UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 23-1767

JADEN BROWN,
Plaintiff-Appellee,

v.

SAM DICKEY, individually and as an employee of the Cumberland County Sheriff's Department; DANIEL HASKELL, individually and as an employee of the Cumberland County Sheriff's Department,
Defendants-Appellants,

CARRIE BRADY, individually and as an employee of the Cumberland County Sheriff's Department; CUMBERLAND COUNTY; KEVIN JOYCE, individually and as Sheriff of Cumberland County; TIMOTHY KORTES, individually and as an employee of the Cumberland County Sheriff's Department; MARK RENNA, individually and as an employee of the Cumberland County Sheriff's Department,
Defendants.

Appeal from the United States District Court
For the District of Maine
Case No. 2:20-cv-00478-NT
The Honorable Nancy Torresen

BRIEF OF *AMICI CURIAE* THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AND THE INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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Dated: February 23, 2024

/s/ George Mills
George Mills

TABLE OF CONTENTS

TABLE OF CASES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC attorneys have taken part in civil rights battles in areas including police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, the treatment of incarcerated people, and qualified immunity. RSMJC has an interest in ensuring accountability for civil rights violations by preventing the unwarranted expansion of qualified immunity.

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society, including judicial enforcement of constitutional limits on government power and accountability for violations of those limits. Because qualified immunity limits access to federal court and drastically hinders the enforcement of constitutional rights, IJ litigates and files amicus briefs in government

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the *amici*, its members, or its counsel, contributed money that was intended to fund preparation or submission of this brief.

immunity and accountability cases nationwide, including in this Court. IJ also recently released a first of its kind national study on qualified immunity and its deleterious effects. *See* Jason Tiezzi, Robert McNamara & Elyse Smith Pohl, *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, Institute for Justice (Feb. 2024), https://ij.org/report/unaccountable/.

INTRODUCTION

Cumberland County Correctional Officers Dickey and Haskell ("Defendants") were feet away from Jaden Brown as she labored to give birth to her daughter. Ms. Brown was not considered a security risk or escape risk. Yet Defendants, both male, positioned themselves steps away from Ms. Brown as doctors performed invasive medical procedures, such as cervical dilation exams, which required Ms. Brown to spread her legs as doctors inserted gloved fingers into her vagina. All the while, Defendants, who both had "troubling histories involving inappropriate relationships" with incarcerated women, made horrifying comments to Ms. Brown. They told her to name her child after the jail, called her and her baby "one and a half inmates," and mocked the appearance of another female inmate who had "accused Haskell of having sex with her." Then, when it came time for Ms. Brown to push, Defendant Dickey was by her bedside as "medical staff held up her legs," completely exposing her naked body during the delivery. Throughout her labor and delivery, Dickey remained close enough to her "to see, hear, and smell everything that was happening."

Ms. Brown testified the officers' presence made her feel "nervous," "embarrassed," "scared," "numb," "lonely," and "terrified." So much so that although she hoped "to have immediate skin-to-skin contact with her baby and breastfeed her," she felt too "disgusted" and "dirty" to expose her body again to the officers.

Defendants' egregious conduct during one of life's most intimate moments violated Ms. Brown's clearly established right to privacy, along with every basic sense of human decency. Contrary to Defendants' arguments on appeal, their behavior is not shielded by the judge-made doctrine of qualified immunity. The district court was right to reject that misguided position. This Court should affirm.

SUMMARY OF ARGUMENT

I. Defendants Dickey and Haskell contend that clearly established law can only be found in two places: opinions of the Supreme Court and opinions of the federal courts of appeals issued in cases presenting nearly identical facts. *See* Appellants' Br. 23-25. Not so. The touchstone of the qualified immunity doctrine is notice. Defendants Dickey and Haskell were on notice three-times over.

A. First, this Court's holding in *Cookish v. Powell* gave Defendants Dickey and Haskell fair warning that "observations of an inmate's naked body by a guard of the opposite sex" almost certainly "violate the Fourth Amendment" unless there is "an emergency condition" or the observations are "inadvertent, occasional, casual, and/or restricted." 945 F.2d 441, 447 (1st Cir. 1991).

In arguing otherwise, Defendants wrongly assume qualified immunity is a one-size-fits-all doctrine. To be sure, in fast-moving emergency contexts where law enforcement officers must make "split-second judgments," the clearly established law inquiry can be exacting, demanding a high degree of fact matching from one case to another. *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014). But in non-urgent circumstances, such as Defendants' hours long invasion of Ms. Brown's hospital room during labor and delivery—less factual overlap is required to give Defendants fair notice. Defendants had ample time to consider and then consider again whether their egregious conduct violated Ms. Brown's constitutional rights.

B. Second, Defendants' formulation of the clearly established law inquiry ignores that the Supreme Court has long held that in "obvious"

cases such as this, general principles of constitutional law alone can provide the requisite fair warning to government officials that their acts are unlawful. *See Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002). In recent years, the Supreme Court has twice reiterated this principle. *See Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021). Like handcuffing an incarcerated person to a hitching post, *Hope*, 536 U.S. at 737-38, looming over Ms. Brown from less than two feet away during labor, delivery, and the post-partum period—absent *any* penological justification—is so obviously unlawful that a corrections officer need not have opened a casebook to know that their conduct was prohibited under the Constitution. *See Taylor*, 141 S. Ct. at 53 (reversing grant of qualified immunity where "no reasonable correctional officer" could believe conditions of confinement were lawful notwithstanding the lack of factually similar precedent); *see also Irish v. Fowler*, 979 F.3d 65, 78 (1st Cir. 2020) (explaining "a general proposition of law may clearly establish the violative nature of a defendant's actions, especially when the violation is egregious.").

C. Third, Defendants' artificially constrained view of the clearly established inquiry casts aside the importance of regulations, policies,

and statutes in putting officials on notice that their actions are unlawful. *See, e.g.*, *Hope*, 536 U.S. at 741-44; *Irish*, 979 F.3d at 77. Here, both Maine state law and Cumberland County's policies provided ample warning that Dickey and Haskell's observation of Ms. Brown during childbirth and labor was unconstitutional.

II. Finally, qualified immunity is unjust, unworkable, ahistorical, and atextual. As this Court considers qualified immunity in this case, this Court need not and should not expand the judge-made defense here, particularly where correctional officers would not have received immunity at common law for conduct causing harm to persons in their custody.

ARGUMENT

I. Qualified Immunity's Clearly Established Inquiry Is Fundamentally Concerned With Notice, and Identical Decisions Are Not the Only Sources of Notice.

Defendants argue that qualified immunity should be extended to their misconduct because "there are no reported cases in which officers who were merely present in a hospital room while an inmate gave birth were held liable for violating the inmate's Fourth Amendment rights." Appellants' Br. 23. In other words, they argue that they are immune from

the consequences of their intentional misconduct until a factually identical case is decided against officials. Not so.

The clearly established law inquiry boils down to notice—not to whether a court has previously passed upon the identical course of conduct. *See Irish v. Fowler*, 979 F.3d 65, 76 (1st Cir. 2020) (explaining that "cases involving materially similar facts are not necessary to a finding that the law was clearly established"). This Court's caselaw, general principles of constitutional law, Maine state law, and Cumberland County's policies each gave Defendants fair warning that their conduct here violated the Constitution.

A. The district court correctly concluded that *Cookish* put Defendants on notice here.

To resolve this case, this Court need look no further than *Cookish v. Powell*, which clearly established that "observations of an inmate's naked body by a guard of the opposite sex" almost certainly "violate the Fourth Amendment" unless there is "an emergency condition" or the observations are "inadvertent, occasional, casual, and/or restricted." 945 F.2d 441, 447 (1st Cir. 1991). *Cookish* gave Defendants fair warning that their conduct was unconstitutional because it is undisputed that no "emergency condition" existed here and, as the district court correctly

held, a reasonable juror could find Defendants' observations of Ms. Brown were not "inadvertent, occasional, casual, and/or restricted." *Id.*; Add. A-18.

The clearly established law inquiry is not a one-size-fits-all exercise. In some cases, such as Fourth Amendment probable cause or excessive force cases, a "high 'degree of specificity'" may be necessary to provide the requisite notice. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). That stringent standard gives law enforcement officers "breathing room" to make "split-second judgments." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011); *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014). But in other cases—particularly violations like those alleged here that occur over the course of hours—less factual overlap is required to provide the required notice. *See*, *e.g.*, *Reitz v. Woods*, 85 F.4th 780, 793 (5th Cir. 2023) (denying qualified immunity when officers violated the Constitution in an "unhurried setting").

This distinction makes sense because notice can be derived from cases that are not on all fours far more easily in non-urgent contexts than in, say, a Fourth Amendment excessive force case. *See Villarreal v. City of Laredo, Texas*, No. 20-40359, --- F.4th ---, 2024 WL 244359, at *22 (5th

Cir. Jan. 23, 2024) (Willett, J., dissenting) (explaining qualified immunity purports to protect split-second, gut decisions, not slow-moving deliberate choices made by law enforcement). In such cases, "qualified immunity protects actions in the 'hazy border between excessive and acceptable force.'" *Mullenix*, 577 U.S. at 18 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)). By contrast, under the facts alleged here, Defendants had ample time to consider whether their conduct violated the law. *See Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari) ("[W]hy should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?").

Given Defendants' extended period for reflection during their hours-long invasion of Ms. Brown's hospital room, this Court's expression of clearly established law in *Cookish* provided sufficient notice here.[2] In *Cookish*, this Court explained that:

[2] The Court can leave for another day whether *Cookish* would provide sufficient notice in faster moving circumstances.

> (1) inadvertent, occasional, casual, and/or restricted observations of an inmate's naked body by a guard of the opposite sex did not violate the Fourth Amendment and (2) if the observation was other than inadvertent, occasional, casual, and/or restricted, such observation would (in all likelihood) violate the Fourth Amendment, *except* in an emergency condition.

See Cookish, 945 F.2d at 447.[3] From that statement, Defendants had notice that observing Ms. Brown's naked body during labor and child birth violated the Fourth Amendment. To be sure, *Cookish* dealt with visual body cavity searches during an emergency. *Id.* at 448. But *Cookish*'s articulation of clearly established law was not limited to such situations. Rather, *Cookish* described a right to be free from regular observation during "personal activities, such as undressing, showering, and using the toilet." *Id.* at 446.

[3] A broad consensus of authority recognizes a similar right to bodily privacy under the Fourth Amendment, which is itself a basis for holding the law was clearly established. *See*, *e.g.*, *Harris v. Miller*, 818 F.3d 49, 57 (2d Cir. 2016) (per curiam); *Parkell v. Danberg*, 833 F.3d 313, 325 (3d Cir. 2016); *Bushee v. Angelone*, 7 F. App'x 182, 184 (4th Cir. 2001) (per curiam); *Hutchins v. McDaniels*, 512 F.3d 193, 196 (5th Cir. 2007) (per curiam); *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 572 (6th Cir. 2013); *Henry v. Hulett*, 969 F.3d 769, 779 (7th Cir. 2020); *Franklin v. Lockhart*, 883 F.2d 654, 656-57 (8th Cir. 1989); *Nunez v. Duncan*, 591 F.3d 1217, 1227-28 (9th Cir. 2010); *Farmer v. Perrill*, 288 F.3d 1254, 1259-60 (10th Cir. 2002); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993).

As the district court observed, there are "few activities that are more intimate than childbirth." Add. A-16 n.16. Defendants observed medical staff perform cervical dilation exams—inserting gloved fingers into Ms. Brown's vagina. *Id.* at A-6. Doctors and nurses also gave Ms. Brown an epidural, inserted a urinary catheter, and monitored the baby's heartbeat. *Id.* And medical staff exposed Ms. Brown's naked body when lifting her legs during the delivery. *Id.* Dickey, sitting less than two feet away, was there to observe all of it. Indeed, as the district court noted, Dickey failed to provide "any explanation for how people sitting mere feet away from a birthing person for hours could possibly *avoid* seeing, hearing, and smelling everything that was happening." *Id.* at A-5 n.6. And a reasonable jury could find Haskell observed Ms. Brown's naked body as well as he "stood and roamed in and out of the room." *Id.* at A-5.

Given their conduct took place over the course of hours, not a "split-second" or even minutes, Defendants had ample time to realize that their conduct violated the clearly established right set out in *Cookish*. To hold otherwise would defy this Court's reminder that "[f]or a constitutional right to be clearly established there does not need to be a prior case with factually identical circumstances finding such a right. Rather, 'notable

factual differences may exist between prior cases and the circumstances at hand as long as the state of the law at the time gave the defendant "fair warning" that his action or inaction was unconstitutional.'" *Decotiis v. Whittemore*, 635 F.3d 22, 37 (1st Cir. 2011) (citations omitted). So, this Court should deny qualified immunity here and hold Defendants accountable to the clear statement of law in *Cookish*.

B. As the Supreme Court has recently reaffirmed, government officials have notice of clearly established law without a prior factually analogous decision in "obvious" cases like this one.

Defendants' cramped view of clearly established law cannot be squared with the Supreme Court's repeated admonitions that some violations are so obvious that no factually similar precedent is required at all. *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020); *Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002). In such cases, "a general proposition of law may clearly establish the violative nature of a defendant's actions, especially when the violation is egregious." *Irish*, 979 F.3d at 78 (citing *Hope*, 536 U.S. 741).

In recent years, the Supreme Court has twice underscored that obviousness can satisfy the clearly established law inquiry. First, in *Taylor*, the Court summarily reversed the Fifth Circuit for its unduly

narrow view of the clearly established inquiry in a prison conditions case. 141 S. Ct. at 53-54. The Supreme Court was untroubled by the absence of a prior case establishing that the *specific* conditions at issue in *Taylor* were unconstitutional. *Id.* Instead, the "obviousness of [the plaintiff's] right" was apparent from the "general constitutional rule" barring deliberate indifference to unsanitary conditions under the Eighth Amendment. *Id.* at 53-54 (quoting *Hope*, 536 U.S. at 741); *id.* at 54 n.2.

Then, several months later, the Supreme Court granted, vacated, and remanded in *McCoy*, another qualified immunity case. *McCoy* instructed the Fifth Circuit to reconsider, in light of *Taylor*, the grant of qualified immunity to a correctional officer who sprayed a prisoner with pepper spray for no reason. 141 S. Ct. at 1364; Reply in Support of Certiorari, *McCoy*, 141 S. Ct. 1364 (No. 20-31), 2020 WL 8023227, at *1. Together, these cases confirm that courts must consider whether a general proposition of law put defendants on notice that their conduct was obviously unconstitutional.[4]

[4] *See also Ramirez v. Guadarrama*, 2 F.4th 506, 524 (5th Cir. 2021) (Willett, J., dissenting from the denial of rehearing en banc) (explaining the Supreme Court "upended" the Fifth Circuit in *Taylor* and *McCoy*); *Cope v. Cogdill*, 3 F.4th 198, 220 (5th Cir. 2021) (Dennis, J., dissenting)

This Court also has long relied on general principles to reject qualified immunity in cases where there is "no case exactly on all fours[.]" *Suboh v. D.A.'s Off. of Suffolk Dist.*, 298 F.3d 81, 94 (1st Cir. 2002) (citing *Hope*, 536 U.S. at 739-741). It has done so in a wide variety of cases presenting "novel factual circumstances" that nonetheless gave rise to violations of clearly established law because general principles provided obvious guidance to government officials. *See, e.g.*, *Irish*, 979 F.3d at 78 (rejecting qualified immunity for a violation of state-created danger doctrine); *Raiche v. Pietroski*, 623 F.3d 30, 39 (1st Cir. 2010) (denying qualified immunity on Fourth Amendment claim without deciding whether materially similar cases exist); *Jennings v. Jones*, 499 F.3d 2, 17 (1st Cir. 2007) (same).

As in those cases, Dickey and Haskell are not entitled to qualified immunity because their conduct was an obvious constitutional violation. As explained above, Defendants remained in Ms. Brown's hospital room as doctors performed invasive medical procedures even though Ms. Brown was not considered a security or escape risk. *See* I.A, *supra*.

(calling *Taylor* a "rebuke" to the Fifth Circuit's failure to recognize an obvious violation).

This conduct robbed Ms. Brown of privacy during one of the most personal periods that exists—labor, childbirth, and the first moments with her daughter post-birth. No resort to constitutional case books was necessary for these male officers to know that observing Ms. Brown in this most intimate setting—with no emergency or penological justification—would violate her vital constitutional interest in bodily privacy. Rather, common sense and basic decency confirm that Defendants' conduct here was a violation of Ms. Brown's bodily privacy during a time of extreme vulnerability. Qualified immunity does not extend to such "egregious" misconduct. *Irish*, 979 F.3d at 78.

C. Cumberland County's policies and Maine statutes provided notice that the officers' conduct violated clearly established law.

Finally, Defendants also ignore that regulations, policies, and statutes can give notice that certain conduct violates clearly established law. *See Hope*, 536 U.S. at 741-42. In *Hope*, for example, the Supreme Court did not rely solely on the obviousness of the Eighth Amendment violation—it also relied on an Alabama Department of Corrections (ADOC) regulation and a Department of Justice (DOJ) report to find that the unlawfulness of defendants' use of a hitching post was clearly

established. *Id.* While the ADOC regulation did not prohibit use of the hitching post, it did impose certain requirements on the practice, including a requirement to periodically offer water and bathroom breaks. *Id.* at 743-44. The Supreme Court held that the defendants' disregard for the regulation's limitations on hitching post use provided "strong support for the conclusion that they were fully aware of the wrongful character of their conduct." *Id.* at 744. Additionally, a DOJ report criticizing Alabama's use of the hitching post as "without penological justification" was found to "buttress[]" the clearly established finding—even though there was "nothing in the record indicating that the DOJ's views were communicated to respondents." *Id.* at 744-45.

Similarly, this Court has recognized that failure to comply with state law or police procedure "bolsters the plaintiff's argument" that "a reasonable officer in the officer's circumstances would have believed that his conduct violated the Constitution." *Irish*, 979 F.3d at 77 (cleaned up). Statutes, in particular, can play an important role in providing the kind of notice relevant to the qualified immunity inquiry. In *Irish*, for example, this Court rejected the defendants' argument that violations of state law had no bearing on the qualified immunity analysis. *Id.* at 72, 77 n.6

(referring to police procedures codified as state law). This Court explained:

> The defendants' argument is tantamount to saying that violations of state law and proper police procedures have no bearing on whether a reasonable officer would know his conduct was unlawful. Such an argument is pernicious; the driving principle behind it would encourage government officials to short-cut proper procedure and established protocols.

Id. at 77 n.6. Other courts of appeals also find statutes particularly probative as to whether a right is clearly established. *See, e.g.*, *Sabir v. Williams*, 52 F.4th 51, 66 (2d Cir. 2022) (relying on the Religious Freedom Restoration Act in combination with prior caselaw to find a violation of clearly established law); *Vazquez v. Cnty. of Kern*, 949 F.3d 1153, 1164-65 (9th Cir. 2020) (finding that statutory standards under the Prison Rape Elimination Act were "relevant . . . to determining whether reasonable officers would have been on notice that their conduct was unreasonable").[5]

[5] Other courts of appeals similarly look to regulations in determining whether a right is clearly established. *See*, *e.g.*, *Okin v. Vill. of Cornwall-On-Hudson Police Dep't,* 577 F.3d 415, 433-34 (2d Cir. 2009) (explaining that a court "may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights"); *Clark v. Coupe*, 55 F.4th 167,

Here, as in *Irish*, Maine state law and the Standard Operating Procedures provided Defendants with ample additional notice that it was unlawful to sit less than two feet from Ms. Brown during childbirth and labor. Maine law prohibits exactly this conduct:

> **Privacy.** When a prisoner or juvenile is admitted to a medical facility or birthing center for labor or childbirth, a corrections officer may not be present in the room during labor or childbirth unless specifically requested by medical personnel. If a corrections officer's presence is requested by medical personnel, the corrections officer must be female if practicable.

Maine Rev. Stat. Ann. tit. 30-A § 1582. That law, Section 1582, codifies the Cumberland County Sheriff's Office Standard Operating Procedure No. D-244, titled "Use of Restraints" word for word. *See* App. 52. Another policy allowed officers to be in a hospitalized inmates room to provide security when necessary, but required officers in such cases to stand

187-188 (3d Cir. 2022) (finding that state law and prison regulations "buttress" the clearly established law analysis); *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 546 (4th Cir. 2017) (same), *cert. denied*, 138 S. Ct. 755 (2018); *Maye v. Klee*, 915 F.3d 1076, 1087 (6th Cir. 2019) (holding that the right of Muslim inmates to participate in Eid was "clearly established in every meaningful sense" by a district court order and an internal policy that "served to place . . . officials on notice"); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 531, 533-34 (8th Cir. 2009) (en banc) (relying on administrative regulations to deny qualified immunity); *Alexander v. Perrill*, 916 F.2d 1392, 1398 (9th Cir. 1990) (same).

"near the room door" to preserve "privacy for medical issues." *See* App. 185.

Whichever policy governed the conduct at issue here, both make clear that sitting less than two feet away from Ms. Brown during labor and childbirth was a violation of her right to bodily privacy. Nor can Defendant Dickey, in particular, plead ignorance as to these policies: Another officer *explicitly* told Dickey that state law prohibited his presence in the delivery room when he arrived at the hospital, and Dickey responded, "OK."[6] App. 60, 69.

Defendants do not even address the state law or procedures in their opening brief. That omission is telling. Where, as here, Defendants' conduct is wholly contrary to governing regulation, they are on notice of its unlawfulness. *See Hope*, 536 U.S. at 744-45 (finding that prison regulation and guidance in DOJ report provided notice for purposes of

[6] Qualified immunity does not protect "those who knowingly violate the law." *Est. of Rahim by Rahim v. Doe*, 51 F.4th 402, 410 (1st Cir. 2022) (cleaned up). Given the evidence that Dickey knew his conduct violated state law, a reasonable juror could find that Defendant Dickey knowingly violated the law here. Such a factual finding would make Dickey ineligible for qualified immunity's protection of good-faith officer behavior. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (explaining qualified immunity does not extend to circumstances where no reasonably competent officer would have engaged in similar conduct).

qualified immunity); *see also Alexander*, 916 F.2d at 1398 (denying qualified immunity where prison officials' duty was "clearly established by virtue of the Bureau of Prisons regulations and policies which they were legally obligated to perform").

II. This Court Should Decline Defendants' Invitation to Unduly Expand the Doctrine of Qualified Immunity, Especially When It Comes to Correctional Officers.

As explained above, Defendants are not entitled to qualified immunity under a straightforward application of settled law. This Court need go no further than that to affirm the district court's well-reasoned decision. And if there were any doubt, there are two additional reasons that this Court should be wary of extending qualified immunity to an extreme case of misconduct like this: (1) the doctrine's entire legal and practical foundation has been questioned in recent years, and (2) it is not clear that qualified immunity should apply at all to correctional officials like Defendants for conduct causing harm to persons in their custody.

A. Qualified immunity is unworkable, unjust, and untethered to any statutory or historical justification.

In recent years, qualified immunity has become the subject of withering criticism from an ever-growing number of jurists, scholars, elected officials, and practitioners. *See, e.g.*, *Baxter v. Bracey*, 140 S. Ct.

1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (the current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers," telling them that "they can shoot first and think later"); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); Emma Tucker, *States Tackling "Qualified Immunity" for Police as Congress Squabbles Over the Issue*, CNN (April 23, 2021), https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html.[7] This increasing consensus against qualified

[7] In addition to the Justices, judges across the country have strongly criticized qualified immunity. *See, e.g.*, *McKinney v. City of Middletown*, 49 F.4th 730, 756-58 (2d Cir. 2022) (Calabresi, J., dissenting appendix) (noting "more and more judges have come to recognize[] qualified immunity cannot withstand scrutiny," and that broad readings of the doctrine do not "strike[] the right balance"); *Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (en banc) (Willett, J., dissenting) ("The real-world functioning of modern immunity practice—essentially 'heads government wins, tails plaintiff loses'—leaves many victims violated but not vindicated."); *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part) (noting "struggle" to apply the "ill-conceived" and "judge-made doctrine of qualified immunity, which is found nowhere in the text of § 1983");

immunity is all the more remarkable because it is "cross-ideological"—no small feat in "this hyperpartisan age." *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). Although much has been written about the multitude of ways in which qualified immunity has been an abject failure, several of its failings warrant emphasis.

First, recent studies have shown that "officers are not actually educated about the facts and holdings of court decisions that"—theoretically—"clearly establish the law." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 683 (2021). This is unsurprising. After all, "[t]here could never be sufficient time to train officers about the hundreds—if not thousands—of court cases that could

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Horvath v. City of Leander, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("[T]here is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases."); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *6-7 (E.D.N.Y. June 26, 2018) (Weinstein, J.) ("The Court's expansion of immunity . . . is particularly troubling. . . . The law, it is suggested, must return to a state where some effective remedy is available for serious infringement of constitutional rights."); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete reexamination of [qualified immunity] which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases.").

clearly establish the law for qualified immunity purposes." *Id.* at 611. And even if there *were* such trainings and there *were* sufficient time, the idea that an officer could recall and apply that volume of complex information in a high-stress, quickly-evolving police interaction is belied by "[d]ecades of research." *Id.* at 668-72. Why then should their liability be premised on the existence of a factually identical case? This finding calls the entire premise of qualified immunity into doubt. And, at a minimum, it supports looking beyond caselaw to the laws and policies that indisputably *do* put officers on notice that certain conduct violates clearly established law, as was the case here. *See supra* I.C.

Second, qualified immunity is unjust. As Justice Sotomayor explained, qualified immunity jurisprudence "sends an alarming signal . . . that palpably unreasonable conduct will go unpunished." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting). The doctrine serves to "insulat[e] incaution," and "formalizes a rights-remedies gap through which untold constitutional violations slip unchecked." *Cole v. Carson*, 935 F.3d 444, 470-71 (5th Cir. 2019) (en banc) (Willett, J., dissenting); *see also* Jason Tiezzi, Robert McNamara & Elyse Smith Pohl, *Unaccountable: How Qualified Immunity Shields a Wide Range of*

Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises, Institute for Justice (Feb. 2024), https://ij.org/report/unaccountable/.

In particular, the vicious cycle created by *Pearson v. Callahan*, 555 U.S. 223 (2009)—allowing courts to decide cases at prong two without first deciding whether there was a constitutional violation at prong one—means that government officials can flagrantly violate the law in similar ways, over and over again, until and unless a court finally decides to intervene and address prong one. The growing frequency of this "Escherian Stairwell," *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part and dissenting in part), is demonstrated by empirical research, *see* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 6-7 (2015) (quantifying post-*Pearson* reduction in courts establishing constitutional violations at prong one). This means that "qualified immunity" ends up functioning a whole lot more like "unqualified impunity." *Cole*, 935 F.3d at 471 (Willett, J., dissenting). The Framers meant for rights to have remedies, but qualified immunity threatens this fundamental precept by continually encroaching upon the theoretical availability of redress for violations of constitutional and

statutory rights. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

Finally, qualified immunity has no basis in the statutory text or common law. Justice Thomas has said as much several times in recent years. *See, e.g.*, *Baxter*, 140 S. Ct. at 1862, 1864 (Thomas, J., dissenting from the denial of certiorari) ("[O]ur § 1983 qualified immunity doctrine appears to stray from the statutory text," and "[i]n several different respects, it appears that our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act." (cleaned up)); *Ziglar v. Abbasi*, 582 U.S. 120, 158 (2017) (Thomas, J., concurring) ("[W]e have diverged from the historical inquiry mandate by the statute . . . [and] completely reformulated qualified immunity along principles not at all embodied in the common law." (cleaned up)).

Scholars agree. *See, e.g.*, Baude, *supra*, at 50-60 (explaining that neither the statutory text nor historical common law immunities provide support for qualified immunity); James E. Pfander & Jonathan L. Hunt,

Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic, 85 N.Y.U. L. REV. 1862, 1863, 1928-29 (2010) (matters of indemnity and immunity were left to Congress, not the judiciary, in the founding era); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506-07 (1987) (the lone historical defense against constitutional torts was legality). The doctrine's untethering from the statutory text and historical practice thus makes the "heads government wins, tails plaintiff loses" reality of modern qualified immunity particularly hard to swallow. *See Cole*, 935 F.3d at 471 (Willett, J., dissenting). Given the significant flaws of the doctrine, this Court should apply the doctrine judiciously.

B. Qualified immunity is particularly inappropriate here because the common-law immunities underpinning qualified immunity did not extend to prison officials.

This Court should also be wary of extending qualified immunity to this case for a second reason: Prison officials were not entitled to immunity at common law for conduct causing harm to persons in their custody.

Again, Section 1983 "on its face admits of no immunities." *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986). Starting with *Pierson v. Ray*, 386

U.S. 547 (1967), however, the Supreme Court began reading a qualified immunity defense into the statute, on the specific ground that "[c]ertain immunities were so well established in 1871" that it was appropriate to "presume that Congress would have specifically so provided had it wished to abolish" them.[8] *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *see Pierson*, 386 U.S. at 554-55 (because common-law "immunity of judges for acts within the judicial role" was "well established," the Court could "presume that Congress would have specifically so provided had it wished to abolish the doctrine"). In early qualified-immunity cases, then, the doctrine was considered consistent with the statute *only* when the "official claiming immunity under § 1983 [could] point to a common-law counterpart to the privilege he assert[ed]." *Malley*, 475 U.S. at 339-40.

[8] Recent scholarship, however, casts doubt on this historical justification for qualified immunity. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 235 (2023). As originally enacted, the text of section one of chapter twenty of the Ku Klux Klan Act of 1871, explicitly instructed that its protections were to be applied "notwithstanding" state laws, "custom, or usage" that might be invoked as a shield from liability, including any common law immunities. Ku Klux Klan Act, Pub. L. No. 42-22, ch. 22, § 1, 17 Stat. 13 (1871). But the Reviser of Federal Statutes omitted that "Notwithstanding Clause" in publishing the first version of the Revised Statues. Reinert, *supra*, at 235. That unintentional omission undermines the historical basis for this atextual, judge-made doctrine.

At common law, there was no "one-size-fits-all doctrine" of immunity that applied broadly "to officers who exercise a wide range of responsibilities and functions." *Hoggard*, 141 S. Ct. at 2421 (Thomas, J., respecting denial of certiorari). Rather, courts analyzed the specific "nature of the duty" a defendant was performing when deciding whether to confer immunity from suit. Thomas M. Cooley, *Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 381 (1879). In other words, it was "not the title of his office" that gave rise to an officer's immunity, but "the *duties* with which the particular officer" is concerned. *Barr v. Matteo*, 360 U.S. 564, 573 (1959) (emphasis added).

Accordingly, to determine whether a given state official would receive immunity from analogous liability at common law, the Supreme Court's early qualified-immunity cases required a "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). For example, the Supreme Court recognized qualified immunity for state executive officers in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and school officials in *Wood v. Strickland*, 420 U.S. 308 (1975), only after examining "the considerations underlying the nature of the immunity of

the respective officials in suits at common law." *Imbler*, 424 U.S. at 419. By contrast, the Supreme Court denied qualified immunity to private prison guards in *Richardson v. McKnight*, 521 U.S. 399, 404 (1997), because "[h]istory does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards." *Id.* at 404.

Exactly the same is true for publicly-employed prison guards, too. In fact, suits against sheriffs and other public prison officials were widely *allowed* at common law. *See, e.g.*, *Commonwealth v. Stockton*, 21 Ky. 192, 193 (1827) ("[F]or any illegal abuse of the process of law, the person injured, whether party to the process or a stranger, is at liberty to sue the sheriff."); *Perkins v. Reed*, 14 Ala. 536, 537-38 (1848) ("It has been so long and often held, as to become an established rule, that the sheriff is liable civiliter, for the acts of his deputies, which are done in the performance of their official duties."); *Knowlton v. Bartlett*, 18 Mass. 271, 280 (1822) (per curiam) (same); *Matthis v. Pollard*, 3 Ga. 1, 3 (1847) (same); *Dabney v. Taliaferro*, 25 Va. 256, 261, 263 (1826) (affirming judgment against sheriff that created conditions of confinement, which led to frost-bite and disease); *Perrine v. Planchard*, 15 La. Ann 133, 134-35 (1860) (allowing civil damages against jailer for harm caused to

detainee, noting that whoever causes damage to another must "repair it"); *Peters v. White*, 53 S.W. 726, 726 (Tenn. 1899) (allowing civil damages against warden of county jail, noting an incarcerated person "does not lose all his rights of protection for his person"); *Asher v. Cabell,* 50 F. 818, 822 (5th Cir. 1892) (denying immunity to a United States marshal that failed to protect a prisoner); *see also* Cooley, *supra* at 393-97 (highlighting various actions for which sheriffs or jailers were found civilly liable, including for escapees).

In short, any "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it," *Imbler*, 424 U.S. at 421, precludes the extension of qualified immunity under § 1983 to jailers like Defendants, who were not exempt at common law from liability for conduct causing harm to persons in their custody. At a minimum, this should inform the Court's qualified immunity analysis here. With qualified immunity in general—and its application to this category of defendants in particular—so unmoored from the doctrine's purported roots, it should not be extended to conduct that Defendants were on notice was unconstitutional from this Court's

caselaw, obvious principles of constitutional privacy rights, and unambiguous on-point state laws and regulations.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Respectfully submitted,

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I hereby certify that:

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Dated: February 23, 2024

/s/ George Mills
George Mills

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2024, I electronically filed the foregoing *Brief of* Amicus Curiae *the Roderick And Solange Macarthur Justice Center and the Institute for Justice in Support of Plaintiff-Appellee and Affirmance* with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 23, 2024

/s/ George Mills
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