No. 19-899

In the Supreme Court of the United States

Shaniz West,

Petitioner,

v.

Doug Winfield, et al.,

Respondents.

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

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

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

February 20, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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 lack of legal justification for qualified immunity, 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—especially in the context of warrantless invasions of the home.

---

[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. 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 Ninth Circuit's decision in this case constitutes an especially egregious application of qualified immunity, effectively requiring Shaniz West to demonstrate what this Court has always insisted was unnecessary—a prior case with virtually identical facts. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) ("'[T]his Court's caselaw does not require a case directly on point for a right to be clearly established . . . .'" (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017))). Here, the panel majority effectively acknowledged that "no

---

[2] *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

reasonable person would have understood [West]'s consent [to enter her home] to encompass shooting tear gas canisters into the house." App. 13. Nevertheless, the majority denied relief to West because there was no prior case specifically holding that consent to enter a home did *not* include consent to use tear gas cannisters. App. 15.

For the last several years, the Cato Institute has argued that qualified immunity lacks any proper legal basis and ought to be reconsidered outright.[3] While the Petition does not ask whether the doctrine as a whole should be reconsidered, it does ask the Court to address the "broader disagreement about what constitutes 'clearly established' law for purposes of qualified immunity." Pet. at 14. Such clarification is absolutely crucial today, as the Ninth Circuit's mode of analysis is far from an outlier. On the contrary, lower courts increasingly grant immunity simply because there is no case exactly on point, without meaningfully engaging the question of whether existing case law would have put a reasonable official on notice that their conduct was unlawful. Even if the Court is unwilling to reconsider qualified immunity entirely, granting the petition will allow it to curb the worst excesses of the doctrine.

Moreover, the specific Fourth Amendment question at issue in this case is especially important, because an aggressive application of qualified immunity to

---

[3] *See, e.g.*, Brief of the Cato Institute as *Amicus Curiae* Supporting Petitioners, *Pauly v. White*, No. 17-1078 (U.S. Sup. Ct., Mar. 2, 2018); Brief of the Cato Institute as *Amicus Curiae* Supporting Petitioner, *Baxter v. Bracey*, No. 18-5102 (U.S. Sup. Ct., May 30, 2019).

scope-of-consent claims seriously undermines the warrant requirement itself. "[W]hen it comes to the Fourth Amendment, the home is first among equals," *Florida v. Jardines*, 569 U.S. 1, 6 (2013)—and the special sanctity of the home means that police generally need a warrant to enter a home, subject to narrow exceptions like consent. But if a civil rights plaintiff must find a case exactly on point to show that a search was *not* within the scope of consent, then the consent "exception" will effectively swallow the rule.

ARGUMENT

I. THE DOCTRINE OF QUALIFIED IMMUNITY IS UNTETHERED FROM ANY STATUTORY OR HISTORICAL JUSTIFICATION.

Notwithstanding that the Petition does not explicitly call upon the Court to reconsider qualified immunity itself, the Court should still consider the questions presented with an eye toward the doctrine's fundamentally shaky legal foundations. It is troubling enough that lower courts routinely deny justice to Section 1983 claimants in defiance of this Court's precedent. But the fact that they do so in reliance on a doctrine that itself lacks a proper foundation in the text or history of Section 1983 means it is all the more important for this Court to put a halt to the most egregious applications of that doctrine.

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:

> ***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 . . . .

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 a protected right "shall be liable to the party injured."

Section 1983's 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 statutory 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 implications of its broad provisions were not "clearly established law" by 1871. If Section 1983

---

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

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 appropriately 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. 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]

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

In the early years of the Republic, constitutional claims typically arose as part of suits to enforce general common-law rights. For example, an individual might sue a federal officer for trespass; the defendant would claim legal authorization 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 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

---

[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*.").

broader instructions to also seize ships coming *from* French ports. *Id.* at 178. The question was whether Captain Little's reliance on these instructions was a defense against liability for the unlawful seizure.

The *Little* Court seriously considered but ultimately rejected Captain Little's defense, which was based on the very rationales that would later come to support the doctrine of qualified immunity. Chief Justice Marshall explained that "the first bias of my mind was 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, even though its harshness to officials was quite clear,"[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

---

[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).

good-faith defense. *See, e.g.*, *Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891) (Holmes, J.) (holding liable members of a town health board for mistakenly killing an animal they thought diseased, even when ordered to do so by government commissioners).

Most importantly, the 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.

---

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

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910). This forceful rejection of any general good-faith defense "is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983's enactment."[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 the freestanding immunity for all public officials that characterizes the doctrine today.

For example, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826), held that a U.S. naval officer was not liable for capturing a Portuguese ship that had attacked his schooner under an honest but mistaken belief in self-defense. *Id.* at 39. The 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

---

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

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

of "conscientious discretion" on this point was justified as a traditional component of admiralty jurisdiction over "marine torts." *Id.* at 54-55. In other words, the good faith of the officer was incorporated into the *substantive* rules of capture and adjudication, not treated as a separate and freestanding defense.

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.

---

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

Even this first extension of the good-faith aegis was questionable as a matter of constitutional and common-law history. Conceptually, there is a major difference between good faith as a factor that determines whether conduct was unlawful in the first place (as with false arrest), 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] And of course, the Court had *already* rejected incorporation of a good-faith defense into Section 1983 in the *Myers* case—which *Pierson* failed to mention, much less discuss.

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. One might then have expected qualified immunity doctrine to adhere generally to the following model: determine whether the analogous tort permit-

---

[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.").

ted a good-faith defense at common law, and if so, assess whether the defendants had a good-faith belief in the legality of their conduct.

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 v. Fitzgerald*, 457 U.S. 800, 818 (1982).

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 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. Justices of this Court and judges across the country have recognized the legal shortcomings of qualified immunity.

The legal infirmities of qualified immunity have not gone unnoticed by members of this Court. *See*

Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 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.").

A growing chorus of lower-court judges has also recognized the serious legal and practical problems with qualified immunity, with many calling for the Court to reconsider the doctrine. *See, e.g.*, *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) ("I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. Doctrinal reform is arduous, often-Sisyphean work . . . . But immunity ought not be immune from thoughtful reappraisal."); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 U.S. Dist. LEXIS 132455, *46 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying

any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment.").[16]

Unless and until these tensions are addressed, the Court will "continue to substitute [its] own policy preferences for the mandates of Congress." *Ziglar*, 137 S. Ct. at 1872.

---

[16] *See also Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, No. CIV 16-0765, 2018 U.S. Dist. LEXIS 147840, *57 n.10 (D. N.M. Aug. 30, 2018) ("The Court disagrees with the Supreme Court's approach [to qualified immunity]. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy."); *Thompson v. Clark*, No. 14-CV-7349, 2018 U.S. Dist. LEXIS 105225, *26 (E.D.N.Y. June 11, 2018) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny."); *Wheatt v. City of E. Cleveland*, No. 1:17-CV-377, 2017 U.S. Dist. LEXIS 200758, *8-9 (N.D. Ohio Dec. 6, 2017) (criticizing the Supreme Court's decision to permit interlocutory appeals for denials of qualified immunity); 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); Jon O. Newman, Opinion, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016) (article by senior judge on the Second Circuit); Stephen Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219 (2015) (article by former judge of the Ninth Circuit).

II. THE COURT SHOULD GRANT CERT TO CLARIFY THAT CIVIL RIGHTS PLAINTIFFS DO NOT NEED TO IDENTIFY PRIOR CASES WITH FUNCTIONALLY IDENTICAL FACTS.

Although the Petition does not call for the reconsideration of qualified immunity entirely, it does present the Court with a valuable opportunity to clarify its case law and to rein in the most problematic excesses of the doctrine. Specifically, the Court should make clear to lower courts that overcoming qualified immunity does not require plaintiffs to first find a case with a virtually identical factual scenario.

While the Ninth Circuit's decision below diverged from the Sixth and Seventh Circuits on the specific scope-of-consent question at issue in this case, *see* Pet. at 10-14, its general mode of analysis—granting immunity because there is no case exactly on point, no matter how egregiously unlawful the violation—is troublingly common. *See Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) ("To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly.").

The following recent cases illustrate just how exacting the application of "clearly established law" has become in the lower courts, effectively requiring a level of particularity that no plaintiff could feasibly meet:

- In *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017), the Second Circuit, over a dissent, reversed the denial of immunity to prison officials who had kept a man

awaiting trial for drug charges in extreme solitary confinement conditions for seven months. The decision to place him in solitary was all due to one instance of supposed "misconduct," when he asked to speak to a lieutenant about why he was not allowed to visit commissary. The majority agreed the prison guards violated the man's rights because his treatment was not "reasonably related to institutional security" and there was "no other legitimate governmental purpose justifying the placement." *Id.* at 58. But the court still held that the guards were entitled to 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." *Id.* at 59.

- In *Latits v. Philips*, 878 F.3d 541 (6th Cir. 2017), the Sixth Circuit granted immunity to an officer who rammed a fleeing suspect's car off the road, ran up to his car, and shot him three times in the chest, killing him. The court held that the officer violated the man's Fourth Amendment rights, and it acknowledged that several prior cases had clearly established that "'shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat.'" *Id.* at 552-53 (quoting *Hermiz v. City of Southfield*, 484 F. App'x 13, 17 (6th Cir. 2012)). Nevertheless, the majority found these prior cases "distinguishable" because they "involved officers confronting a car in a parking lot and shooting the non-violent driver as he attempted to *initiate* flight," whereas here "Phillips shot Latits after

Latits led three police officers on a car chase for several minutes." *Id.* at 553. The lone dissenting judge noted 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).

- In *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018),[17] the Sixth Circuit granted immunity to two officers who deployed a police dog against a suspect that had surrendered by sitting on the ground with his hands in the air. A prior case had already held that an officer clearly violated the Fourth Amendment when he used a police dog without warning against an unarmed residential burglary suspect who was lying on the ground with his hands at his sides. *See Campbell v. City of Springsboro*, 700 F.3d 779, 789 (6th Cir. 2012). But the court found this prior case insufficient because "Baxter does not point us to any case law suggesting that *raising his hands, on its own*, is enough to put Harris on notice that a canine apprehension was unlawful." *Baxter*, 751 F. App'x at 872 (emphasis added). In other words, prior case law holding it unlawful to deploy police dogs against non-threatening suspects who surrendered by *laying on the ground* did not make clear that it was unlawful to deploy police dogs against non-threatening suspects who surrendered by *sitting on the ground with their hands up*.

[17] Mr. Baxter's petition for a writ of certiorari was docketed on April 10, 2019, and it is currently before the Court. *See Baxter v. Bracey*, No. 18-1287 (U.S. Sup. Ct.).

- In *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019),[18] the Eleventh Circuit, over a dissent, granting immunity to an officer who shot a ten-year-old child lying on the ground, while repeatedly attempting to shoot a family dog that was not posing a threat to anyone. The majority granted immunity based on the "unique facts of this case," *id.* at 1316, and held that "[n]o case capable of clearly establishing the law for this case holds that a temporarily seized person—as was [the child] in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person," *id.* at 1319.
- In *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), [19] the Ninth Circuit granted immunity to officers who stole hundreds of thousands of dollars during execution of a search warrant, by seizing $151,380 in cash and $125,000 in rare coins, but recording only $50,000 in seized property. The court noted that while "the theft of . . . personal property by police officers sworn to uphold the law" might be "morally reprehensible," *id.* at 943, the officers were entitled to immunity simply because "[w]e have never addressed whether the theft of property covered by the terms of a search warrant, and

[18] Ms. Corbitt's petition for a writ of certiorari was docketed on November 26, 2019, and it is currently before the Court. *See Corbitt v. Vickers*, No. 19-679 (U.S. Sup. Ct.).

[19] Mr. Jessop's petition for a writ of certiorari was docketed on February 18, 2020, and it is currently before the Court. *See Jessop v. City of Fresno*, No. 19-1021 (U.S. Sup. Ct.).

seized pursuant to that warrant, violates the Fourth Amendment." *Id.* at 941.

These decisions, along with the Ninth Circuit's decision in this case and many others like it, apply the "clearly established law" standard more aggressively than this Court has ever instructed. But those mistakes are somewhat understandable, as this Court's jurisprudence has hardly been a model of clarity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the 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. This test was intended to define qualified immunity in "objective terms," *id.* at 819, in that it would turn on the "objective" state of the law, rather than the "subjective good faith" of the defendant, *id.* at 816. But the "clearly established law" standard announced in *Harlow* has proven hopelessly malleable and indefinite, because there is simply no objective way to define the level of generality at which it should be applied.

Since *Harlow* was decided, this Court has issued dozens of substantive qualified immunity decisions that attempt to hammer out a workable understanding of "clearly established law," but with little practical success. On the one hand, the Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and stated that "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U. S. 635, 640 (1987)). But on the other hand, it has said that its case

law "does not require a case directly on point for a right to be clearly established," *Kisela*, 138 S. Ct. at 1152 (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)).

How to navigate between these abstract instructions? The Court's specific guidance has been no more concrete—it has stated simply that "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 742). The problem, of course, is that this instruction is circular—how to identify clearly established law depends on whether the illegality of the conduct was clearly established. It is therefore absolutely crucial that this Court clarify the standards for determining "clearly established law," curb the most egregious applications of qualified immunity, and reaffirm the principle that certain constitutional violations are so obvious as to not require prior cases with functionally identical facts.

III. THE NINTH CIRCUIT'S DECISION WILL PERMIT LAW ENFORCEMENT TO USE SCOPE-OF-CONSENT DISPUTES AS AN END-RUN AROUND THE WARRANT REQUIREMENT.

Formally speaking, the Fourth Amendment establishes that for a government search or seizure to be reasonable, "a warrant must generally be secured." *Kentucky v. King*, 563 U.S. 452, 459 (2011). This requirement is, of course, "subject to certain reasonable

exceptions," *id.*, such as exigency, the automobile exception, and searches incident to a lawful arrest. And as a practical matter, when citizens are out in public, it could reasonably be argued that these "exceptions" to the warrant requirement are so broad that they effectively make searches without a warrant the default, rather than the exception. *See California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (observing that the warrant requirement "has become so riddled with exceptions that it [has become] basically unrecognizable").

But the one context in which the warrant requirement still has genuine force is protecting the special sanctity of the privacy of the home. This Court has acknowledged that "when it comes to the Fourth Amendment, the home is first among equals," *Florida v. Jardines*, 569 U.S. 1, 6 (2013), and that "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). The Court has thus resisted interpretations of the Fourth Amendment that would effectively allow exceptions to swallow this rule. *See, e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1668 (2018) (automobile exception does not permit police to enter the curtilage of a home without a warrant).

However, if the Ninth Circuit's application of qualified immunity to West's scope-of-consent claim is allowed to stand, then it will effectively permit exactly the sort of end-run around the warrant requirement that this Court has repeatedly rejected. Under regular Fourth Amendment principles, consent itself is a "'jealously and carefully drawn' exception" to the "rule ordinarily prohibiting the warrantless entry of a person's

house as unreasonable *per se*." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)). Thus, when the state wishes to use consent to justify the lawfulness of a warrantless search, it has "the burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

The panel majority's aggressive application of the "clearly established law" standard effectively flips this burden of proof. Instead of asking, "can the state prove that there was consent for a warrantless search?," the question becomes "can a civil rights plaintiff prove that there *wasn't* consent, by finding a prior scope-of-consent case exactly on point?" For innocent individuals like Shaniz West—who will obviously not have any remedy for scope-of-consent violations in a criminal suppression hearing—the only practical means of vindicating their Fourth Amendment rights is through a civil remedy. It is therefore especially critical that the Court grant the petition to ensure that misunderstandings of qualified immunity jurisprudence by lower courts do not eviscerate the warrant requirement itself.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant certiorari.

Respectfully submitted,

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

February 20, 2020