No. _____

In The
Supreme Court of the United States

SHANIZ WEST,

Petitioner,

v.

DOUG WINFIELD, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an officer who has consent to "get inside" a house but instead destroys it from the outside is entitled to qualified immunity in the absence of precisely factually on-point caselaw.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Shaniz West was the plaintiff in the United States District Court for the District of Idaho and the plaintiff-appellant in the United States Court of Appeals for the Ninth Circuit. Respondents Matthew Richardson, Alan Seevers, and Doug Winfield,[1] all police officers with the Caldwell, Idaho police department, were defendants in the district court and defendants-appellants in the Ninth Circuit. The City of Caldwell, the City of Caldwell Police Department, and former Caldwell Police Chief Chris Allgood were all defendants in the district court. The complaint filed in the district court also named Does I–X, unidentified Caldwell police officers involved in destroying West's home and belongings.

STATEMENT OF RELATED CASES

United States District Court (D. Idaho):

West v. City of Caldwell, No. 16-cv-00359 (Oct. 18, 2019).

United States Court of Appeals (9th Cir.):

West v. City of Caldwell, No. 18-35300 (July 25, 2019).

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[1] Richardson and Seevers were sued in their individual capacities; Winfield was sued in his official and individual capacities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 931 F.3d 978. The opinion of the United States District Court for the District of Idaho, App. 30, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2019. Petitioner timely petitioned for rehearing, which was denied on September 4, 2019. On November 19, 2019, Justice Kagan extended the time to file a petition for a writ of certiorari until February 1, 2020. This petition is timely filed on January 16, 2020. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated."

42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . 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[.]"

STATEMENT

Since 1982, this Court has held that government officials may be held liable for violating the Constitution only if they violate a "clearly established" rule of law. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). But the "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" in order for a prior case to have "clearly established" a rule of law. *Zadeh* v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). That intractable division has real consequences. Here, Petitioner Shaniz West gave law enforcement her consent to enter her home to search for a fugitive whom they (incorrectly) believed was inside. Instead of entering the home, the officers decided to spend hours besieging it, during which time they (among other things) repeatedly fired tear-gas grenades into the house from the outside. West sued,

arguing that her consent to enter the home did not include consent to intentionally destroy it.

As a matter of Fourth Amendment law, this is not a difficult legal question. Indeed, Petitioner can find no case countenancing anything even close to what happened here. But as a question of qualified immunity, it divided the panel below in exactly the way that similar questions—about consent searches and about qualified immunity more broadly—have divided the courts of appeals. The petition for certiorari should be granted to correct rampant confusion in the lower courts about the proper scope of qualified immunity.

1. The events at the heart of this case began around 2:20 p.m. on August 11, 2014, when West arrived home with her children to discover her house surrounded by the City of Caldwell police—five officers in total, watching every exit. App. 35. The officers were there because they had reason to suspect that West's ex-boyfriend, who was wanted on an outstanding warrant, was inside. App. 33–36.

West explained to Respondent Richardson that her ex-boyfriend had been there earlier, that she had told him to gather his belongings and leave, and that she had told him to chain the front door behind him and exit through the back. App. 33, 36. She also said she could not be sure whether he had done so, but that she was certain her dog was in the house. App. 36–37. Richardson then threatened her with arrest for harboring a fugitive if the ex-boyfriend proved to be inside. App. 36. After some back-and-forth, Richardson

eventually asked her for "permission to get inside [her] house and apprehend him." App. 38. West agreed and handed him her keys. She then left.[2] Soon after West left, the sergeant in charge called the Canyon County Prosecuting Attorney's Office and spoke with an attorney, who informed him that if he had consent to search the house, he did not need a warrant. App. 38–39.

But the officers on scene did not use the keys. Instead, the sergeant in charge called the local SWAT unit, which had not previously been on scene, and asked for their assistance. App. 39. By 3:00 p.m., about half an hour after West had first come home, the SWAT team had been activated. App. 40.

Once the SWAT team was activated, the plan changed. Respondent Doug Winfield, the team leader, developed a tactical plan "designed to extract [the ex-boyfriend] from the residence without requiring SWAT members to go inside." App. 40. The first step in the plan was to surround the residence and call out in hopes of inducing the ex-boyfriend to come out. App. 40–41. The second step was to bombard the home with tear-gas grenades to force him to come out. App. 41. If the tear gas failed, the SWAT team would then conduct a "limited breach" of the home to search for him. *Ibid*. The SWAT team conducted several dry runs of the plan at police headquarters and then deployed to West's home, arriving there around 5:23 p.m.—about three

[2] One officer testified below that he had wanted West to stay during the search so "she could revoke consent at any time," but it is undisputed that the police did not require her to stay and that she left with their full permission. App. 38.

hours after West's first conversation with the officers on scene. *Ibid*.

At no point during this several-hour process was West informed that the plan had changed from "get[ting] inside [the] house" to bombarding it with grenades. App. 38–40. At no point did she consent to the new plan. *Ibid*. And at no point did any officer either obtain a warrant or seek further guidance from counsel about the legality of their new plan. *Ibid*.

In West's absence, the SWAT team implemented the plan as described. First, they announced their presence. App. 42. Less than 20 minutes later, they began bombarding the house with grenades. *Ibid*. A little after 7:00 p.m., they for the first time tried to use West's keys in her front door, which (as West had told them) was chained shut. *Ibid*. The keys would have unlocked the back door, but they were unnecessary: That door had been shattered by a grenade, allowing the team to enter without needing a key. *Ibid*.

After a thorough and destructive search, the police concluded that West had been right and her exboyfriend was not there. App. 43. Instead, the police had spent hours laying siege to and bombarding a house that was empty except for West's dog, Blue.

West was not allowed to reenter her home until some time later—and when she did, she found it "destroyed." App. 43. Her and her children's personal belongings were saturated with tear gas; there were holes in walls and ceilings; and the home was littered with debris and broken window glass. *Ibid*. During the

siege, officers had fired tear gas into every living space in the home, leaving everything—food, clothing, electronics, furniture—covered in a golden sticky residue that caused burning and tearing upon contact. *Ibid*.

West and her children were unable to move back into the home for two full months. App. 44. During that period, the City of Caldwell provided them with a hotel room for three weeks and offered $900 for the damage caused to West's personal property, but otherwise denied liability. *Ibid*.

2. West sued, alleging (as relevant here) that the officers involved in the siege had violated her Fourth Amendment rights by their warrantless bombardment of and violent entry into her home. App. 48. She argued, in essence, that she had agreed only to allow the police to "get inside" her home, and that no reasonable officer could believe consent to "get inside" a home was authorization to stand outside and destroy it. App. 49.

The parties cross-moved for summary judgment, and the District Court of Idaho denied both motions. App. 71. The court rejected West's primary theory—that the officers had exceeded the scope of her consent—but found that there was a fact dispute about whether the search had been reasonable under the circumstances. App. 49–56. The court therefore denied both West's motion and the individual defendants' motion seeking qualified immunity and ordered the case to mediation. App. 71–73.

The individual defendants filed an interlocutory appeal on the qualified-immunity question, and a

divided panel of the Ninth Circuit reversed, finding that the officers were entitled to qualified immunity not just on the reasonableness of the search, but also on the question of whether they had exceeded the scope of West's consent. App. 15, 19.

The panel majority found that the officers were entitled to qualified immunity on the scope-of-consent question because "no Supreme Court or Ninth Circuit case clearly established, as of August 2014, that Defendants exceeded the scope of consent" when they took West's permission to "get inside" her house as permission to bombard and destroy it. App. 13. After all, the majority reasoned, the officers "did 'get inside' [her] house, first with objects and later with people." *Ibid*.

The majority specifically disclaimed, however, any holding "that a 'typical reasonable person' consenting to an entry to look for a suspect could be understood by a competent police officer as consenting to damage to his or her home so extreme that [it] renders [the home] uninhabitable for months." App. 13 (alterations in original). Neither did it dispute that "no reasonable person would have understood [West's] consent to encompass shooting tear gas canisters into the house." *Ibid.* Instead, its holding was premised solely on the absence of a specific case in which an officer had exceeded consent in this particular way. *Ibid.*

Judge Berzon dissented, arguing that the officers were not entitled to qualified immunity on the scope-of-consent claim. App. 20. In her view, it is "clearly established" law that "general consent to search is not

without its limitations," and in light of those limitations it is "clear that extensive property destruction rendering a home uninhabitable goes beyond the limitations inherent in a general consent to search." App. 24–25 (citing *Florida* v. *Jimeno*, 500 U.S. 248, 251–52 (1991)).

The dissent did not purport to find a "closely similar case[] to guide the clearly established law inquiry[.]" App. 27. Instead, it found no such case was necessary because any competent officer would have understood he could not lawfully destroy a house simply because he had consent to enter it. *Ibid.* On Judge Berzon's view, "the likely reason there are no closely similar cases standing for the proposition that officers may not use a general consent to search to take actions that render a home uninhabitable for months is that law enforcement officers well understand" this would be illegal. *Ibid.* Indeed, the dissent noted that lower courts were nearly unanimous in holding that a general consent to search could not authorize police to destroy or render useless the property being searched.[3]

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[3] Judge Berzon's opinion actually slightly understates lower courts' unanimity on this point. It suggests that "[t]he Second Circuit allows for intentional damage to personal property in the course of a general consent search." App. 25–26 & n.2 (citing *United States v. Mire*, 51 F.3d 349, 351–52 (2d Cir. 1995)). But the property damaged in *Mire* was a set of false-soled sneakers being used to smuggle cocaine, and the per curiam opinion in that case holds only that it was "objectively reasonable" for officers to search the sneakers incident to the search of the bag they were contained in. *Id.* at 351–53. The opinion does not discuss the degree to which the sneakers themselves were damaged, and the damage to the property is not mentioned as an aspect of the court's Fourth Amendment analysis. *Ibid*.

Because "the majority's reading of West's consent . . . quite frankly, border[ed] on the fantastic," App. 22, the dissent found that there was "simply no plausible possibility that a 'typical reasonable person' would have understood that West agreed to the destruction" of her home. App. 28. And where no reasonable officer could have believed he was acting lawfully, qualified immunity would be inappropriate. *Ibid.*

This petition followed.

REASONS FOR GRANTING THE PETITION

The decision below exacerbates an existing split of authority among the Second Circuit (which follows the rule articulated by the majority) and the Sixth and Seventh Circuits (both of which follow the rule advocated by the dissent). And that split matters—both on its own and because it is emblematic of a deeper and enduring disagreement among the courts of appeals over what constitutes "clearly established" law for purposes of qualified immunity. Finally, this case presents these legal disputes in an ideal vehicle in which this Court's traditional justifications for qualified immunity are notably absent.

A. The decision below conflicts with decisions from the Sixth and Seventh Circuits about how qualified immunity applies when officials exceed the scope of consent to search.

There is no dispute about the underlying substantive law of consent searches. This Court has long held that while consent is an exception to the Fourth Amendment's warrant requirement, it is an exception "jealously and carefully drawn." *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones* v. *United States*, 357 U.S. 493, 499 (1958)). And there is no question that, when searching pursuant to consent, authorities are limited to the scope of that consent. *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991). Where lower courts disagree, however, is whether and when these established principles constitute "clearly established" law that government officials may be held liable for violating. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

The disagreement among the lower courts is illustrated by the two opinions below. The majority held that the officers were entitled to qualified immunity because "no Supreme Court or Ninth Circuit case clearly established, as of August 2014, that Defendants exceeded the scope of consent" by bombarding the house instead of using the keys to go inside. App. 13. The dissent would have held that no such case is necessary because "there is simply no plausible possibility that a 'typical reasonable person'" would have believed he was acting lawfully in destroying West's home. App. 28.

This is not a dispute about the law of the Fourth Amendment. The majority opinion seems perfectly correct that there is no existing case holding that consent to enter a house does not encompass consent to bombard it with grenades. But the dissent is also correct that there is no case holding to the contrary, and that no officer seems to have ever even made this argument to a federal court. Cf. *United States* v. *Lanier*, 520 U.S. 259, 271 (1997) ("'The easiest cases don't even arise.'").[4] This is, instead, a dispute about the law of qualified immunity.

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[4] It is revealing that in the most factually similar case the dissent points to, seemingly every judge on the Fifth Circuit agreed that the sort of home-destroying conduct engaged in here would violate the Fourth Amendment. App. 25–26 (citing *United States* v. *Ibarra*, 965 F.2d 1354 (5th Cir. 1992)). In *Ibarra*, an evenly divided Fifth Circuit affirmed a holding that police exceeded consent to search a home when they destroyed some boards to gain access to the home's attic. See *United States* v. *Ibarra*, 965 F.2d 1354, 1358–59 (5th Cir. 1992) (en banc) (opinion of Jolly, J.). Half the judges found that breaking apart a boarded-up area was outside the scope of consent to search because consenting to a search does not include consent to break down doors. *Id.* at 1358. The other half would have held that the search did not violate the scope of consent—but only because they believed the searching officers had not caused the sort of damage undisputedly caused here. *Id.* at 1360–61 (Duhe, J., dissenting); cf. *id.* at 1357 n.3 (opinion of Jolly, J.) (chiding the dissenting opinion for taking too narrow a view of "structural" damage as including only damage that "would render a house uninhabitable"). *Ibarra* does not, of course, satisfy the panel majority's demand for on-point caselaw here—breaking boards is not launching grenades—but it reflects the huge distance between courts' analysis of the qualified immunity question and their analysis of the substantive constitutional question.

And it is a dispute that maps perfectly onto an existing disagreement among the Second, Sixth, and Seventh Circuits. The majority's holding finds support in the Second Circuit, which also demands an on-point case holding that a specific search exceeded a specific consent. *Winfield* v. *Trottier*, 710 F.3d 49 (2d Cir. 2013). In *Winfield*, an officer who had general consent to search a vehicle proceeded to open envelopes (while "not looking for anything in particular") and read private correspondence. *Id.* at 52. The Second Circuit held that while the search had in fact violated the Fourth Amendment, qualified immunity was appropriate in the absence of precisely on-point caselaw. *Id.* at 57. Specifically, the Second Circuit found that the only way to defeat qualified immunity would be to identify a prior Second Circuit case holding "[i]t is a Fourth Amendment violation when a police officer reads a suspect's private papers, the text of which is not in plain view, while conducting a search authorized solely by the suspect's generalized consent to search the area in which the papers are found." *Ibid.*

But that approach to qualified immunity for consent searches (like that of the panel majority below) conflicts directly with the law of the Sixth and Seventh Circuits. Both the Sixth and Seventh Circuits have adopted the exact approach advocated by the dissent below in the course of rejecting qualified immunity for officers who exceed the scope of consent to search.

In *Shamaeizadeh* v. *Cunigan*, the Sixth Circuit held that no on-point case is needed to defeat qualified immunity where the police clearly exceed the scope of

consent. 338 F.3d 535, 546 (6th Cir. 2003). There, a woman called the police to report a potential robbery in progress. *Id.* at 541. When an officer arrived, she gave him consent to search the house for the intruder. *Id.* But, growing suspicious, the officer called in others—first a supervisor to conduct a second search, and then later an officer with greater experience in detecting drugs to conduct a third. *Id.* at 542. The Sixth Circuit denied qualified immunity for the second and third searches. *Id.* at 547–50. It did not point to any factually analogous case. Instead, it followed the approach advocated in dissent here: It held that it was clearly established that "the scope of a search is limited by the terms of its authorization," *id.* at 550 (quoting *Walter* v. *United States*, 447 U.S. 649, 657 (1980)), and that qualified immunity was inappropriate because a reasonable officer "could not have objectively considered the consent . . . to have extended beyond [the] initial search of the residence." *Ibid.*

So too in the Seventh Circuit. In *Michael C.* v. *Gresbach*, a social worker obtained consent to interview children about alleged abuse, but then also searched their bodies. 526 F.3d 1008 (7th Cir. 2008). The social worker claimed qualified immunity, arguing that although the Seventh Circuit had clearly established that the Fourth Amendment applied to social workers, its earlier cases had not addressed the scope-of-consent question. *Id.* at 1017. But the Seventh Circuit rejected this argument. Like the dissent below, it cited *Jimeno* for a "general constitutional rule" about the scope of consent. *Ibid.* And even though *Jimeno*

had applied that rule in the context of a car search, the court held that it applied "with obvious clarity" to the social worker's search of a child. *Ibid.* It was therefore "clearly established that the scope of consent to interview does not extend to a search of an individual's body under *Jimeno* and its progeny[,]"[5] and qualified immunity was inappropriate. *Ibid*.

In brief, the panel majority's view of qualified immunity under *Jimeno* represents the law of the Second (and now the Ninth) Circuit. But the dissent's view of the law is correct in both the Sixth and Seventh Circuits. This Court's intervention is warranted to resolve this split of authority.

B. The question presented is of national importance.

The narrow circuit split over qualified immunity in scope-of-consent cases matters because it is not simply a disagreement about consent searches. Instead, the split presented by this case is emblematic of a broader disagreement about what constitutes "clearly established" law for purposes of qualified immunity. Some courts view the inquiry as a practical one, asking whether an officer's conduct was reasonable in light of clearly established legal principles. Others view it as a

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[5] Despite the reference to *Jimeno*'s progeny, the Seventh Circuit did not identify—and rejected the need for—any case after *Jimeno* presenting the same facts as the case before it. *Ibid.*

formal inquiry, asking whether a federal court has ever addressed an officer's specific conduct.

This dispute is rooted in this Court's seeming endorsement of both approaches. In one line of cases, this Court embraces the practical nature of the inquiry, stressing that the purpose of qualified immunity is to ensure that officials have "fair warning" their conduct is unlawful. *Hope* v. *Pelzer*, 536 U.S. 730, 740–41 (2002). When describing this vision of the doctrine, the Court rejects any "rigid gloss on the qualified immunity standard" that would "require[ ] that the facts of previous cases be 'materially similar' " to the case at bar. *Id.* at 739; see also *United States* v. *Lanier*, 520 U.S. 259, 271 (1997) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question[.]"); *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (rejecting notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful").

But in other cases, the Court has articulated a far more formal version of the doctrine. In this version (which largely appears in the use-of-force context, *infra* at 18), the question for a court is almost entirely subsumed in a search for an existing "case where an officer acting under similar circumstances as [a defendant] was held to have violated" the Constitution. *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017).

The result of these two overlapping visions of qualified immunity is that the "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" to defeat qualified immunity. *Zadeh* v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring); see also *Golodner* v. *Berliner*, 770 F.3d 196, 205 (2d Cir. 2014) ("Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established. . . ."). And there are nearly as many approaches to this question as there are courts of appeals. In the First Circuit, there is a two-part test to determine whether the law is "clearly established." *Stamps* v. *Town of Framingham*, 813 F.3d 27, 34 (1st Cir. 2016). The Second Circuit's test has three parts. *Jermosen* v. *Smith*, 945 F.2d 547, 550 (2d Cir. 1991). The Tenth Circuit does not use parts but instead employs a "sliding scale to determine when law is clearly established." *Casey* v. *City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007); but see *Lowe* v. *Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017) (noting possible tension between "sliding scale" approach and some of this Court's decisions). In recent years, the Ninth Circuit has at times eschewed tests altogether and instead suggested that, at least in the Fourth Amendment context, it may be almost impossible to say that an officer "obvious[ly]" violated the law without a direct case on point. *Sharp* v. *Cnty. of Orange*, 871 F.3d 901, 912 (9th Cir. 2017). Meanwhile, courts in the Eighth Circuit are more "flexible" in their search for on-point precedent and instead "demand[] that officials apply general, well-developed legal principles" in

Fourth Amendment qualified-immunity cases. *Mountain Pure, LLC* v. *Roberts*, 814 F.3d 928, 932 (8th Cir. 2016).

Unsurprisingly, different tests yield different results in similar cases. Indeed, the split among the Second, Sixth, Seventh, and Ninth Circuits about qualified immunity in the consent-search context is just one example of this broader, intractable methodological disagreement about the underlying doctrine of qualified immunity. This Court's intervention is warranted to resolve the deep disagreements among the lower courts.

C. This case provides an ideal vehicle to resolve the jurisdictional split of authority over an important constitutional issue.

For years, jurists and scholars alike have criticized existing qualified-immunity doctrine based both on legal objections to the doctrine's foundations and policy objections to the doctrine's failure to achieve its stated goals.[6] This case is an ideal opportunity for the Court to address those concerns. The question presented was the sole ground of dispute between the majority and

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[6] See, *e.g.*, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Cole v. Carson*, 935 F.3d 444, 470–73 (5th Cir. 2019) (en banc) (Willett, J., dissenting); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 88 (2018); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 869 (2010); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 70 (2017).

dissenting opinions below, and the case arises on cross-motions for summary judgment that present a clean fact record.

Moreover, this case presents circumstances in which at least two of the Court's longstanding justifications for the qualified-immunity doctrine are notably absent.

First, this Court has repeatedly explained that a core policy justification for qualified immunity is to ensure courts' constitutional analyses account for the fact that "'police officers are often forced to make split-second judgments'" and may accordingly make mistakes. *City & Cnty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1775 (2015) (quoting *Plumhoff* v. *Rickard*, 572 U.S. 765, 775 (2014)); accord *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *Graham* v. *Connor*, 490 U.S. 386, 396 (1989)). And, indeed, most of the modern cases in which this Court has invoked a stringent requirement for factually similar caselaw fit this justification exactly: They involve an officer in a fast-moving situation deciding whether to detain a suspect or how much force to use.[7] But the Court has never squarely addressed whether the analysis should differ where this core justification for qualified

[7] See, *e.g.*, *Kisela*, 138 S. Ct. at 1152 (qualified immunity for use of force); *Dist. of Columbia* v. *Wesby*, 138 S. Ct. 577, 587–89 (2018) (qualified immunity for asserted false arrest); *White* v. *Pauly*, 137 S. Ct. 548, 551–52 (2017) (per curiam) (qualified immunity for use of force); *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (qualified immunity for use of force).

immunity is absent.[8] Cf. *Cole* v. *Carson*, 935 F.3d 444, 472 (5th Cir. 2019) (Willett, J., dissenting) (proposing that this Court should "clarify[] the degree of factual similarity required in cases involving split-second decisions versus cases involving less-exigent situations").

This case presents exactly that scenario. The officers besieging West's house had ample time to consider their action. They had ample time to seek legal counsel. Indeed, they did exactly that—they just did not seek legal counsel again after their plans changed from getting inside the house to standing outside the house bombarding it with grenades. See App. 38–40. If the point of qualified immunity is to protect officers in fast-moving situations, the Court should hold that the doctrine has less force in slow-moving situations that invite reflection. And if that is *not* the point of qualified immunity, this case presents an opportunity for the Court to clarify its earlier statements about the scope of the doctrine.

Second, this Court has at times expressly grounded its qualified-immunity jurisprudence in the history of common-law immunities that existed at the time of the adoption of Section 1983. *E.g.*, *Filarsky* v. *Delia*, 566 U.S. 377, 383–84 (2012). At the same time, Members of this Court have routinely noted that the actual doctrine seems far afield from any analogous common-law

[8] To be sure, this Court has found qualified immunity in contexts where officials had ample time to engage in careful deliberation, but in these cases the Court has also tended to express deep skepticism of (or even outright rejected) the underlying constitutional claim. Cf. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735 (2011).

immunities. See *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting); *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring). Justice Thomas, in particular, has recently suggested that the Court's qualified-immunity jurisprudence should be reevaluated in light of common-law tort principles of 1871. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring in part and concurring in the judgment) (citing Baude, *supra*).

On this front, too, this case presents facts that would help the Court clarify the importance of history. West's claim is that local government officials committed a trespass—that they exceeded the scope of her consent to enter her home, and that they should be held liable for doing so. Under any plausible understanding of 19th century common law, the physical invasion of one's home by government agents without a court order would have subjected those agents to a suit in trespass.

Indeed, trespass suits like these are at the very heart of the Fourth Amendment itself. This Court has identified the roots of the Fourth Amendment's protection from "unreasonable" search and seizure as stemming from a lawsuit filed in trespass after government agents searched a private home and damaged private property pursuant to a general warrant. *Boyd* v. *United States*, 116 U.S. 616, 626 (1886) (extolling Lord Camden's decision in in *Entick* v. *Carrington & Three Other King's Messengers* as a "monument of English freedom").

And that robust tradition of trespass liability for officials who unlawfully searched, seized, or destroyed property continued after the adoption of Section 1983.[9] Indeed, the majority view in the 19th century was that the only proof necessary in a trespass action against an official was that the trespass itself had occurred; any official justification had to be proved as an affirmative defense. *Masters* v. *Teller*, 56 P. 1067, 1069–70 (Okla. 1898) (collecting authorities). And an officer who trespassed without a court order did so at his peril, without any apparent presumption of legality.[10] *E.g.*,

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[9] In the words of one leading treatise of the time, "[i]t is almost unnecessary to say that a sheriff is responsible civilly for an abuse of his authority or oppression in the exercise of his functions." 2 William L. Murfree, *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 934, at 473 (St. Louis, Nixon-James Printing Co.1884); *accord* 2 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 618, at 475 (New York, Baker, Voorhis & Co. 4th ed. 1888) ("[N]o action, unless given by statute will lie against the [sheriff's] deputy for mere breach of duty in his office[,] though he is personally liable for a trespass committed by him in the supposed discharge of his duty."); see also *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331, 336–37 (1806) (awarding damages in trespass against officers who acted to enforce an unlawful fine); *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 123–25 (1804) (Marshall, J.) (upholding award of damages against a captain who seized a vessel without probable cause despite the fact that "he acted upon correct motives[and] from a sense of duty"); *Miller* v. *Horton*, 26 N.E. 100, 102–03 (Mass. 1891) (Holmes, J.) (holding—on explicit constitutional-avoidance grounds—that nuisance statute authorizing destruction of diseased horses allowed for subsequent tort suit against an officer if the horse had not actually been diseased).

[10] These trespass actions included claims for damage caused in the course of the trespass. *E.g.*, *Ilsely* v. *Nichols*, 29 Mass. 270 (1831) (affirming plaintiff's recovery of $75 from an officer who

Alexander v. *Helber*, 35 Mo. 334, 340–41 (1864) (holding officer personally liable for seizing property under town ordinance where ordinance was invalid as a matter of state law). It was not controversial in the middle of the 1800s to say that an officer who overstepped in searching or seizing property could be sued in trespass; instead, the salient legal controversies of the time were over whether an officer would be indemnified for that trespass.[11]

Given the historical grounding of trespass claims against government officials, this case presents a clear

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"broke the outer door [of] the plaintiff's house"); see also, *e.g.*, *Weld* v. *Green* 10 Me. 20 (1833) (sheriff sued in tort for "the estimated value of [the damaged brig] when attached" because "the law is perfectly clear that the Sheriff is answerable for such value at all events"); *Banker* v. *Caldwell*, 3 Minn. 94 (1859) ("There can be no doubt that the sheriff was guilty of a flagrant violation of his duty in copying the plaintiff's books, and that an action will lie against him for the damage the plaintiff has sustained by reason of his misconduct.").

[11] See, *e.g.*, *Holliman* v. *Carroll's Adm'rs*, 27 Tex. 23, 26–27 (1863) (collecting authorities and distinguishing between an officer who "was guilty of malfeasance in attempting to perform an official duty," who would be indemnified by a surety, and an officer acting "without any process whatever[,]" who would not); *accord Lammon* v. *Feusier*, 111 U.S. 17, 19 (1884) (noting same distinction as a matter of federal law); see also 2 Murfree, *supra*, § 611 at 284–85 (noting the then-recent trend of indemnification by bond or surety was a "depart[ure] from the rigor of the old rule, that in all cases 'the sheriff acts at his peril,' and to exact from that officer in common with all others, only a reasonable service"). While courts eventually developed doctrines of good-faith immunity for government officials, those developments "almost entirely post-dated the enactment of Section 1983." Baude, *supra*, at 59–60.

opportunity for the Court to clarify what role, if any, historical immunity doctrines play in its modern qualified-immunity jurisprudence.

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Simply put, this case presents an important question. It presents that question with no vehicle problems. And it presents the question in a context that would allow this Court to clarify the margins of its qualified-immunity doctrine. For all of these reasons, the petition for certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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