT

Qualified immunity is both atextual and ahistorical. Jurists of all stripes, including members of nearly every court of appeals and Justices

of the Supreme Court, agree that Section 1983's immunity doctrines are policy choices and unmoored from both its statutory text and the common law in 1871. Those realities justify the Supreme Court revisiting the doctrine of qualified immunity wholesale. This case, however, presents an opportunity for a more incremental approach to fixing qualified immunity that this Court very much could (and should) implement.

I. A "weapon-by-weapon" approach to qualified immunity is too narrow and conflicts with Supreme Court precedent.

The clearly established standard is at the heart of qualified immunity. The Supreme Court announced its modern-day iteration in *Harlow v. Fitzgerald*, and the Court explained that the purpose of the standard was to ensure that government officials have breathing room to make mistakes. 457 U.S. 800, 818 (1982). This breathing room, however, is not infinite. Rather, the purpose of qualified immunity is to give government officials "fair warning" that their conduct is unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). And as the Supreme Court has warned, an official can still have "fair warning" that his conduct is unconstitutional "even in novel factual circumstances." *Id.*

This warning is particularly important when police use weapons or employ force. As *Hope* itself explained, a factual distinction between the

exact type of force employed is too narrow for qualified immunity purposes. There, an official punished an inmate by handcuffing him to a hitching post in the sun for seven hours. *Id.* at 734–35. Even though there wasn't a previous case saying, "don't handcuff inmates to a hitching post for an extended period of time," a reasonable officer was still on notice that such conduct was unconstitutional. That's because previous cases established that "corporal punishment" by prison guards violated the Eighth Amendment. *Id.* at 742. It didn't matter, then, whether guards punished an inmate by handcuffing him to a fence, by making him "stand, sit or lie on crates [or] stumps," by tying him to the bars of a prison cell, or even by handcuffing him to a hitching post in the sun—in any of those factual scenarios, a reasonable officer would have fair notice that they were violating the Eighth Amendment. *Id.* at 733–35, 742–43. Thus, the Supreme Court reversed the Eleventh Circuit's grant of qualified immunity because distinguishing *how* the guards employed corporal punishment defined the right too narrowly. *Id.* at 745–46.

The Supreme Court has repeatedly affirmed this warning to lower courts to not slice and dice cases so thinly. In *Taylor v. Riojas*, the Supreme Court considered whether prison guards violated an inmate's

Eighth Amendment rights when the guards housed him in cells "teeming with human waste" for six days. 592 U.S. 7, 9 (2020) (per curiam). The Fifth Circuit had granted qualified immunity because, although it "was clear that prisoners couldn't be housed in cells teeming with human waste for months on end," the Fifth Circuit "hadn't previously held that a time period so short violated the Constitution." *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019), *rev'd sub nom. Taylor v. Riojas*, 592 U.S. 7 (2020). But the Supreme Court reversed: Whether it was six days or six months, "any reasonable officer should have realized that [the] conditions of confinement offended the Constitution." *Riojas*, 592 U.S. at 9. In other words, the specific time period just didn't matter. What *did* matter was the more general principle that the inmate endured "deplorably unsanitary conditions" for "an extended period of time." *Id.* at 8–9; *see also Sause v. Bauer*, 585 U.S. 957, 959 (2018) (reversing a grant of qualified immunity despite "the absence of a prior case" saying officials can't order someone to stop praying because "[t]here can be no doubt that the First Amendment protects the right to pray").

Then in *McCoy v. Alamu*, the Court summarily reversed another grant of qualified immunity, this time for an official's assault of an

inmate. 141 S. Ct. 1364 (2021) (mem.). In *McCoy*, an officer sprayed an inmate with pepper spray "directly in the face" "for no reason at all." *McCoy v. Alamu*, 950 F.3d 226, 229 (2020), *rev'd*, 141 S. Ct. 1364 (2021). The inmate pointed to many cases that clearly established that such an unprovoked use of force was unconstitutional. But as the Fifth Circuit saw it, those cases were different because the "weapon of choice" was "a fist, taser, [ ] baton," "a pepper ball launcher," "mace," or "two cans" of pepper spray—not "an isolated, single use of pepper spray" in the face. *Compare id.* at 231–32, *with id.* at 234–35 (Costa, J., dissenting in part). More simply, to the Fifth Circuit, *how* the officer assaulted the inmate made all the difference, so it parsed the previous cases weapon-by-weapon to grant qualified immunity.

But the Supreme Court reversed. As explained in *Riojas*, it did not matter *how* (or *by what means*) the officer assaulted the inmate. 141 S. Ct. at 1364. Rather, *McCoy,* just like *Riojas*, involved a hyper-specific focus on granular facts that didn't impact the "fair notice" analysis to officers. For example, telling officers not to put inmates in "cells teeming with human waste" should be enough no matter how long the inmates are forced to endure it, just like telling officers not to assault inmates "for

no reason at all" should be enough regardless of the "weapon of choice" the officer uses to deploy the beating. *See McCoy*, 950 F.3d at 234–35 (Costa, J., dissenting in part).

This Court has taken the Supreme Court at its word. In an eerily similar case, for instance, this Court refused to grant qualified immunity to police on the Dakota Access Pipeline. In *Mitchell*, police fired "lead-filled bean bags" out of "12-gauge shotguns" towards a nonviolent protestor who had "his hands raised in the air." 28 F.4th at 894, 898. The bean bags "shattered his eye socket." *Id.* at 898. Despite no previous case involving "lead-filled bean bags being shot out of 12-gauge shotguns," this Court still found that it was clearly established that the officers' use of force was excessive and unconstitutional.

Applying the correct framework, it was clear that police can't use "more than *de minimis* force" against nonthreatening protestors. *Id.* at 898–99. That principle was true (and clearly established) whether police tackled someone from behind, tripped someone by "sweeping her . . . leg," or executed "a takedown." *Id.* at 898 (collecting cases). None of those previous cases, however, involved lead-filled bean bags, shotguns, or any firearms whatsoever. S*ee also* App. 8–9 R. Doc. 1, at 5–6, ¶ 36 (citing

Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009), and *Kukla v. Hulm*, 310 F.3d 1046, 1050 (8th Cir. 2002) (establishing that an officer may *not* use force against "those who do not flee or actively resist arrest and pose little or no threat to the security of the officers of the public")).

In contrast, the district court used the very "weapon-by-weapon" analysis rejected by the Supreme Court and this Court—conflicting with *Hope*, *Riojas*, *McCoy*, *Sause*, *Mitchell*, and *Brown*. As the district court cursorily framed it, Matthew did not point to a case that confronted the same "pain compliance techniques used in this case," so it granted qualified immunity. App. 22 R. Doc. 23, at 5. But the specific *type* of force or *how* the force is employed is too granular of an analysis. Instead, the proper level of detail (as explained in Matthew's complaint and the briefing that followed—not to mention as explained by the Supreme Court and this Court) is that officials cannot use more than *de minimis* force on peaceful and nonviolent protesters. *See* App. 5–6 R. Doc. 1, at 2–3, ¶¶ 12–13.

That rule, as Matthew explained, was true no matter *how* or through *what means* force is used against peaceful protesters—whether

through chokeholds, batons, wrist bending techniques, or pepper spray. *See Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 118 (2d Cir. 2004); *Asociacion de Periodistas de P.R. v. Mueller*, 529 F.3d 52, 60 (1st Cir. 2008). Indeed, Matthew even cited a case establishing that it was excessive force when police tortured protesters (by applying a Q-tip soaked in pepper spray to the corner of their eyes) that were using nearly identical "lockbox devices" to protest. *See Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1129–30 (9th Cir. 2002).

That rule, with the proper level of generality, applies to Matthew. Matthew was sitting next to (and chained) to an excavator. He could not flee; he posed no risk to officer safety[4]—he was just sitting. App. 5–6

[4] This was true of most all protests along Line 3—they were admittedly peaceful. This was due to the sheer size (and remoteness) of the project. As a company spokesperson explained back in 2021, the construction of Line 3 had "five active construction zones with multiple construction sites in each zone." David Kraker & Evan Frost, *Line 3 Opponents Occupy Enbridge Pump Station as Protest Ramps Up*, MPR News (June 8, 2021 5:16 AM), https://tinyurl.com/Line-3-Waiting (quoting Juli Kellner). For that reason, the "protests have had very little impact on [the project's] schedule," and despite the protests, the company expected to (and did) finish the project on time. *Id.*; *see also* Danielle Kaeding, *Protests Heat Up Over Controversial Pipeline that Would Bring More Oil through Wisconsin*, Wisc. Pub. Radio (June 8, 2021), https://tinyurl.com/Line-3-WPR (quoting Juli Kellner) ("It should be noted that protests affected work at just [one] site, and construction continued yesterday and today across

R. Doc. 1, at 2–3, ¶¶ 12–13. And most egregious (and perhaps masochistic), was that the officers could have just waited for the "cut team" to arrive. But rather than wait, they chose to torture Matthew. Any reasonable officer would know that was unconstitutional.

But the district court waived away all these cases (and common sense) for no other reason than that previous cases did not include the precise "pain compliance techniques used in this case." App. 22 R. Doc. 23, at 5. Even worse, the district court did not explain how the "pain compliance techniques" used on Matthew were distinguishable—or why that matters. Nor did the district court distinguish the cases Matthew cited. *Id.* So now, according to the district court, it is "clearly established" that applying pepper spray to a peaceful protester's eye is excessive force, but pressing so hard on a peaceful protester's skull that his face is paralyzed is not.

The district court's analysis is wrong. Qualified immunity does not turn on *how* officers apply force. Nor does it depend on what novel

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dozens of worksites in the five construction zones that stretch across northern Minnesota.").

weapon *or means* of force officers use. Both the Supreme Court and this Court have foreclosed any "weapon-by-weapon" analysis.

Instead, the correct approach is simple: Officers should not use excessive force on a person who is not threatening, fleeing, or resisting, no matter what weapon or torture technique the officers prefer. That's the analysis the Supreme Court demands. And to hold otherwise would encourage officers to find new and creative ways to violate the same clearly established rights.[5] Whether the police use dogs, water hoses, pepper spray, rubber bullets, shotguns, pain compliance techniques, tasers, nun-chucks, fists, batons, or anything in-between, it is clearly established that the police cannot use weapons or torture techniques to employ more than *de minimis* force on peaceful protestors.[6] For this reason alone, the Court should reverse the grant of qualified immunity.

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[5] This is not a parade-of-horribles hypothetical, it is happening now. Consider the Oklahoma County jail, which recently announced new "electric gloves" that it plans to use on inmates. An Oklahoma City council member called use of the gloves as "torturing somebody." David Chasanov, *'Will Only Cause Lawsuits': Oklahoma County Jail's New Electric Gloves Spark Controversy*, Fox 25 (Mar. 25, 2024 9:19 PM), https://tinyurl.com/Taser-Gloves.

[6] This rule follows commonsense—and ordinary Americans understand it. From police in Birmingham, Alabama, siccing police dogs on civil rights protestors, *see* Joshua Clark Davis, *Birmingham's Use of Police*

II. Qualified immunity should not apply when officials have time to make calculated choices.

There's a second reason qualified immunity should not protect the officers that tortured Matthew: They were not making a split-second decision akin to normal on-the-beat cops. Rather, the officers' decision was more like that of an official that "has the means, the freedom, and the duty to make necessary inquiries." *See Whirl v. Kern*, 407 F.2d 781, 792 (5th Cir. 1968). In this situation, when an official "is not subject to the stresses and split-second decisions of an arresting officer," qualified immunity should not apply. *Id.*

Justice Thomas recently explained why. Officials "who have time to make calculated choices about enacting or enforcing unconstitutional policies," should not "receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting." *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (mem.) (Thomas, J.,

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Dogs on Civil Rights Protesters Shocked Liberal Onlookers. But the Backstory was All-American, Slate (May 16, 2023), https://tinyurl.com/1963-Dogs, to University of California officers pepper spraying students conducting a sit-in, *see* Judith Welikala, *U.C. Davis Pepper Spray Students to Receive Payout*, Time (Sept. 14, 2012), https://tinyurl.com/Time-Pepper-Spray, Americans reject such obvious displays of force against peaceful and nonthreatening protesters.

statement respecting denial of certiorari). In *Hoggard*, Justice Thomas questioned this Court's grant of qualified immunity to officials "who have time to make calculated choices," such as university administrators that prohibited a student "from placing a small table on campus . . . to promote a student organization." *Id.* at 2421–22. Other judges agree. It flips "qualified immunity backwards" to grant it to officials who, as here, have time to deliberate before acting and are not "mak[ing] split-second, life-and-death decisions to stop violent criminals." *Gonzalez v. Trevino*, 60 F.4th 906, 912 (5th Cir. 2023) (mem.) (Ho, J., dissenting from denial of en banc review), *cert. granted*, 144 S. Ct. 325 (2023).

This distinction makes sense within the judge-made world of qualified immunity. When the Supreme Court was still crafting the contours of its modern qualified immunity doctrine, it explained that it was concerned with "the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). This Court has agreed with that policy concern, and thus, has consistently refused to "judg[e] an officer's split-second decision (made with imperfect information)." *Goffin v. Ashcraft*, 977 F.3d 687, 691 (8th Cir. 2020).

But the opposite was true here. Matthew and the other Line 3 protesters "did not actively resist and did not pose any threat of harm to anyone." App. 6 R. Doc. 1, at 3, ¶ 13. Rather, Matthew was peacefully sitting and posed no safety risk to the officers or anyone else.

What's more, the company and officers had a plan for this exact situation: Call the "cut team" and have them safely remove the protesters. That's what makes the officers' decision to torture Matthew and the other protesters so egregious—there was no split-second decision to make. In fact, there was no decision to make *at all*—they just needed to follow protocol and call the cut team (the same cut team that bragged about their ability to safely remove protesters from sleeping dragons on its social media page). *See* NLTF Twitter, *supra*. Qualified immunity should not protect officials who have the time to make such calculated choices before acting. Here, the officers had as much time as they needed—and they *still* chose torture. The Court should reverse the grant of qualified immunity.

III. In 1871, Congress abrogated common-law immunities when it created Section 1983.

In the end, this entire discussion about qualified immunity is gratuitous. Nearly forty years ago, Justice Thurgood Marshall noted that

immunity for state officials conflicted with Section 1983's unambiguous language and Congress's intent to abrogate common-law immunities. *Briscoe v. LaHue*, 460 U.S. 325, 347–64 (1983) (Marshall, J., dissenting). Justice Marshall was correct. Congress abrogated common-law immunities that existed in 1871 when it created Section 1983. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 235–41 (2023). The text enacted by Congress made state officials liable "notwithstanding" "any . . . custom[ ] or usage"—that is, notwithstanding common-law defenses like immunity. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13; Inst. for Just. Amicus Br., *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, No. 21-806 (U.S. Sept. 23, 2022) (elaborating on the Notwithstanding Clause).

In 1874, Congress compiled the Revised Statues for the first time. In doing so, "[t]he Reviser of Federal Statutes made an unauthorized alteration to Congress's language" by omitting the Notwithstanding Clause. *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring). That omission, however, did not incorporate the common law back into Section 1983. *See* Inst. for Just. Amicus Br., *Talevski*, at 13–18 (explaining why).

Judge Willett recently explained this truth: "the Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*." *Rogers*, 63 F.4th at 979–81. Other judges are now joining the growing call to revisit qualified immunity wholesale. *See, e.g.*, *Green v. Thomas*, No. 3:23-cv-126, 2024 WL 2269133, at *17–26 (S.D. Miss. May 20, 2024) (explaining why "the doctrine [of qualified immunity] should come to its overdue end").

Thus, if the Supreme Court wanted to apply Section 1983's original text, qualified immunity would be off the table altogether. But at the very least, Appellant's claims in this Court should not be precluded by qualified immunity. The Line 3 protests involved no emergency circumstances, there was no reason not to wait for the cut team, and the district court was wrong to employ a weapon-by-weapon analysis.

CONCLUSION

The Court should reverse the district court.

Dated: June 11, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was filed electronically on June 11, 2024, and thus, will be served electronically upon all counsel. I further certify that, upon this brief being file-accepted, one paper copy will be served on counsel for each party by commercial carrier under Local Rule 28A(d) and Fed. R. Civ. App. P. 25(c)(1)(C).

/s/ Brian A. Morris
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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(g), I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 4,403 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

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