23-753

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADRIAN THOMAS,

Plaintiff-Appellant,

– v. –

ADAM R. MASON, RONALD FOUNTAIN, TIM COLANERI, and MICHAEL SIKIRICA,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District Of New York

BRIEF OF *AMICUS CURIAE* THE LEGAL AID SOCIETY IN SUPPORT OF PLAINTIFF-APPELLANT FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1(a), *amicus curiae* The Legal Aid Society discloses that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

INTEREST OF THE AMICUS CURIAE

The Legal Aid Society is the nation's oldest and largest private non-profit legal services agency, dedicated since 1876 to providing quality legal representation to low-income New Yorkers.[1] It has served as the primary public defender in New York City since 1965 and, each year, represents tens of thousands of people who are arrested and unable to afford private counsel. Legal Aid's Special Litigation Unit brings civil rights litigation under 42 U.S.C. § 1983 on behalf of Legal Aid's public defense clients when government officials have violated their constitutional rights. Legal Aid, on behalf of its current and future Section 1983 clients, has a strong interest in the vindication of constitutional rights and the development of legal doctrines that support or frustrate such vindication. The qualified immunity doctrine at issue in this case routinely prevents Legal Aid clients from obtaining relief for the government's violation of their constitutional rights. In this brief, Legal Aid raises fundamental arguments about the application of the qualified immunity doctrine that might otherwise escape the Court's consideration.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

This case presents a vivid example of the injustice wrought by the fundamentally flawed doctrine of qualified immunity and presents an opportunity for this Court to call on the United States Supreme Court to correct the legal and historical errors that gave birth to this indefensible doctrine by overturning it. The police defendants in this case subjected plaintiff Adrian Thomas to a "set of highly coercive deceptions" resulting in a legally involuntary and false confession that led to his wrongful conviction for murder and imprisonment for nearly six years. *People v. Thomas*, 22 N.Y.3d 629, 642 (2014); Complaint ¶ 21, ECF No. 1, *Adrian Thomas v. City of Troy, et al.*, 1:17-cv-626 (NDNY) (June 12, 2017).[2] The United States District Court for the Northern District of New York acknowledged that the plaintiff's federal constitutional rights were clearly established but nonetheless granted defendants summary judgment on the basis of qualified immunity. *Thomas v. Mason*, 2023 WL 2709730 at *9, *13-14 (N.D.N.Y. March 30, 2023).[3] If that result stands, Mr. Thomas will have no legal remedy for the serious injuries caused by an obvious and egregious constitutional violation.

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[2] The district court below acknowledged that the New York Court of Appeals, which unanimously vacated Mr. Thomas's conviction, had written a "comprehensive and compelling" opinion, the reasoning of which "should be persuasive for federal courts." *Thomas v. Mason*, 2023 WL 2709730 at *10 (N.D.N.Y. March 30, 2023).

[3] The case was re-captioned *Thomas v. Mason* after the District Court dismissed the City of Troy as a defendant.

The injustice of such an outcome is all the more galling given the lack of textual basis and historical support for the judge-made doctrine of qualified immunity. The time has come to do away with a doctrine that has been flawed from its inception and is incompatible with the fundamental legal principle that violations of rights require remedies. While this Court is bound to apply qualified immunity as directed by the Supreme Court, this Court can and should raise its voice in opposition to this misbegotten, harmful doctrine and acknowledge that the time has come for the Supreme Court to overrule its qualified immunity precedents. *See, e.g., Rogers v. Jarrett*, 63 F.4th 971, 979 (5th Cir.), *cert. denied*, 144 S. Ct. 193 (2023) (Willett, J., concurring).

If this case, or another like it, reaches the Supreme Court, principles of *stare decisis* weigh in favor of overturning precedents on qualified immunity. The Supreme Court has long acknowledged that in certain circumstances it must overturn its precedents, including where, as here, the precedent in question "relied on an erroneous historical narrative," stands on "exceptionally weak grounds," and cannot be "understood and applied in a consistent and predictable manner." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 270-81 (2022); *Ramos v Louisiana*, 590 U.S. --- , 140 S.Ct. 1390, 1414 (2020) (Kavanaugh, J. concurring in part); *see also Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899-904 (2007) (overruling a nearly century-old precedent that interpreted a common-

law statute, despite acknowledging that *stare decisis* concerns are strong in cases of statutory interpretation). Applying these three principles here, the Supreme Court's qualified immunity precedents should fall.

ARGUMENT

I. THE SUPREME COURT'S QUALIFIED IMMUNITY PRECEDENTS REST ON TEXTUAL AND HISTORICAL ERRORS.

New scholarship confirms that the doctrine of qualified immunity in cases brought under 42 U.S.C. § 1983 is built upon a misconception. The Congress that passed the Civil Rights Act of 1871 intended to bar the application of state common law immunities, such as qualified immunity, to the right of action it created, but a transcription error left the relevant language out when the Act was compiled for the first time in the Revised Statutes of the United States in 1874. *See* Alexander R. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 235-37 (2023) (hereinafter "Reinert").

The first compilation of the federal code transcribed the language of the Civil Rights Act of 1871, now found at 42 U.S.C. § 1983, as follows:

> 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 . . . .

This language has remained in the code ever since. But in the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, there is additional text, a "notwithstanding clause," set forth in the emphasized font below:

> 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, ***any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding***, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Recently published historical research indicates that the omission of this "notwithstanding clause" was a scrivener's error, in effect an unauthorized amendment to the text made by a person with no authority to alter the law. Reinert at 235-41 (discussing the historical evidence, including contemporaneous legislative history that further confirms the plain reading of the law's actual text). Early Supreme Court cases interpreting the Civil Rights Act cite the full text of the law, including the "notwithstanding clause," and describe the "changes of the arrangement of clauses" in the codified version as "not intended to alter the scope" of the law itself. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939). Indeed, the Reviser who committed this error of omission had no authority to make any alterations. *See* Revised Statues of the United States, Preface, at v (1878) (stating that Reviser had no authority to make substantive changes).

Thus the original text of the Act, including the "notwithstanding clause"—notwithstanding its unauthorized omission from the code—is better evidence of Congress's intent than the text found in Section 1983. *See* An Act to Provide for the Preparation and Publication of a New Edition of the Revised Statutes of the United States, 19 Stat. 268, ch. 82, § 4 (1877), as amended by 20 Stat. 27, ch. 26 (1878) (stating that revised statutes are considered "legal" evidence of laws, but not "conclusive"); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent"), quoting *Stephan v. United States*, 319 U.S. 423, 426 (1943).

The language of the Civil Rights Act of 1871 leaves no doubt that Congress intended the "notwithstanding clause" to encompass state common law principles, and thus to create liability despite the existence of any state common law defenses such as qualified immunity. "Custom, or usage" refers to the common law itself. *See* Reinert at 235 (citing legislative history demonstrating that the Congress of 1871 understood this); *Strother v. Lucas*, 37 U.S. 410, 437 (1838) (stating that whether a rule was established by "usage" or through "custom," it existed by "a common right, which means a right by common law"); *Western Union Telegraph Co. v. Call Pub. Co.*, 181 U.S. 92, 102 (1901) (citing Black's Law Dictionary for the proposition that common law springs from "usages and customs"). Congress plainly intended the Act

to create a cause of action and establish remedies for violations of federal law, *notwithstanding* any common law defenses.

In the Supreme Court's seminal case on qualified immunity, *Pierson v. Ray*, 386 U.S. 547 (1967), the Court held that the Mississippi state common law defense of good faith and probable cause was available to the police officers who had been sued under Section 1983 after arresting freedom riders who were peacefully protesting the segregation of bus facilities. *Id.* at 557. The Supreme Court rested this conclusion on the clearly erroneous premise that the legislative record behind Section 1983 gave "no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554. In the ensuing years, the Supreme Court built the structure of qualified immunity case by case, each time relying on the supposed silence of Section 1983 on immunities and the supposed power of the Court to fashion them.[4]

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[4] *See, e.g., Tenney v. Brandhove*, 341 U.S. 367 (1951); *Imbler v. Pachtman,* 424 U.S. 409, 418 (1976) ("The decision in *Tenney* established that §1983 is to be read in harmony with general principles of tort immunities and defenses, rather than in derogation of them."); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) ("Although the Court has recognized that in enacting §1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials."); *Briscoe v. Lahue*, 460 U.S. 325, 337 (1983) ("[W]e find no evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions."); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989) (relying on the presumption that the 42nd Congress "likely intended" for the common law to apply); *Buckley v.*

Although, as the Supreme Court has admonished, "something more than ambiguous historical evidence is required before we will flatly overrule a number of major decisions of this Court," *Gamble v. United States*, 587 U.S. ---, 139 S. Ct. 1960, 1969 (2019) (cleaned up), the historical evidence here is not ambiguous. Apparently unaware of the Act's "notwithstanding clause," the Supreme Court assumed that the Congress that created the right of action now found in Section 1983 did not address the applicability of state common law immunities. Relying on that misconception, the Court in *Pierson* and its progeny imported a state common-law defense into Section 1983 that an Act of Congress plainly intended to bar.

On top of this textual error, the Supreme Court also made a historical error by claiming support in the common law for reading immunity into a remedial statute such as Section 1983. *Id.* at 555-57. In considering whether any defenses or immunities were available to the Mississippi police officers, the Court drew on its decision in *Monroe v. Pape*, 365 U.S. 167 (1961), a Section 1983 case against police officers who raided a suspect's home without a warrant. The *Pierson* Court quoted *Monroe* for the proposition that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Pierson*, 386 U.S. at 556. It then went on to say that "part of the background

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Fitzsimmons, 509 U.S. 259, 268 (1993) (holding that "[c]ertain immunities were so well established in 1871" that "Congress would have specifically . . . provided had it wished to abolish them.").

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 to come to this conclusion, the Court did not look to centuries of common law precedents on immunity for government officers. It simply adopted the reasoning of *Monroe* from six years earlier and approved the federal circuit court's application of Mississippi's good faith defense to the torts the freedom riders were alleging. *Id.* If the Supreme Court had looked for precedential support for importing a common law defense into a remedial statute, such as Section 1983, it would have found none. Reinert at 225 (noting that defenses, unlike rights, were not conceived of as deserving protection from derogation by statutes).

Although it did not specifically say so, the *Pierson* Court rested its importation of the defense of good-faith qualified immunity on the so-called "Derogation Canon"—that absent clear language, statutes that arguably conflict with the common law should be strictly construed with a presumption in favor of the common law. This was a dubious maneuver. As of 1871, the Supreme Court's use of the Canon did not support the incorporation of common law defenses into new statutory causes of action. Reinert at 222-28. Rather, the Court's use of the Derogation Canon up to that time was limited to three cases: (1) statutes creating novel procedural rules that arguably conflicted with common law rules, (2) statutes that arguably conflicted with common law property rights, and (3) statutes that arguably displaced common law

claims, not defenses. Reinert at 222. And in the years since 1871, the Court has never given defenses the same protection from derogation by legislation. *See, e.g.*, *Campbell v. Holt*, 115 U.S. 620, 629 (1885) (holding that the defense that a suit for payment of inheritance money was time barred was not a property right protected from derogation by state legislation). Outside the context of Section 1983, the Court has not employed the Canon to import common law defenses to limit the reach of claims. Reinert 228-34. Indeed, on the few occasions when the Supreme Court has considered the Canon's effect on a new statutory enforcement scheme other than Section 1983, it has not applied a presumption in favor of the common law. Reinert at 229-30. The qualified immunity doctrine is truly an outlier with no historical foundation.

II. THE SUPREME COURT'S QUALIFIED IMMUNITY PRECEDENTS DISPLAY POOR LEGAL REASONING.

In addition to resting on fundamental textual and historical errors, the Supreme Court's qualified immunity precedents also display poor-quality legal reasoning and naked judicial policy-making, an additional factor counseling against the application of *stare decisis* that received such sustained attention in *Dobbs*. *See Dobbs*, 597 U.S. at 269-80.

The current formulation of the qualified immunity doctrine dates to 1982, when, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court jettisoned the subjective good faith element of the defense that had been required since *Pierson*

and articulated the doctrine thus: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. In *Harlow*, the Court barely discussed the common law lineage of immunity for government officers and based its holding on a policy preference, as developed in its previous cases: "In identifying qualified immunity as the best attainable accommodation of competing values . . . we relied on the assumption that this standard would permit insubstantial lawsuits to be quickly terminated." *Id.* at 507-8 (cleaned up), citing *Butz v. Economou*, 438 U.S. 478 (1978) and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). As much as the Justices may have approved of the quick termination of insubstantial lawsuits, their doctrine was untethered from the intent of the Congress that created the right of action and from pre-1967 common law. Instead, the Court engaged in unabashed policy making about the appropriate reach of Section 1983, balancing the pros and cons of damages liability for government officers. This is precisely what the Court itself, four years later, disclaimed the power to do: "our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

This shaky foundation has dogged the doctrine of qualified immunity for its entire history, even as the Supreme Court has continued to apply it. In *Anderson v.*

Creighton, 483 U.S. 635, 641 (1987), the Court held that an FBI agent who conducted a warrantless search of a home must be allowed to argue that he was entitled to qualified immunity on the ground that his actions were lawful. The Court reversed the circuit court's holding that qualified immunity was foreclosed before discovery because the right to be protected from warrantless searches of homes was clearly established. But Justice Stevens, joined by Justices Brennan and Marshall, wrote in dissent:

> The Court stunningly restricts the constitutional accountability of the police by creating a false dichotomy between police entitlement to summary judgment on immunity grounds and damages liability for every police misstep, by responding to this dichotomy with an uncritical application of the precedents of qualified immunity that we have developed for a quite different group of high public office holders, and by displaying remarkably little fidelity to the countervailing principles of individual liberty and privacy that infuse the Fourth Amendment.

Anderson, 483 U.S. at 647 (cleaned up).

In *Wyatt v. Cole*, 504 U.S. 158 (1992), Justice Kennedy, concurring, articulated his discomfort at the lack of precedential and historical grounding for the Court's second-generation qualified immunity doctrine, noting that the Court had "diverged to a substantial degree from the historical standards. . . . [and] completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common

law with an objective inquiry into the legal reasonableness of the official action." *Id*. at 171-72 (Kennedy, J. concurring).

More recently, Justice Thomas expressed concern about the doctrine's shaky foundation in his concurrence in *Ziglar v. Abassi*, a case that granted federal officials and jail wardens qualified immunity from suit by non-United States citizens detained under harsh conditions in the wake of the September 11 attacks:

> Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in interpreting the intent of Congress in enacting the Act. Our qualified immunity precedents instead represent precisely the sort of freewheeling policy choices that we have previously disclaimed the power to make.

Ziglar v. Abassi, 582 U.S. 120, 159-60 (2017) (Thomas, J. concurring in part) (cleaned up). In 2020, Justice Thomas also criticized the doctrine's lack of textual and historical grounding in his dissent from denial of *certiorari* in *Baxter v. Bracey*, which had been brought by a burglary suspect attacked by a police dog:

> Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition. [. . .] The text of § 1983 makes no mention of defenses or immunities. Instead, it applies categorically to the deprivation of constitutional rights under color of state law. [. . .] Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity was historically accorded the relevant official in an analogous situation at common law. [. . .] I continue to have strong doubts about our § 1983 qualified immunity doctrine.

Baxter v. Bracey, 140 S.Ct. 1862, 1865 (2020) (Thomas, J. dissenting) (cleaned up).

One year later, Justice Thomas returned to both criticisms in a statement respecting

denial of *certiorari* in a case alleging infringement of the right to free speech on a college campus:

> As I have noted before, our qualified immunity jurisprudence stands on shaky ground. [. . .] Our analysis is not grounded in the common-law backdrop against which Congress enacted § 1983. [. . .] Whatever the history establishes, we at least ought to consider it. Instead, we have substituted our own policy preferences for the mandates of Congress by conjuring up blanket immunity and then failed to justify our enacted policy.

Hoggard v. Rhodes, 141 S. Ct. 2421, 2421-22 (2021) (cleaned up). Notably, the Justices made all of these points without the benefit of new scholarship revealing Section 1983's missing "notwithstanding clause."

III. COURTS HAVE LONG RECOGNIZED THE UNWORKABILITY OF THE SUPREME COURT'S QUALIFIED IMMUNITY DOCTRINE.

Over the decades, federal judges of various ideological stripes have pointed out the unworkability of the Supreme Court's qualified immunity doctrine, noting the complexity of its application, its impediments to establishing clear legal rules, and the arbitrariness with which it withholds legal remedies. It is a far cry from a workable doctrine, which the Supreme Court described as one that can be "understood and applied in a consistent and predictable manner." *Dobbs*, 597 U.S. at 281.

The doctrine of qualified immunity requires judges to decide whether a government official's actions "violate clearly established statutory or constitutional

rights of which a reasonable person would have known." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 7 (2021) (per curiam). On the fundamental question of which precedents clearly establish the law, the Supreme Court has been unclear. In 2012, 37 years into the *Harlow* era of qualified immunity doctrine, the Court suggested that circuit court precedent may not be sufficient to clearly establish the law. *Reichle v. Howards*, 566 U.S. 658, 665-66 (2012) ("Here, the right in question is . . . to be free from a retaliatory arrest that is otherwise supported by probable cause. This Court has never held that there is such a right. [. . .] Assuming *arguendo* that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case . . ."). Just three years ago, the Court made the same suggestion in *Rivas-Villegas*, 595 U.S. at 5: "Even assuming that controlling Circuit precedent clearly establishes law for purposes of § 1983 . . . ." To this day, the question of which precedents are required to clearly establish the law remains unanswered.

The unworkability of the qualified immunity doctrine is exemplified by the difficulty lower courts experience in applying the doctrine. In cases alleging constitutional violations, the difficulty begins with the definition of the right. As this Court put it:

> This task involves striking a balance between defining the right specifically enough that officers can fairly be said to be on notice that their conduct was forbidden, but with a sufficient measure of abstraction to avoid a regime under which rights are deemed clearly

> established only if the precise fact pattern has already been condemned.

Simon v. City of New York, 893 F.3d 83, 96–97 (2d Cir. 2018) (cleaned up). The Supreme Court has repeatedly admonished lower courts for failing to strike the right balance in defining rights. *See, e.g., City of Tahlequah, Oklahoma v. Bond,* 595 U.S. 9, 12 (2021) (per curiam) ("We have repeatedly told courts not to define clearly established law at too high a level of generality.") (citing examples); *cf. Hope v. Pelzer*, 536 U.S. 730, 739-42 (2002) (rejecting circuit court decisions defining clearly established law based on whether precedent with "materially similar" or "fundamentally similar" facts exist, and explaining that "general statements of the law are not inherently incapable of giving fair and clear warning") (cleaned up).

To add to the unpredictability of the doctrine's application, the Supreme Court has explained that even without precedent finding the action in question unlawful, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741 (cleaned up). But what may be obvious to the Supreme Court may not be obvious to lower courts. In *Hope* 536 U.S. 730, the Supreme Court confronted a case where prison guards handcuffed a shirtless prisoner to a post in the summer sun for seven hours. The Court noted the "obvious cruelty" of the defendants' actions, reversed the circuit court's grant of qualified immunity, and held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at

741, 745. In *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam), the Court confronted a case where a prisoner was held in a cell teeming with human waste for six days. The Court reversed the circuit court's grant of qualified immunity, noting the egregious facts and the "obviousness of [the] right." *Id.* at 8-9, n.2. That the Supreme Court had to reverse lower courts for failing to grasp a right that it deemed obvious makes clear the unpredictable nature of applying the qualified immunity doctrine.

The Supreme Court's frequency of reversing lower court qualified immunity decisions in the post-*Harlow* era further demonstrates the difficulty that lower courts experience in applying the doctrine. In the 35 years following the *Harlow* decision in 1982, the Supreme Court ruled on qualified immunity in 30 cases, and it reversed lower court decisions denying qualified immunity in all but two of those cases. William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 82-84 (2018). Lower courts are left to try to balance this Supreme Court trend to grant qualified immunity where no specific precedent exists addressing the right in question, with the Court's admonishment that such precedent is not necessary when the right is obvious.

Against the backdrop of a lack of Supreme Court guidance on what precedent clearly establishes a right, inconsistent guidance on how to define a right, and frequent Supreme Court reversals, circuit courts continue to have difficulty applying the qualified immunity doctrine. In a Ninth Circuit case from 2020, for example, the

majority "reluctantly affirm[ed]" the grant of qualified immunity to county social workers accused of sexually harassing a woman using their services. *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1025 (9th Cir. 2020). The majority lamented that the "Supreme Court's exceedingly narrow interpretation of what constitutes a 'clearly established' right precludes us from holding what is otherwise obvious to us—that the right . . . was clearly established." *Id.* In a separate opinion, Judge Hurwitz further lamented that: "[u]ntil the Supreme Court revisits its qualified immunity jurisprudence, as a constitutionally 'inferior' court, we must continue to struggle to apply it" *Id.* (Hurwitz, J., concurring in part and dissenting in part) (cleaned up).

IV. THE SUPREME COURT'S QUALIFIED IMMUNITY DOCTRINE PRODUCES UNJUST OUTCOMES.

Critiques of qualified immunity are abundant, especially in recent years.[5] The fundamental consensus behind these critiques is that qualified immunity too often

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[5] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55–61 (2018) (arguing that there was no good-faith defense on which to base immunity, there was no need to counter-balance the supposedly broadened reach of Section 1983 after *Monroe v. Pape*, and lenity toward government officials should not apply); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1799–1814 (2018) (arguing that qualified immunity has no basis in the common law and does not achieve its intended policy goals); Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 329–34 (2020) (discussing barriers to success in Section 1983 litigation); *Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity: Hearing Before the Subcomm. on Const., Civ. Rts., and Civ. Liberties of the H. Comm. On the Judiciary*, 117th

shields officers from accountability when they abuse their power and forecloses justice for people who have meritorious claims that their rights have been violated. As Justice Sotomayor recently stated:

> The result is that a purportedly 'qualified' immunity becomes an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations. Officers are told that they can shoot first and think later, because a court will find some detail to excuse their conduct after the fact. The public is told that palpably unreasonable conduct will go unpunished. And surviving family members like Stokes' daughter are told that their losses are not worthy of remedy.

N. S., only child of decedent Stokes v. Kansas City Bd. of Police Commissioners, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting from denial of certiorari) (cleaned up); *see also Zadeh v. Robinson*, 928 F.3d 457, 479–81 (5th Cir. 2019) (Willet, J., concurring in part) (expressing "unease" that qualified immunity in practice makes it "immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current 'yes harm, no foul' imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached.") (cleaned up).

Cong. (2022) (statement of Hon. Jon O. Newman, Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit), https://docs.house.gov/meetings/JU/JU10/20220331/114567/HHRG-117-JU10-Wstate-NewmanJ-20220331.pdf (proposing employer liability for an employee's violation of Constitutional rights and authorization for the United States Attorney to initiate or intervene in Section 1983 actions).

Examples of these unjust results are found across the nation. In *Crawford v. Cuomo*, 721 Fed.Appx. 57 (2d Cir. 2018), this Court granted qualified immunity to a guard whose sexual abuse of prisoners, though "abhorrent," "reprehensible and possibly criminal," and "repugnant and intolerable," was not a clearly established Eighth Amendment violation. In *Harte v. Bd. of Comm'rs of Cty. of Johnson, Kan.*, 864 F.3d 1154 (10th Cir. 2017), the court granted qualified immunity to officers who conducted a SWAT-style raid on a home and held a family with young children for two and a half hours based on the presence of a leafy substance erroneously believed to be marijuana. In *Latits v. Phillips*, 878 F.3d 541 (6th Cir. 2017), the court granted qualified immunity to a police officer who broke several department rules, shot a fleeing driver to death, and later admitted to mischaracterizing the driver's allegedly threatening conduct. In *Doe v. Woodard*, 912 F.3d 1278 (10th Cir. 2019), the court granted qualified immunity to a caseworker who partially undressed and photographed a preschool child in an effort to find evidence of parental abuse. In *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021), the court granted qualified immunity to guards who watched without intervening as a jail inmate known to be suicidal wrapped a phone cord around his neck and killed himself.

Adrian Thomas's case would add another example to this list. While his infant son was barely clinging to life in intensive care with symptoms strongly suggesting septic shock, and with his other children having been taken away by child protective

services, Troy police officers took Mr. Thomas to the station and interrogated him for 9-1/2 hours over two days. *Thomas,* 22 N.Y. 3d at 637. Mr. Thomas was so distraught that he expressed suicidal thoughts to the defendant officers on the first day of interrogation and was involuntarily hospitalized in a secure psychiatric unit overnight. *Id.* at 637-38. After sleeping no more than an hour and a half, according to his complaint, Mr. Thomas was picked up from the hospital by the officers and subjected to further interrogation at the police station. *Id.* at 638; Complaint ¶ 21. During this second interrogation session, the officers repeatedly lied to Mr. Thomas, telling him that they were not investigating what they thought to be a crime, and that after he told them what happened he could go home. *Thomas* at 638. Despite the fact that his son had already died at the hospital, the officers told Mr. Thomas that the child was alive and that his survival could depend on what Mr. Thomas told them about how he had supposedly caused his son's "injuries." *Id.* The officers also falsely represented to Mr. Thomas that his wife had blamed him for their child's "injuries," and they threatened to arrest his wife if he did not take responsibility. *Id.* The officers then goaded Mr. Thomas into adopting an abuse scenario totally fabricated by them. *Id.* at 639-41; Complaint ¶¶ 48-49. Despite these overbearing, coercive tactics that extracted an involuntary, false confession—which the New York Court of Appeals unanimously threw out—the district court below granted the defendant officers qualified immunity and dismissed Mr. Thomas's case.

To dispose of meritorious cases in this way not only disregards the harms that plaintiffs suffer, it also signals to officers and other state actors that their rights-violating conduct is acceptable. Unfortunately, the consequences reach beyond the litigants, as news of unjust dismissals erodes the public's respect for law enforcement and the judiciary. As Judge Calabresi declared in a 2022 dissent, "the doctrine of qualified immunity—misbegotten and misguided—should go." *McKinney v. City of Middletown*, 49 F.4th 730, 756, 758 (2d Cir. 2022) (challenging police excessive force against a mentally ill man in their custody) (Calabresi, J. dissenting). This Court should take the opportunity presented by Adrian Thomas's deeply troubling case to call on the Supreme Court to overturn its qualified immunity precedents.

CONCLUSION

For these reasons, *amicus curiae* The Legal Aid Society urges this Court to reverse the District Court's decision as to the police defendants and to call on the Supreme Court to overrule its qualified immunity precedents.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,667 words, excluding the portions of the brief exempted by Rule 32(f). I further certify that this brief complies with the typeface and type-style requirements of Rule 32(a)(5)–(6) because it is printed in a proportionally spaced 14-point font, Times New Roman.

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