No. 18-1287

IN THE
# Supreme Court of the United States

ALEXANDER L. BAXTER,
*Petitioner*,
v.
BRAD BRACEY AND SPENCER R. HARRIS,
*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth 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*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES:**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

IN THE
# Supreme Court of the United States

No. 18-1287

ALEXANDER L. BAXTER,
*Petitioner*,
v.
BRAD BRACEY AND SPENCER R. HARRIS,
*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth 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**

## 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

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil-justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ members frequently represent plaintiffs seeking legal recourse and accountability under 42 U.S.C § 1983.

Americans for Prosperity (AFP) recruits, educates, and mobilizes citizens to build a culture of mutual benefit where people succeed by helping others improve their lives. Such a culture can only flourish in a justice system in which the rule of law is clear, law enforcement is just, and due process thrives. Current qualified immunity doctrine in the United States violates all three of these principles, and AFP is thus mission-bound to advocate for a reconsideration of the doctrine and, by extension, a justice system that better supports a culture of mutual benefit.

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.

The Law Enforcement Action Partnership (LEAP) is a nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal-justice

---

*amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

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 NAACP Legal Defense & Educational Fund, Inc. (LDF) strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights. LDF has a long-standing concern with the doctrine of qualified immunity, which denies redress to deserving civil-rights plaintiffs and insulates government officials from the consequences of their unconstitutional behavior.

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.

Public Justice is a national public-interest law organization that specializes in high-impact civil litigation, with a focus on fighting corporate and governmental misconduct. Public Justice has an established project devoted to access to justice, and it has long represented those whose rights have been violated by law-enforcement officers and other government officials. Public Justice, therefore, is deeply concerned about the use of qualified immunity to prevent victims of civil-rights abuses from vindicating their rights in court.

The R Street Institute is a nonprofit, nonpartisan public-policy research organization whose mission is to engage in policy research and outreach to promote free markets and limited, effective government. The R Street Institute believes that qualified immunity as currently constituted has created a trust gap between officials and communities and does not represent the limited government the Constitution outlined.

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.

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, Chicago.

*Amici* reflect an extensive cross-ideological and cross-professional consensus that this Court's qualified immunity case law undermines accountability, harming citizens and public officials alike. While law-enforcement officers are often the face of the public's lost trust, qualified immunity shields a wide range of official misconduct. 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 vindicate 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 corrodes 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. And the doctrine's primary justification, to prevent public officials from paying their own judgments, has proven empirically unfounded as the

widespread availability of indemnification already provides that protection.

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). The text of 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 anything like the 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."); *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.*, Pet. 25–29; Baude, *supra*. 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.

Qualified immunity effectively insulates broad swathes of official misconduct from either judicial review or a damages remedy. That undermines both our government institutions and the people's trust in them. This Court should restore Section 1983 to its intended function.

Consider the context most often associated with how qualified immunity undermines the public's trust in government: police misconduct. 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 that distinct minority of officers generates a staggering number of fatalities. From 2015 to 2017, law-enforcement officers fatally shot, on average, nearly a thousand Americans each year. Julie Tate et al., *Fatal Force*, Washington Post Database (last updated Mar. 31, 2019).[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.

For example, a cell-phone camera livestreamed on Facebook the aftermath of a Minnesota officer shooting a motorist during a traffic stop for a broken taillight, after the motorist 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

---

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

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

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

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

camera catalogued two Baton Rouge officers who shot a father of five after they pinned him to the ground. ABC News, *Alton Sterling Shooting Cell-phone Video*, YouTube (July 6, 2016).[6] A cell-phone camera recorded 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 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, faith in law enforcement has fallen (no matter the actual overall rate of misconduct). In 2015, Gallup

---

[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.

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

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 such misconduct. "[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. *See* 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 Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case,* N.Y. Times (Dec. 3, 2014).[14] According to a 2017 Pew Research Center survey of more than 8,000 police officers, 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).[15]

But qualified immunity shields more than just police misconduct from accountability. Lawsuits against the police have historically constituted less

---

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

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

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

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

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

than half of the federal courts' non-prisoner constitutional-torts docket. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 690–691 (1987); *see also* Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government As Defendant*, 73 Cornell L. Rev. 719, 777 (1988) (estimating from administrative data that police-misconduct cases account for "thirty percent of the constitutional tort actions" surveyed). Qualified immunity applies to a wide array of public officials, from social workers to teachers to school administrators; it even applies to private individuals the government temporarily employs to carry out its work. *Filarsky* v. *Delia*, 566 U.S. 377, 388–389 (2012) ("[E]xamples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself.").

Because other means of oversight often fail or are otherwise unavailable, civil-damages liability is all the more important for holding public officials accountable. Section 1983 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 federally guaranteed rights, that person "shall be liable to the party injured." 42 U.S.C. § 1983.

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 Public Officials for Unconstitutional Misconduct.

Qualified immunity breaks with the text and purposes of Section 1983 by allowing for the perverse-yet-all-too-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 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 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 deemed 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 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. *Board of Comm'rs of Cty. of Johnson*, 864 F.3d 1154 (10th Cir. 2017).
- Acknowledging that "false statements in a warrant affidavit are not to be condoned," the Fifth Circuit nonetheless reversed a district court's conclusion that a teacher arrested for allegedly falsifying student grades had shown a triable fact issue as to whether the investigating officer lied in his affidavit because it was not sufficiently established that "an officer who knowingly or recklessly included false statements on a warrant affidavit can be held liable for false arrest." *Arizmendi* v. *Gabbert*, 919 F.3d 891, 899, 904 (5th Cir. 2019).
- The Sixth Circuit affirmed the dismissal of claims against a child-protective-services

caseworker whose false statements in support of a removal order resulted in minor children being taken from their families, separated, and denied visitation, even though the panel "entirely agree[d]" that "a social worker, like a police officer, cannot execute a removal order that would not have been issued but for known falsities that the social worker provided to the court to secure the order." *Brent* v. *Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 685 (6th Cir. 2018).

- 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 public officers alike, these cases can hardly inspire confidence in

our "government of laws." *Marbury*, 5 U.S. (1 Cranch) at 163.[16]

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 cycle. Violations must be clearly established to survive qualified immunity; but qualified immunity itself stunts the development of the law and prevents it from becoming clearly established. *See, e.g.*, *Sims* v. *City of Madisonville*, 894 F.3d 632, 638 (5th Cir.

---

[16] *See also, e.g.*, *Jessop* v. *City of Fresno*, 918 F.3d 1031, 1035–37 (9th Cir. 2019) (qualified immunity proper because, while "the theft" of "personal property by police officers sworn to uphold the law" may be "morally wrong," it was not clearly established that officers could not seize $151,380 in cash and $125,000 in rare coins but record only $50,000 in seized property on inventory sheet); *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 book and charge seventh-grader in the hallway during class as permitted by his disability accommodation received qualified immunity, because at the time, no prior case had interpreted the specific probable-cause state statute at issue).

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 the 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.

Before their claims can be heard on the merits, Section 1983 plaintiffs must overcome qualified immunity not only 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 and billable time piles up. These effects are especially pronounced for claims promising only modest monetary recovery.

"Avoiding a litigation scenario in which defendants can raise a qualified immunity defense is a legitimate strategic decision for plaintiffs worried about the risk of losing and walking away with no damages and no improved law." Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 Utah L. Rev. 639, 658 (2018). 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 the deck 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 constitutional harms that will go unremedied.

But qualified immunity, as currently constituted, 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 other

contexts.[17] And regardless, the extraordinary 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 a sweeping 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 PUBLIC 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,

---

[17] 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 law-enforcement decisionmaking.

but public officials themselves—especially those who work in law enforcement.

Policing is dangerous, difficult work. Without the trust of their communities, officers cannot safely and 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).[18]

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* U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 80 (Mar. 4, 2015) (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.").[19]

When properly trained and supervised, the vast majority of officers follow 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,

---

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

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

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 minority of police who routinely break the law and thereby erodes relationships between communities and law enforcement.

In a recent survey, a staggering nine in ten law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings. 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 premised on the assumption that individual officers pay their own judgments. *See, e.g.*, Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 78 (1999). That assumption is empirically unfounded. The widespread availability of indemnification *already* protects individual public officials from ruinous judgments. For one example, 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).

Far from threatening individual officers with 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. Qualified immunity subverts this axiom and exacerbates our accountability crisis by denying justice to victims of unconstitutional misconduct, while undermining the public's trust in the very officials the doctrine 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*

May 2019

# APPENDIX

# APPENDIX

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

*Counsel for the American Association for Justice*

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

*Counsel for Americans for Prosperity*

SHANA-TARA O'TOOLE
DUE PROCESS INSTITUTE
700 Pennsylvania Avenue S.E., #560
Washington, D.C. 20003

*Counsel for the Due Process Institute*

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

*Counsel for the Law Enforcement Action Partnership*

AMIR H. ALI
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
777 6th Street, N.W., 11th Floor
Washington, D.C. 20001

*Counsel for Roderick & Solange MacArthur Justice Center*

SHERRILYN A. IFILL
JANAI S. NELSON
SAMUEL SPITAL
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

CHRISTOPHER KEMMITT
DANIEL HARAWA
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street, N.W., Suite 600
Washington, DC 20005

*Counsel for NAACP Legal Defense & Educational Fund, Inc.*

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*

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

*Counsel for Public Justice*

ARTHUR L. RIZER III
THE R STREET INSTITUTE
1212 New York Avenue, N.W., Suite 900
Washington, D.C. 20005

*Counsel for the R Street Institute*

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*