No. 19-899

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

BRIEF OF THE DKT LIBERTY PROJECT, THE DUE PROCESS INSTITUTE, THE RUTHERFORD INSTITUTE, AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are non-profit organizations dedicated to the protection of individual liberties, especially those guaranteed by the Constitution of the United States. As organizations concerned about the expansion of qualified immunity—and that doctrine's ability to shield egregious violations of individuals' constitutional rights from any meaningful liability—*amici* have a particular interest in this case. *Amici* are the following:

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and promoting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance against government overreach of all kinds, but especially law enforcement overreach that restricts individual civil liberties. The Liberty Project has filed briefs as *amicus curiae* in both this Court and in state and federal courts in cases involving constitutional rights and civil liberties—and particularly those involving qualified immunity, when the application of

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[1] Pursuant to Rule 37.2(a), counsel for *amici curiae* provided timely notice to counsel of record for all parties of *amici*'s intention to file this brief. Counsel of record for Petitioner and Respondents have both consented to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

that doctrine would shield egregious violations of individuals' constitutional rights from liability.

The Due Process Institute is a bipartisan, nonprofit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Due Process Institute has already participated as an *amicus curiae* before this Court in cases presenting important criminal justice issues, such as *Timbs v. Indiana*, 139 S. Ct. 682 (2019), *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), *United States v. Haymond*, 139 S. Ct. 2369 (2019), and *Asaro v. United States*, No. 19-107 (petition for certiorari pending).

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties and filed numerous *amicus curiae* briefs in the federal Courts of Appeals and Supreme Court. The Rutherford Institute works to preserve the most basic freedoms of our Republic through litigation brought under 42 U.S.C. § 1983, and advocates to assure that the remedies provided by that statute remain effective in protecting individual civil rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and

policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues.

SUMMARY OF ARGUMENT

Petitioner Shaniz West provided law enforcement officers with the key to her home, and consented to allow those officers to enter her home to apprehend her ex-boyfriend, who was believed to be inside. What happened next exceeded any plausible understanding of Ms. West's consent. Over a series of hours, officers besieged her home with tear gas canisters in an attempt to flush out West's ex-boyfriend—causing devastating property damage to West's home and belongings—all before actually attempting to enter her home.

The conduct of the defendants in this case is shocking. But, without even determining whether the defendants' brazen actions constituted an unreasonable search under the Fourth Amendment, the Ninth Circuit below granted the defendants qualified immunity because no case established the unlawfulness of the defendants' conduct with sufficient specificity "to alert *these* deputies *in this case* that *their particular conduct* was unlawful." Pet. App. at 14 (quotation marks omitted).

As the Petition explains, the decision below entrenches a split of authority among the courts of appeal over the degree of factual similarity that is required to find that a Fourth Amendment violation concerning a consent search is "clearly established." But even more importantly, the Ninth Circuit's reasoning locks qualified immunity doctrine into an impossible catch-22. Consistent with this Court's precedent, lower courts are free to grant qualified immunity solely on the ground that a constitutional violation is not "clearly established"—and in doing so, to sidestep resolving the merits of constitutional claims. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The types of cases the decision below deems required to hold law enforcement officials accountable, therefore, are unlikely to materialize. The result is that even egregious violations of constitutional rights will be shielded from liability under Section 1983.

Not only is that result wrong as a matter of doctrine, but it also exacerbates the significant costs that an already expansive immunity doctrine imposes on litigants, the public, and law enforcement. If immunity will make success extremely difficult in Section 1983 cases seeking to recover damages based on even the most egregious constitutional violations, litigants will be discouraged from bringing those cases. And when bad actors are not held accountable, public trust in law enforcement is severely compromised. Policing by those officers who act reasonably is only made difficult and less safe—to the detriment of the rule of law.

The Court should grant the petition and provide needed guidance on the scope of the "clearly established" inquiry.

ARGUMENT

I. Requiring A Case Presenting Nearly Identical Factual Circumstances To Demonstrate "Clearly Established" Law Sets An Impossible Standard And Insulates Egregious Constitutional Violations From Liability.

The Ninth Circuit in this case found that qualified immunity shielded the defendants' actions from liability because Petitioner could not point to any factually identical case clearly establishing that law enforcement officials exceeded the scope of Petitioner's consent to enter her home when they essentially destroyed her home. That reasoning sets an impossible standard. Because courts are free to advance to the "clearly established" prong of the qualified immunity inquiry without first deciding threshold constitutional questions, it is unlikely that a body of case law with closely analogous factual circumstances will ever develop. As a result, the decision below not only entrenches a split of authority among the circuits; it also perpetuates a cycle that will result in insulating the most egregious constitutional violations from liability.

The "scope of a suspect's consent under the Fourth Amendment" is to be measured under an "'objective' reasonableness" standard, which asks "what . . . the typical reasonable person [would] have understood by the exchange between the officer and the suspect." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). As the

Petition explains, however, courts like the Ninth Circuit below and the Second Circuit apply qualified immunity particularly expansively. In those circuits, in the absence of "an on-point case holding that a specific search exceeded a specific consent" the court will not conclude that a search violated "clearly established" law. Pet. at 12. That result is at odds with the decisions of the Sixth and Seventh Circuits—both of which have held that the objective reasonableness standard suffices, alone, to give officers notice of when a search would exceed the bounds of a person's consent and would violate the Fourth Amendment. *See* Pet. at 12-14.

The reasoning embraced by the Ninth and Second Circuits—requiring a Section 1983 plaintiff to point to a decided case with identical, or nearly so, factual allegations in order to defeat qualified immunity—sets an impossible standard. That is because lower courts have the discretion to bypass the first step in the qualified immunity analysis (determining whether there was a constitutional violation) and may grant immunity based solely on a finding that any such violation was not "clearly established." *Pearson*, 555 U.S. at 236. That flexibility, this Court has explained, is necessary because it may not be prudent to expend "scarce judicial resources" on "difficult questions that have no effect on the outcome of the case." *Id.* at 236-37. Or, it may be "far from obvious whether in fact there is" a constitutional right, but clear that any such right "is not clearly established." *Id.* at 237.

At the same time, this Court has cautioned that first determining whether a constitutional right has been violated is "often beneficial," because it "promotes the

development of constitutional precedent." *Id.* at 236. Providing answers to constitutional questions "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.*

But when courts decline to grapple with the merits of constitutional claims, they preclude the development of exactly the type of fact-bound decisions that the Ninth Circuit below mandates must exist to defeat qualified immunity. By avoiding an examination of underlying constitutional questions and reflexively granting immunity in the absence of a case that has analyzed identical, or nearly identical, factual circumstances, courts effectively lock in a state where constitutional violations—even the most obvious ones—"might *never* be clearly established." Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 12 (2015). Put more bluntly, "[c]ontinuing to resolve the question at the clearly established step means the law will never get established." *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018).

Unfortunately, this appears to be what is happening. Since the Court's 2009 decision in *Pearson*, lower courts have exercised their discretion to reach a constitutional question before going on to nevertheless grant immunity in less than ten percent of cases. Nielson & Walker, *supra*, at 33, 37-38. It is the rare court that extends itself out to decide a constitutional question. *See, e.g.*, *Sims*, 894 F.3d at 638 (finally deciding question regarding First Amendment retaliation, noting that the case was "the fourth time in three years that an appeal has presented the question"). Skipping the first step of the qualified

immunity inquiry, as the Ninth Circuit did below, risks "reduc[ing] the meaning of the Constitution to the lowest plausible conception of its content." John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 120. The result is that even egregious violations of constitutional rights will be shielded from any liability under Section 1983.

This case presents a perfect example: Petitioner provided consent to law enforcement officers to enter her home to search for her ex-boyfriend. However, the consent she provided to enter her home *did not include* consent to intentionally destroy her home by, among other things, besieging her house with tear gas canisters before even entering. *See, e.g.*, Pet. at 2-3; Pet. App. at 12. The panel majority below "assume[d] without deciding that Defendants exceeded the scope of consent by employing tear gas canisters for their initial entry, which is the entry that damaged [Petitioner's] house." Pet. App. at 12. Indeed, the majority did "not dispute" that "no reasonable person would have understood [Petitioner's] consent to encompass shooting tear gas canisters into the house." *Id.* at 13. Nevertheless, the majority granted immunity on the sole basis that no case had "clearly established" the violation with sufficient specificity "to alert *these* deputies *in this case* that *their particular conduct* was unlawful." *Id.* at 13, 14 (quotation marks omitted).

That result is nonsensical as a matter of doctrine. It also conflicts with this Court's repeated admonition that qualified immunity doctrine need not blind itself to obvious constitutional violations. A violation can be

clearly established even without a specific, factually analogous case on point because, as this Court has emphasized, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quotation marks omitted); *see also United States v. Lanier*, 520 U.S. 259, 271 (1997) (acknowledging that often "[t]he easiest cases don't even arise" (quotation marks omitted)).

Indeed, it would "be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015) (Gorsuch, J.) (denying qualified immunity). And that is precisely the case here: as Judge Berzon explained in dissent, "this case well illustrates that some police actions are so *clearly* unacceptable under the applicable standard that it is the *absence* of closely similar cases that is most telling." Pet. App. at 27 (Berzon, J., dissenting).

The conflict among circuits concerning the precise factual match necessary to demonstrate clearly established law will not remedy itself absent this Court's intervention. Circuits like the Sixth and Seventh may continue to apply a broader, and more practical view, of what constitutes "clearly established" law. Some courts may also, on isolated occasions, decide constitutional issues. But circuit courts are unlikely to look to *other* circuits' isolated holdings to find law clearly established. This case proves that point. As the majority below concluded, a single case from another circuit "cannot

provide clearly established law in our circuit." Pet. App. at 15. Unless this Court intervenes, the result will be that plaintiffs' ability to vindicate their constitutional rights will depend entirely on arbitrary geographic distinctions.

The standard applied in the Ninth and Second circuits insulates even egregious misconduct from liability whenever there (understandably) exists no prior case that has confronted precisely the same factual scenario and held that, on those facts, a constitutional violation occurred. That approach extends qualified immunity doctrine to its extreme. If this Court is going to continue to allow lower courts to skip the first step of the qualified immunity inquiry and forgo determining whether a constitutional violation has occurred, then it must intervene to clarify that at the second step of the inquiry, these same courts must take a more reasonable view of what constitutes "clearly established" law.

II. The Unjustified Extension Of Qualified Immunity Undermines Public Trust In The Rule Of Law—Particularly In The Fourth Amendment Context.

Beyond its legal infirmities, the decision below also has practical consequences—it undermines the rule of law. Congress intended Section 1983 "to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. Dep't of Social Servs. of City of N.Y.*, 436 U.S. 658, 700-01 (1978). While it should shield law enforcement officers who act reasonably, qualified immunity should not be an obstacle standing in the way of holding officials

"accountable when they exercise power irresponsibly." *Pearson*, 555 U.S. at 231.

When courts extend qualified immunity to cover actors who act as egregiously as the officers did here, the rule of law suffers. Considerable evidence proves that, when bad actors are not held accountable, both litigants and public trust in law enforcement pay the price. The Ninth Circuit's approach to qualified immunity—requiring a precisely on-point factual case before finding a violation clearly established—only entrenches these concerns. As the dissent below aptly explained, "[a]side from its complete implausibility as a matter of common experience, the majority's holding is likely to hamper legitimate law enforcement activity by making homeowners extremely reluctant to agree to consensual searches." Pet. App. at 26-27.

A. Qualified Immunity Imposes A Significant Procedural Hurdle To Litigants' Vindication Of Constitutional Rights.

As an initial matter, qualified immunity places a nearly insurmountable hurdle in the way of civil rights litigants seeking to hold state actors accountable and to vindicate the purpose of Section 1983.

1. These hurdles manifest themselves in the initial decision of whether to bring a lawsuit at all. Immunity frequently discourages litigants from bringing cases—even when an obvious constitutional violation is at issue. A survey of civil rights litigants shows that the availability of a qualified immunity defense plays a substantial role in lawyers' assessment of whether to take a case. Alexander A. Reinert, *Does Qualified*

Immunity Matter?, 8 U. St. Thomas L.J. 477, 492-93 (2011). In that study, "[n]early every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage" and "[f]or some, qualified immunity was the primary factor when evaluating a case for representation." *Id.* at 492.

When, despite these challenges, litigants do choose to bring a case, qualified immunity poses a continuing obstacle, even when egregious constitutional violations are at issue. A district court's denial of qualified immunity is an immediately appealable collateral order. *See Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014). Thus, every civil rights litigant must be prepared to defeat a qualified immunity defense *both* in the district court and in the court of appeals before proceeding with her case. And she must do so at every stage of the proceeding—from motions to dismiss to summary judgment. Moreover, she often must do so without critical factual development, because discovery is frequently stayed during the pendency of an appeal, even when the district court has denied immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed.").

This gauntlet is formidable. Litigants are unlikely to be willing to run it, particularly if courts require plaintiffs to point to a case that has presented nearly the same factual scenario. When courts take such a stringent view of "clearly established" law and grant defendants immunity in even the most egregious cases —like the decision to grant immunity over the obvious alleged violation in this case—those outcomes only

further discourage litigants from vindicating their rights and holding police officers accountable.

2. This is particularly problematic because a civil action under Section 1983 is often the only means through which a victim of misconduct can seek to hold bad actors accountable. Criminal charges and formal disciplinary processes have proven entirely ineffective.

Law enforcement officials are only rarely charged criminally for violations of individuals' constitutional rights. *See, e.g.*, Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, Wash. Post (Apr. 11, 2015).[2] Similarly, formal complaints frequently lead nowhere. In Chicago, for example, "[f]rom 2011 to 2015, 97 percent of more than 28,500 citizen complaints resulted in no officer being punished." Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. Times (Nov. 18, 2015)[3]; *see also* U.S. Dep't of Justice, *Investigation of the Ferguson Police Department*, at 82 (Mar. 4, 2015)[4] (explaining that Ferguson's "internal affairs system fails to respond meaningfully to complaints of officer misconduct" and "does not serve as a mechanism to restore community members' trust in law enforcement,

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[2] https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.86c08aa2aa36.

[3] https://www.nytimes.com/2015/11/19/us/few-complaints-against-chicago-police-result-in-discipline-data-shows.html.

[4] https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

or correct officer behavior"). Most telling of all, even 72% *of police officers* in a 2017 Pew Research Center survey disagreed with the representation that "officers who consistently do a poor job are held accountable." *See* Rich Morin *et al.*, *Behind the Badge*, Pew Research Center, at 40 (2017)[5] (describing survey of nearly 8,000 police officers).

Given these realities, private lawsuits can provide the sunshine needed to expose unlawful police practices that might not otherwise come to light. Private lawsuits "are a valuable source of information about police-misconduct allegations" because they may alert departments to possible misconduct that might not otherwise surface. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 844-45 (2012). In fact, acts like Fourth Amendment violations based on the scope of a person's consent are among the types of misconduct *most likely* to escape notice. "[P]otentially serious constitutional violations" that do not involve the use of force—like those that take place during "vehicle pursuits, searches, and home entries"—"[may] not trigger reporting requirements." *Id.*

By requiring a precisely factually on-point case in order for a plaintiff to show that a legal violation was "clearly established," the decision below provides potential bad actors with at least one free pass (and likely more) to violate the law without consequence. This only exacerbates the public accountability gap and

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[5] https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf.

works at cross-purposes with the rationale underlying immunity.

B. Qualified Immunity Undermines Accountability And Public Trust In Law Enforcement.

A failure to hold bad actors accountable also has a counterproductive effect on the public at large and the very police officers who "perform their duties reasonably." *Pearson*, 555 U.S. at 231. Particularly in the Fourth Amendment context, Section 1983 serves a critical deterrent function that is undermined by a narrow reading of the "clearly established" doctrine.

1. The unjustified extension of qualified immunity erodes public trust in police. It undermines the belief that law enforcement will do their jobs fairly, and will be held accountable when they do not. That erosion works to the detriment of police officers and frustrates their ability to form the very community relationships that allow police to do their job—and to do it safely.

It is "critical to successful policing" that law enforcement officers are "viewed as fair and just." Inst. on Race and Justice, Northeastern Univ., *COPS Evaluation Brief No. 1: Promoting Cooperating Strategies to Reduce Racial Profiling*, at 21 (2008).[6] When the actions of law enforcement officials are viewed as legitimate, individuals are more likely to comply with the law, more likely to cooperate with and assist police, and more likely to support and empower law

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[6] *available at* https://www.researchgate.net/publication/269931068_Promoting_cooperative_strategies_to_reduce_racial_profiling.

enforcement. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 Law & Soc'y Rev. 513, 534 (2003). Such positive externalities promote conformance with the law and therefore "free[] the police up to deal with problematic people and situations." *Id.* at 535.

Even law enforcement agrees: police officers themselves report that, in order for policing to be successful, it is critical to demonstrate fairness and respect when dealing with the public. *See* Morin *et al.*, *Behind the Badge*, *supra*, at 65, 72. Overall, "[l]awful policing increases the stature of the police in the eyes of citizens, creates a reservoir of support for police work, and expedites the production of community safety by enhancing cooperation with the police." Nat'l Research Council, *Fairness and Effectiveness in Policing: The Evidence* 6 (2004).

Unfortunately, the reverse is also true: if law enforcement is perceived as unfair, "it will undermine their effectiveness." Inst. on Race and Justice, *supra*, at 21; *see also* DOJ, *Investigation of Ferguson Police*, *supra*, at 80 ("When police and courts treat people unfairly, unlawfully, or disrespectfully, law enforcement loses legitimacy in the eyes of those who have experienced, or even observed, the unjust conduct."). When application of the law is perceived as arbitrary or unfair, it "fosters a sense of second-class citizenship" and "increases the likelihood people will fail to comply with legal directives." Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 Harv. L. Rev. 2283, 2356 (2018). People are "more likely to resist enforcement efforts and

less likely to cooperate with law enforcement efforts to prevent and investigate crime." DOJ, *Investigation of Ferguson Police*, *supra*, at 80.

And, currently, police are facing a public perception crisis. In 2015, in the midst of several high-profile policing events, public trust in police officers fell to a twenty-two year low. Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup (June 19, 2015).[7] Almost 90% of police report that they are more concerned for their safety in recent years, and that policing has become more dangerous and more difficult. *See* Morin *et al.*, *Behind the Badge*, *supra*, at 80.

Against this backdrop, court decisions like the Ninth Circuit's below only increase the public's perception that law enforcement can escape accountability. Even a cursory review of recent qualified immunity decisions resolved on the "clearly established" prong of the inquiry demonstrates that requiring a plaintiff to point to a nearly factually identical case has morphed the doctrine to shield even truly egregious behavior from accountability.

One example is the Tenth Circuit's decision last year in *Doe v. Woodard*. There, the court affirmed a finding of qualified immunity for a government caseworker who strip-searched a four-year-old child and then photographed her while she was undressed—all without either a warrant or parental consent. 912 F.3d 1278 (10th Cir.), *cert. denied*, 139 S. Ct. 2616 (2019). Limiting

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[7] https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx.

its analysis to whether any constitutional violation was clearly established—and without answering the constitutional question—the court noted that the plaintiffs had not "cited a Supreme Court or Tenth Circuit decision specifically holding that a social worker must obtain a warrant to search a child at school for evidence of reported abuse." *Id.* at 1293. Therefore, the court held that the plaintiffs had not "met their burden of showing clearly established law." *Id.*

Or take *Scott v. City of Albuquerque*, which also puts the "clearly established" inquiry's effects on display. 711 F. App'x 871 (10th Cir. 2017). There, a police officer serving as a school resource officer handcuffed for multiple hours, interrogated, and then charged a thirteen-year-old seventh-grader with disability needs who was present in his school's hallways during classes (as permitted under the student's individualized disability program). *Id.* at 873-74. The officer claimed he had arrested the student under a state statute prohibiting "willful interference with the educational process" of a school. *Id.* at 874 (quotation marks omitted). But the Tenth Circuit concluded that the student's constitutional rights had been violated, finding that: "nothing would have given [the officer] the reasonable belief that [the student] was 'willfully' trying to interfere with the educational process." *Id.* at 878. And yet, the Tenth Circuit still granted qualified immunity, on the ground that the student could not point to any "on-point federal cases." *Id.* at 879.

Cases like these, and like the decision below, raise considerable concern about qualified immunity's effect on public trust in law enforcement.

2. In the Fourth Amendment search and seizure context, the ability to pursue remedies for constitutional violations through Section 1983 is particularly important for maintaining public trust in law enforcement. That is because, as this Court has explained, there can be social costs to resorting to the remedy of suppression. Suppression has been the Court's "last resort, not [its] first impulse" because of the propensity suppression has to "set[] the guilty free and the dangerous at large." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (holding that exclusionary rule was not applicable to remedy knock-and-announce violations under the Fourth Amendment). This Court has resisted a reflective application of the exclusionary rule, in part out of a belief that "civil liability is an effective deterrent," and that courts allow colorable cases to proceed "unimpeded by assertions of qualified immunity." *Id.* at 598.

The increasing tendency of some courts of appeals to grant qualified immunity defenses in the absence of a case with nearly identical facts undermines this assumption. It insulates the most brazen Fourth Amendment violations from liability simply because they have not occurred before, like the egregious violation that took place in this case. Where courts only grant immunity—and never deny it—the result is a "one-sided approach to qualified immunity" that "transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). At a minimum, the scope of the Fourth Amendment's consent exception requires a more circumspect application of qualified

immunity doctrine. *Cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (expressing concern over applying the "'clearly established' standard 'across the board' and without regard to 'the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 645 (1987))).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

February 20, 2020

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