No. 17-8654

IN THE
Supreme Court of the United States

ALMIGHTY SUPREME BORN ALLAH,
Petitioner,
v.
LYNN MILLING, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF OF CROSS-IDEOLOGICAL GROUPS DEDICATED TO ENSURING OFFICIAL ACCOUNTABILITY, RESTORING THE PUBLIC'S TRUST IN LAW ENFORCEMENT, AND PROMOTING THE RULE OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CATHERINE E. STETSON
Counsel of Record
NICHOLAS S. BROD
KYLE M. DRUDING
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST

The following parties, who reflect a diverse set of ideological viewpoints and a shared commitment to ensuring the rule of law, and who are also listed in the Appendix, respectfully submit this brief as *amici curiae*.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary

Alliance Defending Freedom (ADF) is a nonprofit, public-interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect First Amendment freedoms. Since its founding in 1994, ADF has played a key role in numerous cases before the United States Supreme Court—most recently, in *National Institute of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018), and *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)—as well as in hundreds of other cases in state and federal courts.

The American Association for Justice (AAJ) is a voluntary national trial bar association whose members primarily represent plaintiffs in personal-injury, employment-rights, and civil-rights cases. AAJ members frequently represent plaintiffs seeking legal recourse and accountability under 42 U.S.C § 1983.

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil-rights laws. Since its founding in 1920, the ACLU has appeared in numerous cases before this Court, both as counsel representing parties and as *amicus curiae*.

Americans for Prosperity (AFP) exists to recruit, educate, and mobilize citizens to promote a free

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contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

society, helping every American live their dream—especially the least fortunate. AFP's 3.2 million activists nationwide advocate and promote limited and accountable government, lower taxes, and more freedom. This case concerns AFP because the doctrine of qualified immunity fails to hold government officials accountable for violations of citizens' constitutional rights.

The Cause of Action Institute is a nonprofit, nonpartisan, government-oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, among other things, appearing as *amicus curiae* before this and other federal courts.

The Due Process Institute is a nonprofit, bipartisan, public-interest organization that works to honor, preserve, and restore procedural fairness in the criminal-justice system.

Freedom Partners Chamber of Commerce is a nonprofit, non-partisan organization whose members support free enterprise, fiscal responsibility, and fair markets. *Amicus* advances its members' business interests and vision of a free and open society by ensuring important policy issues—such as creating opportunity for all, eliminating corporate welfare, safeguarding our financial future, protecting free speech, and keeping Americans safe—are at the forefront of the public debate. *Amicus* and its members are concerned that the current doctrine of

qualified immunity has eroded accountability and decreased trust between public officials and the communities in which they serve.

The Institute for Justice is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute for Justice litigates in state and federal courts nationwide to secure these guarantees, including in defense of private property rights, educational choice, economic liberty, and free speech. As part of its commitment to protecting private property rights, the Institute for Justice fights to roll back civil forfeiture.

The Law Enforcement Action Partnership (LEAP) is a nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal-justice professionals who seek to improve public safety, promote alternatives to arrest and incarceration, address the root causes of crime, and heal police–community relations through sensible changes to our criminal-justice system.

The Roderick & Solange MacArthur Justice Center (MJC) is a nonprofit, public-interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC attorneys have led civil-rights battles in areas that include police misconduct, the rights of the indigent in the criminal-justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, and files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts.

The National Police Accountability Project (NPAP) was founded in 1999 to address misconduct by law enforcement and detention facility officers. NPAP has approximately 600 attorney-members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information, and resources for nonprofit organizations and community groups involved with victims of law-enforcement and detention-facility misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as *amicus curiae* in cases of particular importance for its members' clients.

Public Justice is a national public-interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil-justice system, and the protection of the poor and the powerless.

Reason Foundation is a nonpartisan public-policy think tank, founded in 1978. Reason's mission is to advance a free society by developing and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason magazine, online commentary, and policy research reports, and by filing briefs on significant constitutional issues.

Second Amendment Foundation (SAF) is a nonprofit § 501(c)(3) educational foundation incorporated in August 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has 650,000 members and supporters residing in every state of the Union.

The above-named *amici* reflect the growing cross-ideological consensus that this Court's qualified immunity doctrine under 42 U.S.C. § 1983 misunderstands that statute and its common-law backdrop, denies justice to victims of egregious constitutional violations, and fails to provide accountability for official wrongdoing. This unworkable doctrine has diminished the public's trust in government institutions, and it is time for this Court to revisit qualified immunity. *Amici* respectfully request that the Court grant certiorari and restore Section 1983's key role in ensuring that no one remains above the law.

SUMMARY OF ARGUMENT

"The government of the United States has been emphatically termed a government of laws, and not of men." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137,

163 (1803). But as Chief Justice Marshall admonished, our government "will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* Few principles run as deep in the American legal tradition. Yet the doctrine of qualified immunity finds itself increasingly out of step with Chief Justice Marshall's formulation, and it does so at a perilous time.

Public trust in our government institutions has fallen to record lows. A rash of high-profile, sanction-free incidents of police misconduct has sent Americans to the streets in protest. Law-enforcement officers, in turn, report serious concerns about their ability to safely and effectively discharge their duties without the confidence of those they must protect. Entire cities are now synonymous with this vicious cycle—Ferguson, Baltimore, Dallas.

Official accountability is in crisis. *Amici* reflect an extensive cross-ideological and cross-professional consensus that this Court's qualified immunity case law exacerbates the accountability deficit, working harm on both citizens and law-enforcement officers alike. The diversity of the signatories reflects how qualified immunity abets and exacerbates the violation of constitutional rights of every sort—including the rights to freedom of speech and religious exercise, to keep and bear arms, to be free from unreasonable searches and seizures, to be free from cruel and unusual punishment, to be free from racial discrimination, and to pursue a lawful occupation, just to name a few.

A civil action under 42 U.S.C. § 1983 is often the only way for a victim of official misconduct to vindi-

cate these federally guaranteed rights. But qualified immunity often bars even those plaintiffs who can prove their case from remedying a wrong: harm, but no foul. Qualified immunity thus enables public officials who violate federal law to sidestep their legal obligations to the victims of their misconduct. In so doing, the doctrine undermines the public's trust in those officials—law enforcement in particular—making on-the-ground policing more difficult and dangerous for all officers, including that vast majority who endeavor to uphold their constitutional obligations.

Neither the text nor the history of Section 1983 compels this perverse outcome. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018). Section 1983 says nothing about immunity, qualified or otherwise. The common law that existed when Congress passed Section 1983 as part of the 1871 Ku Klux Act did not provide for the type of sweeping defense that qualified immunity has become. *Id.* at 55–61. Members of this Court have recognized as much. *See Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity * * * we have diverged from the historical inquiry mandated by the statute."); *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity * * * we have diverged to a substantial

degree from the historical standards."); *see also* *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (the Court's "one-sided approach to qualified immunity" has "transform[ed] the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment").

This brief will not retread these textual and historical arguments, which are discussed at length elsewhere. *See, e.g.*, Baude, *supra*; Br. for the Cato Institute as *Amicus Curiae* 11–23. Instead, this brief recognizes that "[a]lthough [the Court] approach[es] the reconsideration of [its] decisions with the utmost caution, *stare decisis* is not an inexorable command," *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018) (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009)), and thus engages the "real world implementation" of a doctrine that was already "wrong on its own terms when it was decided," *see id.* at 2097.

Qualified immunity denies justice to victims of unconstitutional misconduct. It imposes cost-prohibitive burdens on civil-rights litigants. And it harms the very public officials it seeks to protect. In short, our Nation's experience with qualified immunity "has made [the Court's] earlier error all the more egregious and harmful." *Id.*

ARGUMENT

I. QUALIFIED IMMUNITY REGULARLY DENIES JUSTICE TO THOSE DEPRIVED OF FEDERALLY GUARANTEED RIGHTS.

A. Official Misconduct Is a Pressing Public Concern, and Section 1983 Liability Is Often the Law's Only Mechanism for Remedying It.

Only a small percentage of law-enforcement officers each year are involved in a fatal confrontation. Gene Demby, *Some Key Facts We've Learned About Police Shootings Over the Past Year*, NPR (Apr. 13, 2015).[2] But even that distinct minority of officers generates a staggering number of fatalities. From 2015 to 2017, law-enforcement officers fatally shot an average of nearly a thousand Americans each year. Julie Tate et al., *Fatal Force*, Washington Post Database (last updated June 20, 2018).[3] Tens of thousands more were wounded or injured over that short period, Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, Newsweek (Apr. 19, 2017),[4] to say nothing of those who suffered injuries that did not result in obvious physical harm. Citizens have documented these encounters like never before. "There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2211 (2018). This new technology has generated powerful, and immediately accessible, evidence of police misconduct.

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[2] *Available at* https://n.pr/2IQ1RBV.

[3] *Available at* https://wapo.st/2KB6B3e.

[4] *Available at* https://bit.ly/2gTs1bo.

For example, a cell-phone camera livestreamed on Facebook the aftermath of a Minnesota officer shooting a man during a traffic stop for a broken taillight, after the man alerted the officer that he was lawfully carrying a firearm. ABC News, *Philando Castile Police Shooting Video Livestreamed on Facebook* YouTube (July 7, 2016).[5] A cell-phone camera catalogued two Baton Rouge officers who shot a father of five after they pinned him to the ground. ABC News, *Alton Sterling Shooting Cellphone Video*, YouTube (July 6, 2016).[6] A cell-phone camera witnessed a Pittsburgh police officer shooting an unarmed teenager who ran when police stopped a vehicle suspected in another shooting. Guardian News, *Black Unarmed Teen Antwon Rose Shot In Pittsburgh*, YouTube (June 28, 2018).[7] And a cell-phone camera caught a Charleston officer shooting a man eight times in the back as he fled from a traffic stop, again for a broken taillight. N.Y. Times, *Walter Scott Death: Video Shows Fatal North Charleston Police Shooting*, YouTube (Apr. 7, 2015).[8]

These four videos collectively have been viewed millions of times on YouTube alone.[9] All precipitated major protests and demonstrations. And they are

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[5] *Available at* https://bit.ly/29K1koJ.

[6] *Available at* https://bit.ly/2lKODNH.

[7] *Available at* https://bit.ly/2KAocbM.

[8] *Available at* https://bit.ly/1PkUn96.

[9] *Amici* invoke these examples only to demonstrate this recent phenomenon enabled by smart-phone technology; this brief takes no position on the ultimate propriety of any specific conduct in these cases and recognizes that not all police shootings are unlawful.

but a few examples. *See* Wesley Lowery, *On Policing, the National Mood Turns Toward Reform*, Wash. Post (Dec. 13, 2015).[10] So it is little wonder that as word—and video—of police misconduct has spread—however rare that misconduct might be in relative terms—faith in law enforcement has fallen. In 2015, Gallup reported that trust in police officers had reached a twenty-two-year low. Jeffery M. Jones, *In U.S., Confidence in Police Lowest in 22 Years* (June 19, 2015).[11]

Worse still, law-enforcement officers are rarely held to account for the misconduct that is increasingly in the public eye. "[A]mong the thousands of fatal shootings at the hands of police since 2005, only 54 officers have been [criminally] charged." Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, Wash. Post (Apr. 11, 2015).[12] Twenty-one of those officers—almost half—were not convicted. *Id.* Many more are never indicted in the first place. In two of the highest-profile examples, grand juries declined to charge the police officer who shot unarmed Ferguson, Missouri teenager Michael Brown and the police officer whose chokehold killed unarmed New Yorker Eric Garner. Both decisions set off mass demonstrations. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. Times (Nov. 24, 2014);[13] J. David Goodman & Al Baker, *Wave of Protests After*

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[10] *Available at* https://wapo.st/2IH8HK4.

[11] *Available at* https://bit.ly/2lQhCj3.

[12] *Available at* https://wapo.st/2Nd12GG.

[13] *Available at* https://nyti.ms/2tL3L2b.

Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case, N.Y. Times (Dec. 3, 2014).[14]

Internal disciplinary mechanisms and citizen-review boards fare no better. In Chicago, for example, more than 99 percent of thousands of police-misconduct complaints filed in 2015 failed to result in any discipline against the officer. *See, e.g.*, Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. Times (Nov. 18, 2015).[15] Other cities' police forces have similar track records. *See, e.g.*, U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 83 (Mar. 4, 2015) ("Even when individuals do report misconduct, there is a significant likelihood it will not be treated as a complaint and investigated.").[16] According to a 2017 Pew Research Center survey of more than 8,000 sworn police officers, an astonishing 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable." Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017).[17]

Because other means of oversight often fail or are otherwise unavailable, it is all the more important that civil liability functions as a robust vehicle for holding police accountable for misconduct. Section 1983 therefore provides a straightforward solution to an undeniable problem. By its own terms, if any person, acting under the color of state law, unlawfully deprives another of his or her feder-

[14] *Available at* https://nyti.ms/2z0kbZl.

[15] *Available at* https://nyti.ms/2KDh1iO.

[16] *Available at* https://perma.cc/XYQ8-7TB4.

[17] *Available at* https://pewrsr.ch/2z2gGSn.

ally guaranteed rights, that person "shall be liable to the party injured." 42 U.S.C. § 1983.

Put simply, under the plain language of Section 1983, a wrongdoer is supposed to pay to redress to the victim. And a robust civil remedy for the violation of federally guaranteed rights serves at least two purposes. First is the "importance of a damages remedy to protect the rights of citizens." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). Second is "the need to hold public officials accountable when they exercise power irresponsibly." *Pearson*, 555 U.S. at 231.

B. Qualified Immunity Regularly Excuses Law Enforcement for Unconstitutional Misconduct.

Qualified immunity breaks with the text and purposes of Section 1983 by allowing for the perverse-yet-common result in which a court recognizes that a victim's constitutional rights were violated while denying any redress. Application of the "clearly established law" standard announced in *Harlow*, 457 U.S. at 818, increasingly means that public officials—even those acting deliberately in bad faith—will escape liability for their misconduct, unless the relevant jurisdiction has already happened to consider and rule upon a case with functionally identical circumstances. That is, under the same federal remedy statute applying the same federal conduct standard, a resident of Texarkana who has her constitutional rights violated may be denied any meaningful relief depending on whether the wrongdoing occurred in Texas (the Fifth Circuit), Arkansas (the Eighth), or Oklahoma (the Tenth). These arbitrary geographical and temporal barriers to recovering damages for a violation of constitutional rights

have no basis in Section 1983's text, history, or purpose, and produce inconsistent results across circuits that this Court can and should reconcile.

Consider the following sample of recent cases in which Section 1983 claimants prevailed on the merits, only to have a court deny recovery because the adjudicated constitutional violation was nevertheless insufficiently "clearly established":

- In a decision that managed to be both per curiam and deeply divided, the Tenth Circuit effectively denied relief against deputy sheriffs who conducted an "early-morning, SWAT-style raid" in which a family with young children was detained for two-and-a-half hours in their house after a warrant-based search turned up empty. The source of the supposed probable cause: an investigation of "a small amount of wet vegetation" from the family's trash can—tea leaves purchased from a garden shop—that allegedly field-tested positive for marijuana. Struggling to apply the "clearly established law" standard, the panel generated three separate opinions, splintering between themselves on whether aspects of the unlawful investigation, basis for the warrant, and use of force in executing the warrant had been "clearly established." *Harte* v. *Bd. of Comm'rs of Cty. of Johnson, Kan.*, 864 F.3d 1154 (10th Cir. 2017).
- A divided Sixth Circuit panel held that it was not "beyond debate" that a police officer, who later admitted to mischaracterizing the victim's allegedly threatening conduct, violated the Constitution by shooting a fleeing suspect

three times in the chest and abdomen after a car chase. Three separate dashboard cameras concededly failed to show that the suspect posed any immediate danger to either the officer or the public. *Latits* v. *Phillips*, 878 F.3d 541 (6th Cir. 2017).

- The Fifth Circuit upheld a grant of qualified immunity to a police officer who, without probable cause, handcuffed a witness, immediately after a SWAT team killed her father during a standoff, and then forcibly detained her in a police car for roughly two hours before taking her to a station where she was interrogated for another five hours. The court held that no prior case law clearly established that the officer's decision to handcuff and detain for two hours a material witness was unlawful "at the least when the witness was standing beside a person when the police shot him." *Lincoln* v. *Turner*, 874 F.3d 833, 850 (5th Cir. 2017).
- The Ninth Circuit, over a dissent, upheld a grant of qualified immunity to a police officer who, during a routine traffic stop, directed the vehicle's driver to sit on the officer's cruiser, pointed a gun at the driver's head, and threatened to kill him if he declined to surrender on weapons charges when the officer discovered a gun in the backseat. The majority reasoned that the unlawfulness of the officer's actions had not been clearly established under the circumstances, because the stop had occurred at night, the driver had a prior conviction for unlawful firearms possession, and the driver "stood six feet tall," "weighed two hundred and

> sixty-five pounds," and "was only 10-15 feet away" from the gun. *Thompson* v. *Rahr*, 885 F.3d 582, 588 (9th Cir. 2018).

For ordinary citizens and law-abiding police officers alike, these cases can hardly inspire confidence in our "government of laws." *Marbury*, 5 U.S. (1 Cranch) at 163.[18]

Qualified immunity also hampers Section 1983 as a tool of accountability by affording federal courts the discretion to avoid deciding whether alleged misconduct even violated federal rights in the first place, and to dispose of otherwise-winning claims solely on the ground that the violation was not "clearly established." *Pearson*, 555 U.S. at 236.

The *Pearson* escape hatch creates a vicious circle. Violations must be clearly established to survive qualified immunity; but qualified immunity itself stunts the development of the law and prevents it

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[18] *See also, e.g.*, *Stanfield* v. *City of Lima*, __ F. App'x __, No. 17-3305, 2018 WL 1341646 (6th Cir. Mar. 15, 2018) (excessive use of force not clearly established when video showed that the officers repeatedly kneed in the ribs an intoxicated suspect and struck him in the legs with a flashlight after taking him to the ground); *Pauly* v. *White*, 874 F.3d 1197 (10th Cir. 2017) (two officers who surreptitiously approached home late at night and failed to identify themselves, ultimately prompting a third officer to shoot and kill one of the residents, were entitled to qualified immunity because it was not clearly established that the third officer's decision to shoot the victim constituted excessive force); *Scott* v. *City of Albuquerque*, 711 F. App'x 871 (10th Cir. 2017) (officer's decision to unlawfully detain, handcuff, interrogate, and ultimately book and charge seventh-grader who was in the hallways during class as permitted by his disability accommodation received qualified immunity, because at the time, no prior case had interpreted the specific New Mexico probable-cause statute at issue).

from becoming clearly established. *See, e.g.*, *Sims* v. *City of Madisonville*, ___ F.3d ___, No. 16-20440, 2018 WL 3151077, at *3 (5th Cir. June 28, 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."); *see generally* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 6 (2015) (federal courts "find constitutional violations yet grant qualified immunity less frequently now (less than one-tenth of the time) than they did before *Pearson*"). That some untold number of federal violations now passes through the federal courts without ever being acknowledged undercuts Section 1983's central accountability function.

Taken together, these features of qualified immunity effectively guarantee that, in all but the most extreme cases, the wronged will receive no remedy and wrongdoers no rebuke. That gets things precisely backwards. Section 1983 should be interpreted to reflect its text and purpose, and courts should be suitably equipped to carry out their critical role in enforcing accountability for all public officials pursuant to Section 1983's command.

II. QUALIFIED IMMUNITY IMPOSES PROHIBITIVE AND UNJUSTIFIED COSTS ON CIVIL-RIGHTS LITIGANTS.

Continued adherence to qualified immunity also carries severe consequences for Section 1983 litigants. The doctrine not only tilts overwhelmingly in public officials' favor, but also imposes extraordinary

costs on potential civil-rights litigants. These costs can end Section 1983 claims before they begin, further shielding official misconduct from public scrutiny and legal accountability.

Qualified immunity functions not merely as a defense to liability, but as an immunity from suit altogether. Thus, the "general rule" that officials cannot appeal from an adverse decision prior to final judgment "does not apply" to "a claim of qualified immunity," *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2018–19 (2014), because immunity from suit, once lost, "can never be reviewed at all," *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985). Like the substantive defense itself, that procedural hurdle is a creature of judicial devise; Congress built into Section 1983 no special procedures for official wrongdoers.

Hence, Section 1983 plaintiffs, before their claims can be heard on the merits, must overcome qualified immunity not just in the district court, but also on the inevitable interlocutory appeal. The resources required to see that process through may render the effort untenable, with financial outlays compounding as evidence grows stale. These effects will be especially pronounced for claims promising only modest monetary recovery.

In a recent survey of several dozen civil-rights litigators, "Nearly every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage." Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 492 (2011). For some respondents, qualified immunity was the "primary factor" used

when deciding to take on a representation. *Id.* Interlocutory appeals, "with stays of discovery routinely granted pending the resolution of a qualified immunity defense," further deterred litigation. *Id.* at 493. These anecdotal reports reflect common sense: With every aspect of the case stacked against you from the outset, why bother?

To be sure, these effects may be seen by some as a feature of qualified immunity, not a bug. For those, the doctrine is best explained as a judicial attempt to temper the perceived excesses of Congress. *See, e.g.*, *Parratt* v. *Taylor*, 451 U.S. 527, 553–554, n.13 (1981) (Powell, J., concurring) (characterizing Section 1983 as "a statute that already has burst its historical bounds" to become "a major vehicle for general litigation"), *overruled by Daniels* v. *Williams*, 474 U.S. 327 (1986). By imposing heightened burdens on Section 1983 plaintiffs, the reasoning goes, the risks posed by vexatious suits against public officials are decreased; those theoretical deterrence gains purportedly counterbalance any harms that will go unremedied.

But qualified immunity is too strong a medicine for this perceived ill. Generally applicable rules governing pleading and proof are more than up to the task of weeding out frivolous Section 1983 litigation—just as they do in all others.[19] And regardless, the ex-

[19] Moreover, in the specific context of law enforcement, the substantive standard for Fourth Amendment "reasonableness" already accounts "for 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, 397 (1989). Thus, qualified immunity amounts to a "double counting" of the practical need for deference to police decisionmaking.

traordinary set of qualified-immunity-only barriers that now block a plaintiff's path to recovery are unwarranted in light of Section 1983's text and purpose. The Court could, after all, fashion a "the King always wins" rule that would similarly stifle unmeritorious claims—and that would effectively repeal Section 1983 altogether.

The current "the King *almost* always wins" regime is a difference in degree, not in kind. By seeking to insulate from liability public officials in such an aggressive and legally untethered fashion, Section 1983's statutory ends have been replaced with the judiciary's "freewheeling policy choice," *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986). Even if providing a meaningful avenue of relief to victims of official wrongdoing were, as a policy matter, no longer worth pursuing, Congress is the only branch of government tasked with saying so.

III. QUALIFIED IMMUNITY HARMS LAW-ENFORCEMENT OFFICIALS BY ERODING PUBLIC TRUST AND UNDERMINING THE RULE OF LAW.

Qualified immunity harms not just the direct victims of official misconduct and their communities, but public officials themselves—especially those who work in law enforcement.

Policing is dangerous, difficult work. Without the trust of their communities, officers cannot effectively carry out their responsibilities. "Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness." Inst. on Race and Justice, Northeastern

Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20–21 (2008).[20]

In other words, "when a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness." Fred O. Smith, *Abstention in a Time of Ferguson*, 131 Harv. L. Rev. 2283, 2356 (2018); *accord Investigation of the Ferguson Police Department*, *supra* at 80 (A "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.").

When properly trained and supervised, the vast majority of officers uphold their constitutional obligations, and will benefit if the legal system reliably holds rogue officers accountable for their misconduct. Indeed, "[g]iven the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated." Inst. on Race and Justice, *supra* at 21. Qualified immunity prevents law-enforcement officers from overcoming those negative perceptions about policing. It instead protects the distinct minority of police who routinely break the law and threatens to bias entire communities against law enforcement, even for isolated instances of misconduct.

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[20] *Available at* https://bit.ly/2KD0aws.

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

Despite the growing recognition that qualified immunity harms the very officers it seeks to protect, this Court has asserted that qualified immunity prevents over-deterrence because "there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 814 (alterations and quotation marks omitted); *see also Forrester* v. *White*, 484 U.S. 219, 223 (1988) ("When officials are threatened with personal liability * * * they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct.").

This concern is empirically unfounded. The widespread availability of indemnification *already* protects individual officers from ruinous judgments. A recent study shows that governments paid approximately 99.98 percent of the dollars recovered in lawsuits against police officers. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). Qualified immunity is largely premised on the faulty assumption that individual officers pay their own judgments. *See, e.g.*, Nina Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 78 (1999).

Far from threatening individual officers with massive damages judgments, then, rethinking qualified immunity would simply ensure that victims whose rights are violated have a remedy. Departments facing more frequent judgments may also invest in better prophylactic training, hiring, disciplinary, and other salutary programs. Lawsuits can serve as "a valuable source of information about police-misconduct claims," and police departments that "use lawsuit data—with other information—to identify problem officers, units, and practices" are better equipped to "explore personnel, training, and policy issues that may have led to the claims." Joanna C. Schwartz, *What Police Learn From Lawsuits*, 33 Cardozo L. Rev. 841, 844–845 (2012).

CONCLUSION

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury*, 5 U.S. (1 Cranch) at 163. Yet qualified immunity subverts this axiom and exacerbates our accountability crisis by denying justice to victims of unconstitutional misconduct, while harming the very law-enforcement officers it seeks to protect.

For the foregoing reasons and those in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
NICHOLAS S. BROD
KYLE M. DRUDING
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

Counsel for Amici Curiae

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APPENDIX

APPENDIX

KRISTEN WAGGONER
DAVID CORTMAN
JORDAN LORENCE
ALLIANCE DEFENDING FREEDOM
440 First Street, N.W., Suite 600
Washington, D.C. 20001

Counsel for Alliance Defending Freedom

JEFFREY WHITE
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, N.W., Suite 200
Washington, D.C. 20001

Counsel for the American Association for Justice

DAVID COLE
SOMIL TRIVEDI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

Counsel for the American Civil Liberties Union Foundation

VICTOR E. BERNSON, JR.
AMERICANS FOR PROSPERITY
1310 N. Courthouse Road, Suite 700
Arlington, VA 22201

Counsel for Americans for Prosperity

JOHN J. VECCHIONE
ERICA L. MARSHALL
CAUSE OF ACTION INSTITUTE
1875 Eye Street, N.W., Suite 800
Washington, D.C. 20006

Counsel for the Cause of Action Institute

SHANA O'TOOLE
DUE PROCESS INSTITUTE
700 Penn. Avenue S.E., #2019
Washington, D.C. 20003

Counsel for the Due Process Institute

DAVID LANGHAIM
FREEDOM PARTNERS CHAMBER OF COMMERCE
2300 Wilson Boulevard, Suite 500
Arlington, VA 22201

Counsel for Freedom Partners Chamber of Commerce

DANA BERLINER
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203

Counsel for the Institute for Justice

CAPTAIN LEIGH MADDOX (RET.)
THE LAW ENFORCEMENT ACTION PARTNERSHIP
121 Mystic Ave., Suite 9
Medford, MA 02155

Counsel for the Law Enforcement Action Partnership

AMIR H. ALI
THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
718 7th Street, N.W.
Washington, D.C. 20001

Counsel for the Roderick & Solange MacArthur Justice Center

JEFFREY T. GREEN
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street, N.W.
Washington, D.C. 20036

Counsel for the National Association of Criminal Defense Lawyers

JOHN BURTON
THE NATIONAL POLICE ACCOUNTABILITY PROJECT
128 Fair Oaks Avenue
Pasadena, CA 91103

Counsel for the National Police Accountability Project

JENNIFER BENNETT
PUBLIC JUSTICE
475 14th Street, Suite 610
Oakland, CA 94612

Counsel for Public Justice

MANUEL S. KLAUSNER
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 W. Fifth Street, Suite 800
Los Angeles, CA 90071

Counsel for Reason Foundation

ALAN GURA
GURA PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314

Counsel for the Second Amendment Foundation