No. 25-943

In the Supreme Court of the United States

ANTONIO M. SMITH,

Petitioner,

v.

JOHN KIND, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CATO INSTITUTE, AMERICAN ASSOCIATION FOR JUSTICE, PUBLIC JUSTICE, AND DUE PROCESS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The question presented is:

When a government official acts in an obviously unconstitutional manner, is that sufficient for the violation to be clearly established, as this Court has held and other Circuits have ruled in analogous circumstances, or is a violation clearly established only if there is binding precedent in a factually indistinguishable case, as the Seventh Circuit required here?

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INTEREST OF *AMICI 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 was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

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 plaintiff trial bar. Throughout its 80-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and

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

frequently represent plaintiffs seeking legal recourse and accountability under 42 U.S.C § 1983.

Public Justice is a national public-interest advocacy 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.

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Amici share a steadfast belief that the Eighth Amendment's prohibition against cruel and unusual punishment lies at the heart of American justice, and that the rigorous enforcement of this prohibition is imperative to preserving constitutional government and promoting accountability.

SUMMARY OF ARGUMENT

Petitioner Antonio Smith suffered extraordinary, deliberate, and unconstitutional mistreatment at the hands of several Wisconsin prison officials. After being pepper-sprayed for non-violent resistance to an unwanted medical examination, he was placed naked in a freezing control cell for 23 hours, in plain contravention of well-established prison procedures. His explicit requests for clothing and bedding were denied, and one officer went so far as to condition the provision of these necessities upon Mr. Smith abandoning his ongoing hunger strike in protest of other prison conditions.

The Seventh Circuit unanimously agreed that Mr. Smith's claims made out a viable Eighth Amendment violation, and his case closely parallels the set of "particularly egregious facts" that, according to this Court's most recent word on the subject, "any reasonable officer should have realized . . . offended the Constitution." *Taylor v. Riojas*, 592 U.S. 7, 9 (2020). Just as *Hope v. Pelzer* involved deliberate exposure of a captive prisoner to extreme heat as punishment, this case involves deliberate exposure of a captive prisoner to extreme cold as coercion—a parallel so close that the Seventh Circuit's contrary result cannot be reconciled with this Court's precedent. Nevertheless, a panel majority held that qualified immunity prevents Mr. Smith from presenting his constitutional claims to a jury. This decision exemplifies the fundamental pathologies of the current qualified immunity regime, as

a matter of both underlying theoretical principles and applied doctrinal practice.

These and other *amici* have repeatedly argued that qualified immunity is a fundamentally atextual, ahistorical doctrine that this Court can and should reconsider entirely.[2] Section 1983 "on its face does not provide for any immunities," *Malley v. Briggs*, 475 U.S. 335, 342 (1986), and the common law of 1871 did not include anything like the sweeping defense that characterizes qualified immunity today.[3] Recent scholarship has further revealed that, shortly after Congress enacted the Civil Rights Act of 1871, the Reviser of the Federal Statutes erroneously removed a 16-word clause from the statute during the codification process that explicitly abrogated common-law immunities.[4] *Amici* maintain that, in an appropriate case, the Court should reconsider qualified immunity entirely.

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[2] *See, e.g.*, Br. of the Cato Institute as *Amicus Curiae* in Supp. of Pet'r, Benning v. Oliver, No. 23-644 (filed Jan. 19, 2024); Br. of Cross-Ideological Groups as *Amici Curiae* in Supp. of Pet'r, *Taylor*, 592 U.S. at 7 (filed May 14, 2020).

[3] William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49 (2018); *see also Baxter v. Bracey*, 590 U.S. 1011, 1013–14 (2020) (Thomas, J., dissenting from den'l of cert.) ("There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this 'clearly established law' test.").

[4] *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 235 (2023); Patrick Jaicomo & Daniel Nelson, *Section 1983 (Still) Displaces Qualified Immunity*, 49 HARV. J.L. & PUB. POL'Y 151 (2026).

Nevertheless, *amici* will not reprise those arguments here. Instead, *amici* write to emphasize two key points about this case's relationship to the existing qualified immunity regime.

First, this case is especially well suited to summary reversal. The majority's decision below, like many lower-court decisions in recent years, flouts the longstanding principle from *Hope v. Pelzer*, 536 U.S. 730 (2002)—recently and clearly reaffirmed in *Taylor v. Riojas*, 592 U.S. 7 (2020)—that sufficiently obvious constitutional violations do not require plaintiffs to identify prior cases with functionally identical facts to overcome qualified immunity. Moreover, if the egregious nature of the unconstitutional treatment that Mr. Smith endured were not obvious on its own, the facts of his case bear a close similarity to the facts in *Taylor* itself and even a prior Seventh Circuit case, which "no reasonable correctional officer could have concluded [were] constitutionally permissible." 592 U.S. at 8. Summary reversal would send a clear message to lower courts across the country that they may not continue to disregard this Court's repeated instruction on how to properly apply the "clearly established law" standard.

More broadly, this case illustrates a structural defect in the "clearly established law" standard as applied to constitutional prohibitions that exist on a continuum. Where no finite body of precedent can ever establish the full range of unconstitutional conduct, officials who subject prisoners to conditions one degree

warmer or one hour shorter than a prior case will always escape liability—not because their conduct is constitutional, but because it has not yet been litigated at that precise point on the spectrum. This structural defect cannot be cured by case-by-case correction alone; it will continue to generate decisions like this one indefinitely.

Second, this case illustrates pointedly how the current qualified immunity regime both denies juries their fundamental role in ensuring public accountability and exacerbates an ongoing crisis of confidence in public institutions, especially law enforcement. While this Court has often described qualified immunity as a kind of "good faith" defense, *see Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982), the modern "clearly established law" standard turns almost entirely on the happenstance of the fact patterns of prior cases, not the actual good faith of defendants. This case makes that disconnect especially vivid: the officers here acted not in good-faith uncertainty about the law, but in deliberate pursuit of a coercive strategy—conditioning the most basic human necessities on a prisoner's capitulation. Whatever justification qualified immunity has as a protection for officials navigating genuine legal ambiguity, it has none here. In a future case, if the Court wishes to address this problem without reconsidering qualified immunity entirely, it should at least reframe the doctrine to permit juries in appropriate cases to decide, as a fact question, whether it should have been

clear to a § 1983 defendant that their conduct was unlawful.

ARGUMENT

I. THE DECISION BELOW CANNOT BE RECONCILED WITH *HOPE* AND *TAYLOR* AND WARRANTS SUMMARY REVERSAL.

As the Petition explains, the case involves important questions about the proper application of this Court's qualified immunity jurisprudence, Pet. at 8–12, as well as divisions between lower courts on the extent to which claims of Eighth Amendment deliberate indifference suffice to overcome qualified immunity, Pet. at 13–14. These are certainly important questions that this Court could decide to address on the merits, but summary reversal is also an especially appropriate resolution here, as the majority's decision below was "squarely contrary to [this Court's] holdings." *Maryland v. Dyson*, 527 U.S. 465, 467 (1999). Specifically, in holding that the defendants here did not violate "clearly established law," the majority effectively required Mr. Smith to demonstrate a level of factual specificity that this Court has again and again rejected as the wrong way to apply qualified immunity.

A. The Seventh Circuit Applied Exactly the "Rigid, Overreliance on Factual Similarity" that This Court Has Repeatedly Condemned.

For decades, this Court has instructed lower courts that the "clearly established law" prong of qualified

immunity does not require a plaintiff to identify a prior case decided on functionally identical facts. *Hope*, 536 U.S. at 739 (rejecting the Eleventh Circuit's demand for "materially similar" precedent as a "rigid gloss" inconsistent with this Court's cases); *Taylor*, 592 U.S. at 8–9 (reversing a grant of qualified immunity because "no reasonable correctional officer" could have concluded the conduct at issue "was constitutionally permissible"). The rule, stated plainly, is that "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 (citation omitted). When a constitutional violation is sufficiently egregious, qualified immunity is unavailable, even absent a closely analogous precedent. And in this particular case, it would be difficult to overstate how apparent the unlawfulness of the underlying conduct was, both in its severity and the intentionality with which it was inflicted.

To restate the most pertinent facts, the incident began when one of the defendants, Captain Jay Van Lanen, pepper-sprayed Mr. Smith while he was prone and defenseless, despite knowing that Mr. Smith suffered from asthma. Pet. at 3.[5] Mr. Smith spent eight

[5] The lower court unanimously found that this use of pepper spray plausibly violated Mr. Smith's Eighth Amendment rights as well, but that Captain Van Lanen was nevertheless entitled to qualified immunity. *Smith v. Kind*, 140 F.4th 359, 369–70 (7th Cir. 2025). There is a colorable argument that, in light of Mr. Smith's diminished physical state due to his ongoing hunger strike, his history of peaceful extractions, and Captain Van Lanen's

minutes struggling to breathe, after which he was stripped naked and placed in a control cell, with a vent blowing air at outside temperatures, which fell below freezing. *Id.* at 3–4. In violation of typical prison practices, he was refused clothing, bedding, and a mattress. *Smith v. Kind*, 140 F.4th 359, 364 (7th Cir. 2025). After being kept in such conditions for three and a half hours, he requested these basic necessities and to be moved to a warmer cell, but those requests were denied. *Id.* Twelve hours later, another officer offered Mr. Smith a smock, but only on the *condition* that Mr. Smith abandon his ongoing protest of prison conditions and submit to future medical evaluations (which he declined to do). *Id.* Mr. Smith thus remained in these conditions, naked and freezing, for 23 hours, unable even to sleep and spending most of the time on his feet. Pet. at 4.

As Judge Hamilton explained in detail in his dissenting opinion, "[d]eliberately exposing a naked prisoner to extreme cold" could easily make out a claim for torture under both the United States Torture Act and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *Smith*, 140 F.4th at 375 (Hamilton, J., concurring in part and dissenting in part). And the record clearly establishes that the defendants inflicted these conditions knowingly and callously. After all,

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knowledge of Mr. Smith's asthma condition, the unlawfulness of this excessive force was likewise obvious. But as that question is not at issue in the Petition, *amici* do not take a position on it.

there was no plausible penological reason to keep Mr. Smith in a freezing cell naked with no protection from the elements; Captain Van Lanen departed from his own past practice, which "involved placing a smock, clothing, and other permitted property in a security box attached to the cell regardless of whether an inmate requests such items," *id.* at 364; and officers not only denied Mr. Smith's explicit request for clothing, bedding, and a mattress, but they even attempted to leverage his suffering as a bargaining chip to convince him to drop his protests. And, of course, all defendants were well aware that the weather in late November in Wisconsin could easily reach freezing temperatures. *Id.* at 371.

Nevertheless, the panel opinion in this case applied precisely the approach this Court rejected in *Hope*. Acknowledging Mr. Smith's well-established "constitutional right to protection from extreme cold," the majority nonetheless granted qualified immunity because it could identify no prior Seventh Circuit case holding it unconstitutional to house an inmate in a cell ranging from 25 to 57 degrees Fahrenheit for 23 hours without clothes or bedding. *Id.* at 372. That is, the majority disposed of the "clearly established" inquiry by observing—correctly, but irrelevantly—that it had "never held it unconstitutional on closely analogous facts" to expose a prisoner to these precise temperatures for this precise duration. *Id.* As Judge Hamilton's dissent recognized, this approach applied "what the Supreme Court has called 'a rigid,

overreliance on factual similarity.'" *Id.* at 373 (Hamilton, J., concurring in part and dissenting in part) (quoting *Hope*, 536 U.S. at 742).

This is not a close case under *Hope* and *Taylor*. The constitutional prohibition on deliberately subjecting a prisoner to extreme cold was well-established long before the events in question. *See, e.g.*, *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (noting as self-evident that "a low cell temperature at night combined with a failure to issue blankets" may establish an Eighth Amendment violation); *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997) ("[P]risoners have a right to protection from extreme cold."). Moreover, the majority ignored not just the general principles of qualified immunity reaffirmed in *Taylor*, but even the eerie similarity between the underlying *facts* in *Taylor*. After all, both cases involved corrections officers deliberately placing an inmate, naked, in a cold cell for an extended period of time, while ignoring his complaints. *Smith*, 140 F.4th at 362; *Taylor*, 592 U.S. at 8.

Admittedly, certain facts in the *Taylor* case could be perceived as even more egregious than those here. For example, the cells that Trent Taylor was kept in were also "shockingly unsanitary"—one covered in feces, the other with a clogged drain that caused raw sewage to overflow into the cell. *Taylor*, 592 U.S. at 7. But certain facts in the present case are even more extreme along other dimensions. For example, while the cell in *Taylor* was described as "frigidly cold," *id.*

at 8, Mr. Smith's cell reached literally freezing temperatures. *Smith*, 140 F.4th at 371. Also, Mr. Taylor was at least given a blanket,[6] while Mr. Smith was denied even that meager protection against the cold, in violation of typical prison practices. Finally, none of the officers in Mr. Taylor's case went so far as the officer in Mr. Smith's case who actively leveraged his suffering as part of a negotiating tactic to convince him to drop his ongoing protest regarding (of all things) prison conditions. *See Smith*, 140 F.4th at 364 ("Twelve hours later, another officer approached Smith and proposed an offer: if Smith submitted to future medical evaluations, he could have a smock; if not, he would remain naked and cold. Smith declined the offer."); Pet. at 3.

Of course, at the end of the day, debating which set of facts is *more* egregious is missing the larger doctrinal point that *Taylor* reaffirmed—when corrections officers, who are "deliberately indifferent," subject inmates to dangerous, inhumane conditions with no demonstration of "necessity or exigency" or a showing that the conditions of confinement "could not have been mitigated," then "any reasonable officer should . . . realize[] that [such] conditions of confinement offended the Constitution." 592 U.S. at 9. Those conditions are met in the present case no less than in *Taylor*—the striking factual parallels just

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[6] *See* Pet. for a Writ of Certiorari at 6, Taylor v. Riojas, No. 19-1261 (filed Apr. 4, 2020).

make it all the more astounding that majority ignored this instruction.

The defendants here did not face a novel legal question about whether extreme cold was ever unconstitutional. They knew the law's clear command; they at most simply assumed that their specific conduct, not yet condemned on identical facts, was beyond its reach. That is precisely the assumption that *Hope* and *Taylor* foreclose.

B. *Gillis v. Litscher* Provided Controlling Notice that This Conduct Was Unconstitutional—and the Majority Did Not Grapple with It.

The majority's "clearly established" analysis rests on the premise that no Seventh Circuit precedent addressed sufficiently analogous facts. But that premise is wrong, and the majority's failure to engage the controlling contrary authority is itself reason enough for this Court's intervention.

In *Gillis v. Litscher*, 468 F.3d 488 (7th Cir. 2006), the Seventh Circuit confronted facts that were functionally the same as those presented here. Wisconsin prison officials—the same state, the same correctional system—left an inmate naked in his cell without clothing, bedding, or a mattress for five days as part of a "Behavioral Modification Program," while cold air blew through a vent. *Id.* at 489–90. The prisoner reported that he had to walk around his cell for 14 hours a day simply to stay warm. *Id.* at 490. The court held that the plaintiff had created a triable issue

on his Eighth Amendment claim and, critically, *rejected the defendants' qualified immunity defense*, explaining tersely but unambiguously that it was well-established that "denial of shelter, heat, and hygiene items implicated an inmate's constitutional rights." *Id.* at 495.

The court in *Gillis* further addressed the intentional character of the defendants' conduct, specifically noting that the evidence indicated prison officials used Behavioral Modification Programs "as a way to deal with inmates without regard" for Wisconsin law. *Id.* at 494. That observation maps directly onto the facts here, where officers conditioned the provision of clothing and bedding on Mr. Smith's abandonment of his hunger strike—a textbook example of using the denial of basic necessities as an instrument of behavioral coercion, not merely as an inadvertent consequence of administrative inaction.

Gillis directly answers the question the panel majority mistakenly claimed remained yet unanswered: whether it was clearly established that Wisconsin prison officials could not deliberately deny clothing and shelter to a naked inmate to coerce behavioral compliance. *Gillis* held that it was. The majority's contrary conclusion—that "before today, we had never held it unconstitutional on closely analogous facts," *Smith*, 140 F.4th at 372—was plainly incorrect. The violation of Mr. Smith's rights was clearly established under any plausible rubric for evaluating that question.

C. The Majority's Reasoning Exposes a Structural Defect with Qualified Immunity that Case-by-Case Correction Cannot Cure.

The majority's approach exposes a deeper problem with the "clearly established law" standard as applied to constitutional protections that exist on a continuum rather than as bright-line rules. The Eighth Amendment prohibition on deliberately exposing a prisoner to extreme cold does not operate through a fixed threshold—it depends on a multi-factor assessment of temperature, duration, available protection, and surrounding circumstances. *See Dixon*, 114 F.3d at 644. That is appropriate; constitutional analysis of conditions of confinement is inherently fact-sensitive.

But this flexibility creates a structural vulnerability in the qualified immunity framework. Because no finite set of prior decisions can ever establish the unconstitutionality of every specific combination of temperature, duration, and circumstance, officials can virtually always escape liability by ensuring that their conduct differs in some measurable respect from whatever has previously been condemned. Suppose a court holds that confining a prisoner at 20°F constitutes an Eighth Amendment violation. The next official holds his prisoner at 21°F. He escapes liability: the prior case involved a colder cell, so the right was not clearly established as to *his* specific conduct. The official after him chooses 22°F

and escapes on the same logic. And so on. At each degree of incremental warming, each defendant can truthfully say that no prior case condemned precisely his temperature. An overwrought qualified immunity doctrine mistakes pinpoints on a map for territorial outlines—treating the specific coordinates of each prior holding as the full extent of the constitutional prohibition.[7] The practical result is that the original holding—the one case where a court finally said *enough*—becomes not a floor protecting future prisoners, but a ceiling above which officials know they are immune. It is never obvious what marginal difference constitutes the constitutional line.

The result is an immunity regime that is, structurally, most protective of the most creative abusers. Officials who push the boundaries of what has previously been condemned can always argue novelty. Only those who simply recreate the exact conditions of prior cases cannot. Perversely, the doctrine as applied by the majority below rewards officials for engineering deprivations that differ just enough from prior holdings to claim the protection of uncharted legal territory—not because their conduct is constitutional, but because it occupies some point that has not yet been specifically litigated. *See Zadeh v.*

[7] For that matter, even were a new officer to set the temperature at 19°F, his attorney could simply point to other distinctions to win qualified immunity, such as that the prisoner was held for 30 seconds less time or placed in a larger cell and so had more room to exercise and so generate body heat.

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.").

This Court cannot fix this problem by identifying, one case at a time, each unconstitutional combination of temperature and duration. *Hope*'s "obvious clarity" standard exists precisely to prevent that approach from becoming the de facto rule. The majority below paid lip service to *Hope* and *Taylor* while applying an analysis that rendered both effectively meaningless in the context of conditions-of-confinement claims. Summary reversal here, grounded in the specific instruction that the "clearly established law" inquiry cannot demand precedent on all fours when the underlying constitutional command is clear and the conduct at issue is deliberate, would help ensure that lower-court misunderstanding of qualified immunity jurisprudence does not wholly undermine § 1983's deterrent and remedial purpose.

II. THIS CASE ILLUSTRATES HOW QUALIFIED IMMUNITY SUPPLANTS JURY ACCOUNTABILITY WITH A DOCTRINE UNTETHERED FROM ACTUAL GOOD FAITH.

The structural defect identified above is not merely an artifact of how this particular majority reasoned; it reflects a deeper dysfunction in what qualified

immunity has become—a doctrine that now operates largely without reference to the actual good faith of the officials it protects. That is ahistorical. Throughout the history of the Court's qualified immunity jurisprudence, it has characterized the doctrine as a kind of "good faith" defense for public officials. In *Pierson v. Ray*, 386 U.S. 547 (1967), effectively the first Supreme Court case to recognize a form of qualified immunity, the Court defended the doctrine on the basis that "the defense of good faith and probable cause" would have been available at common law for a similar claim. *Id.* at 557. Even *Harlow*, which first articulated the modern "clearly established law" regime, justified that standard as a kind of "objective" good faith. 457 U.S. at 818 ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.").

But as this case vividly illustrates, qualified immunity today has become divorced from anything that could reasonably be called "good faith." The officers here were not acting under pressure, navigating uncertain law, or making split-second judgments that turned out to be wrong. They were engaged in a deliberate, calculated strategy of using exposure to freezing temperatures as leverage to extract behavioral compliance from a prisoner. The record establishes that when Mr. Smith, naked and shivering after 23 hours in a cell where temperatures dropped below freezing, asked for

clothing, an officer responded not with concern for his immediate welfare but with a bargain: submit to future medical evaluations or stay cold. *Smith*, 140 F.4th at 364. This was not a mistake.

Moreover, many other qualified immunity decisions in the lower courts reveal that even officers who *know* they are acting unlawfully may still receive qualified immunity. For example, in *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021), the Tenth Circuit held that police officers who had arrested a bystander for recording them in public were entitled to qualified immunity, even though they had received explicit training that such conduct was constitutionally protected. *Id.* at 1016 ("[I]t is therefore 'irrelevant' whether each officer defendant actually believed—or even in some sense knew—that his conduct violated a statutory or constitutional right . . . ."); *see also Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019) (holding that officers alleged to have used a search warrant to steal from plaintiffs were entitled to qualified immunity). The hunt for identical fact patterns replaces the search for the justice Congress sought to ensure for victims of civil rights violations when it enacted § 1983.

One possible solution to this problem, assuming the Court is hesitant to reconsider qualified immunity entirely, would be to clarify that successfully invoking it demands *actual* good faith, not the allegedly "objective" good faith of *Harlow*'s clearly established law standard. Modifying the doctrine would imply

that, if a defendant wished to argue that he could not have reasonably known that his actions were unlawful, such an argument would need to be decided as a factual matter by a jury. And that arrangement would be consonant with the foundational role that civil juries were meant to play in the American constitutional order.

The right to a jury trial long predates even the Seventh Amendment. "Legal writers and political theorists who were widely read by the colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen."[8] The Framers unambiguously conceived of this right not just as a means to ensure redress for victims, but as a vital check on state power.[9] Thomas Jefferson described the right to a civil jury trial as "the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution."[10] James Madison referred to this right as being "as essential to secur[ing] the liberty of the people as any one of the pre-existent rights of nature."[11] Indeed, so aligned

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[8] Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653–54 (1973).

[9] Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1017 (1994) (collecting Founders' statements).

[10] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), https://tinyurl.com/2efzm634 (punctuation modernized).

[11] Hon. Kathleen M. O'Malley, *Foreword: Trial by Jury: Why It Works and Why It Matters*, 68 AM. U. L. REV. 1095, 1098 (2019)

were the members of the Founding Generation on this point that, as Alexander Hamilton famously declared in Federalist No. 83, "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury."[12]

By precluding juries from hearing otherwise viable § 1983 claims, the contemporary "clearly established law" standard not only enfeebles one of the Constitution's key checks on state power, it also exacerbates an ongoing crisis of confidence in law enforcement. Policing is dangerous, difficult work, and without the trust of their communities, officers cannot safely and effectively carry out their responsibilities.[13] This trust is undermined by a lack of avenues for public accountability: "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

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(citing Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005) (quoting 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789) (discussing civil cases))).

[12] THE FEDERALIST No. 83 (Alexander Hamilton).

[13] *See* Inst. on Race & Just., *Promoting Cooperative Strategies to Reduce Racial Profiling*, NORTHEASTERN UNIV., at 20–21 (2008) ("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."). Available at https://tinyurl.com/4dmm2atp.

statelessness." Fred O. Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018).

Nor are these concerns abstract or academic. In recent years, in the aftermath of many high-profile police killings, Gallup reported that trust in police officers had reached a 27-year low. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, THE N.Y. TIMES (Aug. 12, 2020).[14] And that loss in confidence has been driven in large part by the perception that officers who commit misconduct are rarely held accountable[15]—a perception shared even by police officers themselves.[16]

When qualified immunity shields obviously unconstitutional conduct from jury consideration, it reinforces the public perception that government officials operate under different rules than ordinary citizens—that the law, as Justice Sotomayor has observed, is devolving into "an absolute shield for law enforcement officers." *Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting). That perception corrodes the trust between communities and the institutions that serve them, and it makes the work of the many

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[14] Available at https://tinyurl.com/kzmbmsr2.

[15] See Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, THE N.Y. TIMES (June 29, 2020), https://nyti.ms/3P33wt8.

[16] *See* Rich Morin et al., *Behind the Badge*, PEW RSCH. CTR. 40 (2017) (finding that 72 percent of officers themselves disagreed that officers who do a poor job are held accountable). Available at https://pewrsr.ch/2z2gGSn.

officers who faithfully honor their constitutional obligations harder, not easier.

If the Court declines to reconsider qualified immunity in its entirety—an outcome *amici* continue to believe is warranted—it should at minimum restore the doctrine's connection to actual good faith by permitting juries to decide, as a factual matter, whether the defendant knew or should have known that his conduct violated the plaintiff's rights. This rule would preserve protection for officials genuinely navigating legal uncertainty while withdrawing it from officials, like those here, whose conduct was deliberate and whose purpose was coercive. It also would honor the common-law tradition, which treated good faith as an element of particular torts rather than a freestanding objective safe harbor divorced from the defendant's actual state of mind. And it would restore to juries the role that both the Constitution and § 1983 assign to them—as the community's voice on whether those entrusted with coercive power have abused it.

CONCLUSION

"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.* The Seventh Circuit below acknowledged that Mr. Smith's rights were violated but nevertheless held that the law

furnishes him no remedy. A system that openly acknowledges a violation yet denies a remedy for want of functionally identical precedent is one of caprice rather than principle. The decision below should be summarily reversed.

Respectfully submitted,

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