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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. To overcome the defense of qualified immunity, is a plaintiff required to show that the "particular practice" at issue has already been held unlawful by a controlling court?

2. Should the doctrine of qualified immunity be modified or overruled?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is the deleterious effect that qualified immunity has on the power of citizens to vindicate their constitutional rights, and the erosion of accountability that the doctrine encourages.

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF THE ARGUMENT

Over the last half-century, the doctrine of qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based. The text of 42 U.S.C. § 1983 ("Section 1983") makes no mention of immunity, and the common law of 1871 did not include any freestanding defense for all public officials. With limited exceptions, the baseline assumption at the founding and throughout the nineteenth century was that public officials were strictly liable for unconstitutional misconduct. Judges and scholars alike have thus increasingly arrived at the conclusion that the contemporary doctrine of qualified immunity is unmoored from any lawful justification and in need of correction.[2]

The Second Circuit's decision in this case throws the shortcomings of qualified immunity into sharp relief. The lower court unanimously agreed that Petitioner, Almighty Supreme Born Allah, was deprived of his constitutional rights when Respondents kept him in solitary confinement for over a year as a pretrial detainee. It was clearly established at the time of this

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[2] *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT (Fall 2017) (essay by judge on the U.S. District Court for the Eastern District of Wisconsin); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Jon O. Newman, Opinion, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://perma.cc/9R6N-323Z (article by senior judge on the U.S. Court of Appeals for the Second Circuit).

deprivation that pretrial detainees may not be subjected to punitive treatment, and that the dungeon-like conditions in which Allah was kept were punitive because they served no legitimate purpose in his case. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

Yet in a split decision, the majority granted qualified immunity, because "Defendants were following an established DOC practice," and "[n]o prior decision of the Supreme Court or of this Court . . . has assessed the constitutionality of that particular practice." *Allah v. Milling*, 876 F.3d 48, 59 (2017). This understanding of qualified immunity goes well beyond this Court's instruction "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and effectively requires what the Court has always insisted was unnecessary—a case directly on point.

The decision below adds to a growing chorus of confusion and inconsistency among lower courts on how to identify "clearly established law." The Petition should be granted to resolve these inconsistencies, but also to address the maturing contention that qualified immunity itself is unlawful. This case is an ideal vehicle for such reconsideration, because there are no disputed facts, Allah has already prevailed at trial, and the Second Circuit unanimously agreed that his constitutional rights were violated. The case turns solely on the legal availability of qualified immunity.

If the Court is inclined to reconsider qualified immunity, it should not hesitate to do so based on *stare decisis*. The amorphous nature of the "clearly established law" test has precluded the doctrine from effect-

ing the stability and predictability that normally justify respect for precedent. Moreover, the Court has already treated qualified immunity as a judge-made, common-law doctrine, and thus appropriate for revision. *See Pearson v. Callahan*, 555 U.S. 223, 233-34 (2009). Continued adherence to the doctrine would not serve valid reliance interests, but would only prolong the inability of citizens to vindicate their constitutional rights.

STATEMENT OF THE CASE

A. Factual Background

"The facts as found by the district court are not in dispute" in this appeal. *Allah*, 876 F.3d at 51. Allah was an inmate with the Connecticut Department of Correction ("DOC"). *Id.* The DOC assigns inmates an "overall risk score" from one to five (higher is riskier), and any inmate who receives a risk score of five is placed in "Administrative Segregation." *Id.* Such segregation entails restrictive housing, close management, and "physical separation from the general prison population." *Id.*

In December 2009, Allah was a post-conviction prisoner in DOC custody, with a risk score of three. *Id.* at 52. On December 22, 2009, he and other inmates were awaiting a commissary visit, when they were told the visit would be delayed. Allah asked an officer present if he could speak to a lieutenant about the delay—a request which the officers perceived as "an attempt to incite other inmates to protest the delay." *Id.* Because of this one act—calmly asking a question—Allah received a disciplinary report for "Impeding Order,"

had his overall risk score bumped up to five (the highest level), and was placed in Administrative Segregation from February 2010 through March 2010. *Id.*

Allah's due process claims do not arise from this initial segregation, but rather from the treatment he received when he returned to DOC custody as a pretrial detainee in September 2010. *Id.* Upon re-entry, he was transferred to a maximum-security facility, and was again placed in Administrative Segregation. The sole justification for his placement was that he had been in Administrative Segregation when he was discharged earlier that year, and it was DOC policy to continue segregating such detainees on their return. *Id.*

DOC segregation is a three-phase program, with Phase I being the most restrictive. Allah began Phase I on October 4, 2010, and was kept there for nearly seven months. *Id.* at 53. For this entire period, he spent 23 hours a day alone in his cell. *Id.* Whenever removed from his cell, he was handcuffed behind his back and fitted with leg irons. *Id.* He was permitted three 15-minute showers per week, during which he was still forced to wear leg irons and wet underwear. *Id.* at 58. He received no programming, counseling, or therapy during the entirety of Phase I. *Id.* Allah proceeded to Phase II in late April 2017, then to Phase III four months later, and then finally was taken out of Administrative Segregation on November 3, 2010—over a year after his original placement. *Id.* at 54.

B. Procedural History

In April 2011, Allah brought a Section 1983 claim against the prison officials responsible for the decision to place and keep him in Administrative Segregation. *Id.* at 54. The district court held a two-day bench trial

in December 2015, and then issued an opinion ruling that the Defendants had violated Allah's due process rights, and that they were not entitled to qualified immunity. The court entered judgment for Allah and awarded him $62,650 in compensatory damages. *Id.*

The Defendants then appealed to the Second Circuit, arguing that their conduct was lawful, and that, in the alternative, they were entitled to qualified immunity. The Second Circuit unanimously affirmed that Allah's rights had been violated, relying on this Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), which held that detainees may not be punished before adjudication of guilt. The Second Circuit had no difficulty concluding that the extreme conditions of Allah's segregation "cannot be said to be reasonably related to institutional security," and that "Defendants have identified no other legitimate governmental purpose justifying the placement." *Allah*, 876 F.3d at 58. Therefore, his restrictions were purely punitive, and violated his due process rights. *Id.*

But in a split decision, the court held that the Defendants were entitled to qualified immunity. *Id.* at 60. The majority acknowledged that "the extremity of the conditions imposed upon Allah come perilously close to the Supreme Court's description of 'loading a detainee with chains and shackles and throwing him in a dungeon.'" *Id.* 58 (quoting *Wolfish*, 441 U.S. at 539 n.20). Nevertheless, the majority determined that Allah's rights were not clearly established, because "Defendants were following an established DOC practice," and "[n]o prior decision of the Supreme Court or of this Court . . . has assessed the constitutionality of that particular practice." *Id.* at 59.

Judge Pooler dissented from this part of the decision. *Id.* at 60. He argued that the conditions in which Allah was kept were functionally identical to the extreme conditions that the Supreme Court in *Wolfish* said "could only be justified by a significant government interest." *Id.* at 62. Because there was *no* legitimate interest here, and because Allah's initial placement was entirely the result of one trivial infraction, the Defendants should not receive qualified immunity. *Id.* at 62-63.

REASONS FOR GRANTING THE PETITION

I. The Courts Of Appeals Are Divided In Their Application Of The "Clearly Established Law" Standard.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court announced the rule that defendants are immune from liability under Section 1983 unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Since then, the Court has endeavored to articulate the proper way to conduct this analysis—in 31 separate qualified immunity decisions.[3] Yet despite the Court's attention to this issue, lower courts remain deeply divided and inconsistent on the nebulous question of how to determine when rights are "clearly established."

For example, the Sixth and Eleventh Circuits—like the Second Circuit here—have effectively held that overcoming qualified immunity requires a prior case

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[3] *See* Baude, *supra*, at 82, 88-90 (identifying cases from 1982–2017); *see also Kisela v. Hughes*, 584 U.S. ___, No. 17-467, slip op. (Apr. 2, 2018); *District of Columbia v. Wesby*, 583 U.S. ___, No. 15-1485, slip op. (Jan. 22, 2018).

with functionally identical facts. In *Latits v. Phillips*, 878 F.3d 541 (6th Cir. 2017), a split panel of the Sixth Circuit held that it was unlawful for a police officer to ram a suspect's car off the road, run up to his window, and shoot him three times, when the suspect posed no ongoing threat. *Id.* at 552. Yet the majority granted qualified immunity—notwithstanding prior cases holding that police officers cannot use deadly force on fleeing drivers who pose no threat—because these cases "did not involve many of the key[] facts in this case, such as car chases on open roads and collisions between the suspect and police cars." *Id.* at 553. The dissent argued that "[i]t is a truism that every case is distinguishable from every other," but that "the degree of factual similarity that the majority's approach requires is probably impossible for any plaintiff to meet." *Id.* at 558 (Clay, J., concurring in part and dissenting in part).

Similarly, in *Young v. Borders*, 850 F.3d 1274 (11th Cir. 2017), the Eleventh Circuit declined to rehear en banc a case in which police ran up to the victim's home late at night without a warrant, slammed on the door without identifying themselves, and shot and killed the victim when he opened the door with a gun in hand. The majority held that the police did not violate clearly established law, notwithstanding the dissent's assertion that "[i]n circumstances closely resembling this case, this Court held that an officer's use of deadly force was excessive even though the victim had a gun." *Id.* at 1292 (Martin, J., dissenting in the denial of rehearing en banc).

On the other end of the spectrum, the Seventh Circuit has rejected an argument almost identical to that embraced by the Second Circuit here. In *Phillips v.*

Community Insurance Corp., 678 F.3d 513 (7th Cir. 2012), police argued that they should receive immunity for using a new gun firing polyurethane bullets because "on the date of the arrest, no case from the Supreme Court or from this circuit had held use of the SL6 [gun] unconstitutional." *Id.* at 528. The Seventh Circuit (albeit over a dissent) explained that this position "misconstrue[s] the qualified immunity analysis" and that "[e]ven where there are 'notable factual distinctions,' prior cases may give an officer reasonable warning that his conduct is unlawful." *Id.* (quoting *Estate of Escobedo v. Bender*, 600 F.3d 770, 781 (7th Cir. 2010)).

The Fourth and Ninth Circuits have also stopped short of requiring functionally identical facts, though both such decisions were likewise issued over a dissent. In *Sims v. Labowitz*, 885 F.3d 254 (4th Cir. 2018), the Fourth Circuit held that it violated clearly established law for a police officer to execute a search warrant by ordering a teenage boy to masturbate in front of him, even though "no other court decisions directly have addressed circumstances like those presented here." *Id.* at 264. *But see id.* at 269 (King, J., dissenting) ("[N]o reasonable police officer or lawyer would have considered this search warrant . . . to violate a clearly established constitutional right.").

Similarly, in *Demaree v. Pederson*, 887 F.3d 870 (9th Cir. 2018), the Ninth Circuit denied immunity to social workers who had unlawfully removed children from their home. The applicable right was clearly established because of "a very specific line of cases . . . establishing that children may not be removed from their homes without a court order or warrant absent cogent, fact-focused reasonable cause to believe the

children would be imminently subject to physical injury or physical sexual abuse." *Id.* at 884. The dissent would have granted immunity, however, because no prior case addressed "circumstances like these, where the type of abuse alleged is sexual exploitation, and it would take a social worker at least several days to obtain a removal order." *Id.* at 891 (Zouhary, J., concurring and dissenting in part).

Finally, qualified immunity has splintered a panel of the Tenth Circuit into three conflicting positions on whether the various acts of misconduct in that case violated clearly established law. *See Harte v. Bd. of Comm'rs*, 864 F.3d 1154, 1158, 1168, 1198 (10th Cir. 2017). The disarray in *Harte* is a perfect microcosm of the intractable division among the courts of appeals in general. Certiorari is necessary to address and resolve this persistent and growing confusion.

II. The Second Circuit's Analysis Is Contrary To Supreme Court Precedent.

The Second Circuit's decision below is flatly inconsistent with this Court's qualified immunity jurisprudence. This Court has instructed lower courts "not to define clearly established law at a high level of generality," *Ashcroft*, 563 U.S. at 742, and held that "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

But the Court has also maintained that its case law "does not require a case directly on point for a right to be clearly established," *Kisela v. Hughes*, 584 U.S. ___, No. 17-467, slip op. at 4 (Apr. 2, 2018) (quoting *White*, 137 S. Ct. at 551), and that "'general statements of the

law are not inherently incapable of giving fair and clear warning.'" *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

The Second Circuit went well beyond the mandate to define constitutional rights in a "particularized" manner, and instead required a prior case specifically addressing the "particular practice" employed by Defendants. *Allah*, 876 F.3d at 59. That approach is plainly at odds with this Court's instruction that "there is no need that 'the very action in question [have] previously been held unlawful.'" *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377 (2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)) (alteration in original).

III. Qualified Immunity Is Legally Unjustified And Ought To Be Reconsidered.

The decision below is incorrect under existing case law, and certiorari would be appropriate in this case to address the division among the courts of appeals in their application of the "clearly established law" standard. But more importantly, this Petition gives the Court the opportunity to reconsider the doctrine of qualified immunity itself.

A. The Text Of 42 U.S.C. § 1983 Does Not Provide For Any Kind Of Immunity.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Yet few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. As currently codified, Section 1983 provides in relevant part:

> ***Every person who***, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, ***subjects***, or causes to be subjected, ***any citizen*** of the United States or other person within the jurisdiction thereof ***to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured*** in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphases added).

Notably, "the statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language just says that any person acting under state authority who causes the violation of any federal right "shall be liable to the party injured." The unconditional nature of this provision is confirmed by the succeeding clause, which creates a limited exception for actions against judicial officers. Thus, under the negative-implication canon, the expression of one limitation on the scope of relief implies the exclusion of other such limitations. *See Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992).

This unqualified textual command makes sense in light of the statute's historical context. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, itself part of a "suite of 'Enforcement Acts' designed to help combat lawlessness

and civil rights violations in the southern states."[4] This purpose would have been undone by anything resembling modern qualified immunity jurisprudence. The Fourteenth Amendment itself had only been adopted three years earlier, in 1868, and the full sweep of its broad provisions was obviously not "clearly established law" by 1871. If Section 1983 had been understood to incorporate qualified immunity, then Congress's attempt to address rampant civil rights violations in the post-war South would have been toothless.

Of course, no law exists in a vacuum, and a statute will not be interpreted to extinguish by implication longstanding legal defenses available at common law. *See Forrester v. White*, 484 U.S. 219, 225-26 (1988). In the context of qualified immunity, the Court correctly frames the issue as whether or not "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)). But the historical record shows that the common law of 1871 did not, in fact, provide for such immunities.

B. From The Founding Through The Passage Of Section 1983, Good Faith Was Not A Defense To Constitutional Torts.

The doctrine of qualified immunity is a kind of generalized good-faith defense for all public officials, as it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

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

But the relevant legal history does not justify importing any such defense into the operation of Section 1983; on the contrary, the sole historical defense against constitutional torts was *legality*.[5]

In the early years of the Republic, constitutional claims typically arose as part of suits to enforce general common-law rights. For example, an individual might sue a federal officer for trespass; the defendant would claim legal authorization as a federal officer; and the plaintiff would in turn claim the trespass was unconstitutional, thus defeating the officer's defense.[6] As many scholars over the years have demonstrated, these founding-era lawsuits did not permit a good-faith defense to constitutional violations.[7]

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[8] which involved a claim against an American naval captain who captured a Danish ship

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

[6] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506-07 (1987). Of course, prior to the Fourteenth Amendment, "constitutional torts" were almost exclusively limited to federal officers.

[7] *See generally* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3-14, 16-17 (2017); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14-21 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414-22 (1986).

[8] *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863 (2010) ("No case better illustrates the standards to which federal government officers were held than *Little v. Barreme*.").

off the coast of France. Federal law authorized seizure only if a ship was going *to* a French port (which this ship was not), but President Adams had issued broader instructions to also seize ships coming *from* French ports. *Id.* at 178. The question was whether Captain Little's reliance on these instructions was a defense against liability for the unlawful seizure.

The *Little* decision makes clear that the Court seriously considered but ultimately rejected the very rationales that would come to support the doctrine of qualified immunity. Chief Justice Marshall explained that "the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages." *Id.* at 179. He noted that the captain had acted in good-faith reliance on the President's order, and that the ship had been "seized with pure intention." *Id.* Nevertheless, the Court held that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* In other words, the officer's only defense was legality, not good faith.

This "strict rule of personal official liability"[9] persisted through the nineteenth century. Its severity was mitigated somewhat by the prevalence of successful petitions to Congress for indemnification.[10] But on the judicial side, courts continued to hold public officials liable for unconstitutional conduct without regard to a good-faith defense. *See, e.g.*, *Miller v. Horton*, 26 N.E.

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

[10] Pfander & Hunt, *supra*, at 1867 (noting that, in the early Republic and antebellum period, public officials secured indemnification from Congress in about sixty percent of cases).

100, 100-01 (Mass. 1891) (Holmes, J.) (holding liable members of a town health board for mistakenly killing an animal they thought diseased, even when ordered to do so by government commissioners).

Most importantly, the Court originally rejected the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Court held that a state statute violated the Fifteenth Amendment's ban on racial discrimination in voting. *Id.* at 380. The defendants argued that they could not be liable for money damages under Section 1983, because they acted on a good-faith belief that the statute was constitutional.[11] The Court noted that "[t]he nonliability . . . of the election officers for their official conduct is seriously pressed in argument," but it ultimately rejected any such good-faith defense. *Id.* at 378.

While the *Myers* Court did not elaborate much on this point, the lower court decision it affirmed was more explicit:

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910). This forceful rejection of any general good-faith defense "is exactly the logic of the founding-era cases,

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

alive and well in the federal courts after Section 1983's enactment."[12]

C. The Common Law Of 1871 Provided Limited Defenses To Certain Torts, Not General Immunity For All Public Officials.

The Court's primary rationale for qualified immunity is the purported existence of similar immunities that were well-established in the common law of 1871. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). But to the extent contemporary common law included any such protections, these defenses were incorporated into the elements of particular torts.[13] In other words, good faith might be relevant to the *merits*, but there was nothing like a freestanding immunity for all defendants.

For example, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826), held that a U.S. naval officer was not liable for capturing a Portuguese ship that had attacked his schooner under an honest but mistaken belief in self-defense. *Id.* at 39. The Court found that the officer "acted with honourable motives, and from a sense of duty to his government," *id.* at 52, and declined to "introduce a rule harsh and severe in a case of first impression," *id.* at 56. But the Court's exercise of "conscientious discretion" on this point was justified as a traditional component of admiralty jurisdiction over "marine torts." *Id.* at 54-55. In other words, the

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

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

good faith of the officer was incorporated into the *substantive* rules of capture and adjudication, not treated as a separate and freestanding defense.

Similarly, as the Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." *Id.* at 556-57. But this defense was not a protection from liability for unlawful conduct. Rather, at common law, an officer who acted with good faith and probable cause simply did not commit the tort of false arrest in the first place (even if the suspect was innocent). *Id.*

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity.[14] *Pierson* involved a Section 1983 suit against police officers who arrested several people under an anti-loitering statute that the Court subsequently found unconstitutional. Based on the common-law elements of false arrest, the Court held that "the defense of good faith and probable cause . . . is also available to [police] in the action under [Section] 1983." *Id.* Critically, the Court extended this defense to include not just a good-faith belief in probable cause for the *arrest*, but a good-faith belief in the legality of the *statute* under which the arrest itself was made. *Id.* at 555.

Even this first extension of the good-faith aegis was questionable as a matter of constitutional and common-law history. There is a major difference between good faith as a factor that determines whether conduct was unlawful in the first place (as with false arrest),

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

and good faith as a defense to liability for admittedly unlawful conduct (as with enforcing an unconstitutional statute). As discussed above, the baseline historical rule at the founding and in 1871 was strict liability for constitutional violations. *See Anderson*, 182 F. at 230 (anyone who enforces an unconstitutional statute "does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law").[15]

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue—false arrest—admitted a good-faith defense at common law. But the Court's qualified immunity cases soon discarded even this loose tether to history. In 1974, the Court abandoned the analogy to common-law torts that permitted a good-faith defense. *See Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). And in 1982, the Court disclaimed reliance on the subjective good faith of the defendant, instead basing qualified immunity on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow*, 457 U.S. at 818.

The Court's qualified immunity jurisprudence has therefore diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support, and the relevant history establishes a baseline of

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[15] *See also* Engdahl, *supra*, at 18 (a public official "was required to judge at his peril whether his contemplated act was actually authorized . . . [and] . . . whether . . . the state's authorization-in-fact . . . was constitutional"); Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927) ("Prior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts.").

strict liability for constitutional violations—at most providing a good-faith defense against claims analogous to some common-law torts. Yet qualified immunity functions today as an across-the-board defense, based on a "clearly established law" standard that was unheard of before the late twentieth century. In short, the doctrine has become exactly what the Court assiduously sought to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

D. This Case Is An Ideal Vehicle For Reconsidering Qualified Immunity.

The legal and practical infirmities of qualified immunity have not gone unnoticed by members of this Court. *See Kisela v. Hughes*, 584 U.S. ___, No. 17-467, slip op. at 15 (Apr. 2, 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"); *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 USC § 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.").

Unless and until this tension is addressed, the Court will "continue to substitute [its] own policy preferences for the mandates of Congress." *Ziglar*, 137 S. Ct. at 1872. Fortunately, this Petition presents exactly that "appropriate case" for the Court to "reconsider [its] qualified immunity jurisprudence." *Id.*

First, the Petition squarely presents and develops the argument that qualified immunity should be reconsidered. Pet. at i, 15-21.

Second, the outcome of this case turns on purely legal questions. There are no disputed facts, and the district court has already held a bench trial and awarded a judgment to Allah. If the Second Circuit's legal decision on qualified immunity is reversed, then the case is over.

Third, this case presents that precise scenario in which qualified immunity has both the greatest effect and the least justification. The Second Circuit unanimously found that the Defendants caused the deprivation of Allah's constitutional rights. Under the plain terms of Section 1983, Defendants must be held "liable to the party injured." 42 U.S.C. § 1983. But if the Second Circuit's decision is allowed to stand, Allah will be denied his legislatively mandated remedy, solely because of a judicial doctrine that lacks textual or historical support.

E. *Stare Decisis* Should Not Preclude The Court From Reconsidering Qualified Immunity.

If the Court is inclined to reconsider qualified immunity, it should not hesitate to do so for any reasons sounding in *stare decisis*.

First, the doctrine of qualified immunity has failed to produce the "stability, predictability, and respect for judicial authority" that comprise the traditional justifications for *stare decisis*. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). As explained above in Part I, *supra* pp. 7-10, the "clearly established law" standard announced in *Harlow* has proven hopelessly malleable, and lower court decisions are persistently divided, inconsistent, and unpredictable.

Second, qualified immunity is not entitled to the "special force" that is traditionally accorded *stare decisis* in the realm of statutory precedent. *Hilton*, 502 U.S. at 202. It is doubtful whether qualified immunity should even be characterized as "statutory interpretation," as it is not an interpretation of any particular word or phrase in Section 1983. In practice, the doctrine operates more like federal common law—a realm in which *stare decisis* is less weighty, precisely because the Court is expected to "recogniz[e] and adapt[] to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

But the most compelling reason not to treat this precedent with special solicitude is that this Court itself has not done so in the past. In *Harlow*, for example, the Court replaced subjective good-faith assessment with the "clearly established law" standard. 457 U.S. at 818-19. And the Court created a mandatory sequencing standard in *Saucier v. Katz*, 533 U.S. 194 (2001)—requiring courts to first consider the merits and then consider qualified immunity—but then overruled *Saucier* in *Pearson v. Callahan*, 555 U.S. 223 (2009), which made that sequencing optional.

Indeed, the *Pearson* Court considered and rejected the argument that *stare decisis* should prevent the Court from reconsidering its qualified immunity jurisprudence. The Court noted that the *Saucier* standard was a "judge-made rule" that "implicates an important matter involving internal Judicial Branch operations," and that "experience has pointed up the precedent's shortcomings." *Id.* at 233-34. As this brief has endeavored to show, the same charges could be laid against qualified immunity in general. It would be a strange principle of *stare decisis* that permitted modifications only as a one-way ratchet in favor of *greater* immunity (and against the grain of text and history to boot).

Third, *stare decisis* does not justify adhering to precedent that continues subjecting individuals to unconstitutional conduct. *See Arizona v. Gant*, 556 U.S. 332, 348 (2009). While qualified immunity is not itself a constitutional rule, it has the effect of abetting constitutional violations, because it vitiates the very statute that was intended to secure and vindicate constitutional rights. The mere fact that some state officials may have come to view the protection of the doctrine as an entitlement "does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Id.* at 349.

CONCLUSION

Sound textual analysis, informed legal history, judicial prudence, and basic justice all weigh in favor of reconsidering qualified immunity. This case is an ideal vehicle for that reconsideration. For the foregoing reasons, and those described by the Petitioner, this Court should grant certiorari.

Respectfully submitted,

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