No. 21-15044

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brendan Nasby,

Plaintiff-Appellant,

v.

State of Nevada, et al.,

Defendant-Appellee.

On appeal from the United States District Court
for the District of Nevada
Case No. 3:17-cv-447-MMD-CLB
Hon. Miranda M. Du

BRIEF OF AMICUS CURIAE PUBLIC ACCOUNTABILITY IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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November 21, 2022

CORPORATE DISCLOSURE STATEMENT

Public Accountability has no parent corporation. No publicly held corporation owns 10 percent or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

Public Accountability is a nonpartisan, nonprofit organization that promotes access to civil justice for those injured by the government. As part of its mission, Public Accountability has developed deep expertise in the area of qualified immunity and related doctrines. Public Accountability uses its expertise to help individuals, to inform lawmakers, and—through briefs like this one—to advise the courts. Because qualified immunity is an issue presented in this appeal, Public Accountability offers a perspective that will help inform the Court's decision.

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel has made any monetary contributions to fund the preparation or submission of this brief. One attorney for Plaintiff sits on the board of Public Accountability but did not vote on whether to appear as amicus and has not contributed financially to Public Accountability in 2022. All parties have consented to the filing of this brief.

INTRODUCTION

This amicus brief offers three points for the Court's consideration. First, qualified immunity's legal foundation has come under fire from "a growing, cross-ideological chorus of jurists and scholars."[2] The Supreme Court has taken heed of that criticism and begun to trim the doctrine's harshest excesses. Its jurisprudential course correction is one reason to deny Defendants qualified immunity.

Second, this case lies at the intersection of two fields where qualified immunity is especially weak: prison cases and policy decisions. The Supreme Court rarely grants prison officials qualified immunity. And jurists including Justice Thomas have suggested that the principles animating qualified immunity have less force when officials make "calculated choices about enacting or enforcing unconstitutional policies."[3] These are more reasons to deny qualified immunity.

Third, even qualified immunity's defenders acknowledge that serious problems emerge when courts regularly use the doctrine to bypass underlying constitutional questions.[4] This case is the perfect

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[2] *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) (footnotes omitted) (collecting authorities).

[3] *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (statement of Thomas, J., respecting denial of certiorari).

[4] *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1884 (2018).

example: Courts have been questioning since 1996 whether Nevada's exact-cite paging system satisfies prisoners' constitutional right to access the courts,[5] but defendant officials still claim the law isn't clearly established—and so they've stuck with the system. Whether the Court denies qualified immunity or not, it should "promote clarity—and observance—of constitutional rules" by answering the constitutional question Nasby presents.[6]

LEGAL FRAMEWORK

Qualified immunity is about "fair notice." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 677 (9th Cir. 2021). It shields government agents from liability for violating constitutional rights if those rights were not "clearly established" at the time of the violation. *Ibid.* Courts may tackle the two prongs of qualified immunity—whether the officer violated a right and whether that right was clearly established—in any order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If a constitutional violation is sufficiently "obvious" or "egregious," courts can impose liability even without precisely analogous precedent. *Hope*, 536 U.S. at 738, 741 (2002); *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam).

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[5] *See* Opening Brief (OB) at 58.

[6] *Cf. Camreta v. Greene*, 563 U.S. 692, 705 (2011).

ARGUMENT

1. The Supreme Court has changed course on qualified immunity. This Court should take that into account.

In recent years, qualified immunity has come under criticism from jurists and commentators of all ideological stripes. Professor William Baude of the University of Chicago, a prominent scholar of originalism, has examined the professed legal bases of qualified immunity and determined that none of them "can sustain the modern doctrine."[7] Professor Alexander Reinert has shown that the text of 42 U.S.C. § 1983 as enacted—before it was altered by a scrivener's error—explicitly excluded common-law defenses like qualified immunity.[8] Even the proponents of the doctrine have beaten a retreat: They now offer only a "*qualified* defense" and suggest "a number of reforms."[9]

Based on such scholarship, Justice Thomas has called for overruling qualified immunity, concluding that it "appears to stray from the statutory text" of § 1983. *Baxter v. Bracey*, 140 S. Ct. 1862, 1862

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[7] William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 51 (2018).

[8] Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 101, 166–67 (forthcoming 2023), *available at* https://ssrn.com/abstract=4179628.

[9] Nielson & Walker, *supra* n.4, at 1884.

(2020) (Thomas, J., dissenting from denial of certiorari).[10] Justice Gorsuch, too, has criticized overly stringent applications of the doctrine. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.). And Justice Sotomayor has objected that the Court's recent uses of the doctrine involve "nothing right or just under the law." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (per curiam) (Sotomayor, J., dissenting).

Meanwhile, in this Court, Judge Hurwitz has criticized qualified immunity as a "judge-made doctrine" found "nowhere in the text of § 1983." *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part). In the Fifth Circuit, Judge Willett has written that "qualified immunity smacks of unqualified impunity." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part). In fact, judges have reached similar conclusions in nearly every other federal court of appeals.[11]

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[10] Previous members of the Court have made similar observations. *See, e.g.*, *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (qualified immunity has "diverged to a substantial degree from the historical standards"); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (qualified immunity is not "faithful to the common-law immunities that existed when § 1983 was enacted").

[11] *See, e.g.*, *McKinney v. City of Middletown*, 49 F.4th 730, 756 (2d Cir. 2022) (Calabresi, J., dissenting) ("[T]he doctrine of qualified immunity—misbegotten and misguided—should go."); *Jefferson v. Lias*, 21 F.4th 74, 87, 93–94 (3d Cir. 2021) (McKee, J., joined by Restrepo & Fuentes, JJ., concurring); *R.A. v. Johnson*, 36 F.4th 537, 547 n.2 (4th Cir. 2022) (Motz, J., concurring in the judgment); *Reich v. City of*

All this criticism has not gone unremarked at the Supreme Court. In a pair of recent cases, the Court rejected lower-court grants of qualified immunity for the first time in over 15 years. *See Taylor*, 141 S. Ct. 52; *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.). In *Taylor*, the Court held that confining a prisoner in "shockingly unsanitary cells" for several days obviously violated the Constitution, even without a prior case that said so. 141 S. Ct. at 53. And in *McCoy*, the Court instructed the Fifth Circuit to reconsider, in light of *Taylor*, its grant of qualified immunity to a prison guard who had gratuitously assaulted an inmate. 950 F.3d 226, 232 (5th Cir. 2020), *vacated*, 141 S. Ct. at 1364.

Assessing these decisions, the Fifth Circuit's Judge Willett has concluded that "the Court seems determined to dial back [qualified immunity's] harshest excesses." *Ramirez v. Guadarrama*, 2 F.4th 506, 522 (5th Cir. 2021) (mem.) (Willett, J., dissenting). Other jurists, too, have concluded that *Taylor* and *McCoy* represent a change in jurisprudential heading. *See, e.g.*, *Truman v. Orem City*, 1 F.4th 1227,

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Elizabethtown, 945 F.3d 968, 989 n.1 (6th Cir. 2019) (Moore, J., dissenting); *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018); *Goffin v. Ashcraft*, 977 F.3d 687, 694 n.5 (8th Cir. 2020) (Smith, J., concurring); *Cox v. Wilson*, 971 F.3d 1159, 1165 (10th Cir. 2020) (Lucero, J., joined by Phillips, J., dissenting from denial of reh'g en banc); *Schantz v. DeLoach*, 2021 WL 4977514, at *12 (11th Cir. 2021) (Jordan, J., concurring); *see also* Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 311 n.6 (2020) (collecting cases).

1240 (10th Cir. 2021); *Moderwell v. Cuyahoga Cnty.*, 997 F.3d 653, 660 (6th Cir. 2021); *Cope v. Cogdill*, 3 F.4th 198, 220 (5th Cir. 2021) (Dennis, J., dissenting); *Rico v. Ducart*, 980 F.3d 1292, 1307 (9th Cir. 2020) (Silver, J., concurring in part). So if this Court reaches qualified immunity here, it should account for this recent course correction at the Supreme Court.

2. This case lies at an intersection where qualified immunity is at its weakest.

The Supreme Court has rejected a claim of qualified immunity on the substance of the defense four times. All but one of those cases arose from prison officials' mistreatment of inmates. *Hope*, 536 U.S. at 741; *Taylor*, 141 S. Ct. at 54; *McCoy*, 950 F.3d at 232.[12] Likewise, only thrice has the Court *granted* qualified immunity to prison officials. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017); *Taylor v. Barkes*, 575 U.S. 822 (2015) (per curiam); *Procunier v. Navarette*, 434 U.S. 555 (1978).[13] Compare that to the dozens of Supreme Court cases granting

[12] The outlier, *Groh v. Ramirez*, involved a violation of the Fourth Amendment's particularity requirement, which the Court deemed clearly established "in the text of the Constitution" itself. 540 U.S. 551, 563 (2004).

[13] Three more cases represent a middle ground of sorts—the Court denied immunity, but on questions ancillary to the substance of the defense. *See Ortiz v. Jordan*, 562 U.S. 180 (2011) (no appealing a denial of summary judgment of qualified immunity after trial); *Richardson v. McKnight*, 521 U.S. 399 (1997) (no qualified immunity for private prison guards); *Crawford-El v. Britton*, 523 U.S. 574 (1998)

qualified immunity to other types of officials—usually police officers[14]—and a pattern becomes clear: The Court is far more skeptical of prison officials than other government employees.[15]

Another emerging dichotomy in the law of qualified immunity is between "split-second" decisions made by law-enforcement officials and "deliberate and considered" decisions made by policymaking officials. *Wearry v. Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J., concurring in denial of reh'g en banc). Justice Thomas, for instance, has suggested that "calculated choices about enacting or enforcing unconstitutional policies" should receive less protection under qualified immunity than "split-second decision[s] to use force in a dangerous setting." *Hoggard*, 141 S. Ct. at 2422 (statement of Thomas, J.). Or as Judge Ho of the Fifth Circuit put it:

(no heightened evidentiary standard for prisoners claiming improper motive).

[14] *See, e.g.*, *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (per curiam); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam); and many others.

[15] A similar pattern may prevail in the courts of appeals, where grants of qualified immunity are reversed 5.5% more often in Eighth Amendment cases than other types of claims. Alexander A. Reinert, *Qualified Immunity on Appeal: An Empirical Assessment*, at app. 11 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3798024. But denials of qualified immunity are also *reversed* more often in the Eighth Amendment context, *id.*, so firm conclusions are hard to draw.

> When public officials are forced to make split-second, life-and-death decisions in a good-faith effort to save innocent lives, they deserve some measure of deference. By contrast, when public officials make the deliberate and considered decision to trample on a citizen's constitutional rights, they deserve to be held accountable.

Wearry, 2022 WL 15208074, at *1 (Ho, J., concurring).

Here, the individual defendants' bid for qualified immunity lies on the losing end of both these fractures. They are policymakers for the Nevada state prisons, and according to Nasby they made a "calculated choice[]" to deny him constitutionally adequate access to a law library. *Cf. Hoggard*, 141 S. Ct. at 2422 (statement of Thomas, J.). At this doctrinal crossroads, qualified immunity is at its weakest. So for this reason, too, the Court should deny qualified immunity.

3. Even if this Court grants immunity, it should answer the constitutional question.

Until 2009, courts confronting qualified immunity adhered to a fixed "order of battle": Decide first whether a constitutional right was violated and then whether it was clearly established. *Pearson*, 555 U.S. at 234 (quotation marks omitted); *Saucier v. Katz*, 533 U.S. 194, 200 (2001). If courts were permitted to "skip ahead" to the second step, the Court explained, the law would be deprived of the case-to-case elaboration that gives force to constitutional guarantees. *Saucier*, 533 U.S. at 201. In *Pearson*, however, the Court relaxed this rule. 555 U.S.

at 242. It acknowledged that the sequential *Saucier* procedure was often "advantageous," but predicted that allowing lower courts to skip the first step occasionally would not lead to "constitutional stagnation." *Id.* at 232, 242 (quotation marks omitted).

Time and experience have given the lie to that prediction. More than a quarter of appellate qualified immunity decisions "leapfrog the underlying constitutional merits" and grant immunity directly. Schwartz, *supra* n.11, at 318 & n.33; *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part, dissenting in part). This practice has been a source of consistent criticism. *E.g.*, *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (en banc) (Grasz, J., dissenting); *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (per curiam). Again and again, such cases "threaten[] to leave standards of official conduct permanently in limbo." *Camreta*, 563 U.S. at 706.

Take the First Amendment right to film the police. Every circuit to consider the issue has concluded that the right exists. *Irizarry v. Yehia*, 38 F.4th 1282, 1290 (10th Cir. 2022). But the Third and Fifth Circuits disposed of the question on the second prong for *years*—denying guidance to police and civilians alike, wasting the resources of litigants and judges alike.[16] During this protracted period of indecision,

[16] Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1897 (2018) (citing *Fields v. City of*

officers in those circuits continued to arrest civilians for recording them. *See, e.g.*, *Karns v. Shanahan*, 879 F.3d 504, 524 (3d Cir. 2018). And for that, of course, they will continue to get immunity. *See id.*

Other examples in which qualified immunity has "frustrate[d] the development of constitutional precedent" abound. *See Camreta*, 563 U.S. at 706 (quotation marks omitted). For example, in this circuit alone, it remains unclear:

- whether an inmate has a constitutional right to confidential phone calls with his lawyer, *Evans v. Skolnik*, 997 F.3d 1060, 1067 (9th Cir. 2021);
- whether police officers' stealing hundreds of thousands of dollars in seized cash offends the Fourth Amendment, *Jessop v. City of Fresno*, 936 F.3d 937, 940–42 (9th Cir. 2019);
- whether consent to enter a home using a key permits officers to nearly destroy the home, *West v. City of Caldwell*, 931 F.3d 978, 984–87 (9th Cir. 2019); and
- whether the Establishment Clause permits a public-school teacher to disparage Christianity in class, *C.F. ex rel. Farnan v.*

Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017)).

Capistrano Unified Sch. Dist., 654 F.3d 975, 978, 988 (9th Cir. 2011).[17]

The result is that plaintiffs face a Catch-22: They are asked to produce precisely on-point precedent "even as fewer courts are producing precedent." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part). All the while, the development of constitutional law is "hamstrung" and constitutional clarity remains "exasperatingly elusive." *Evans*, 997 F.3d at 1076 (Berzon, J., concurring in part); *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part, dissenting in part).

This state of affairs is not a necessary consequence of qualified immunity. It is a case-by-case choice. And in this case, if the Court chooses to grant immunity, it should choose also to "avoid avoidance." *Cf. Camreta*, 563 U.S. at 706. It should choose instead to answer the constitutional question Nasby presents and clarify how far the Nevada state prisons must allow inmates access to the courts. Nasby has been

[17] *See also, e.g.*, *Larios v. Lunardi*, 856 F. App'x 704, 705 (9th Cir. 2021) (whether a public employer may seize all the data on an employee's personal cellphone without a warrant); *Lowe v. Raemisch*, 864 F.3d 1205, 1206–07 (10th Cir. 2017) (whether a prison may deny an inmate outdoor exercise for over two years); *Sama v. Hannigan*, 669 F.3d 585, 592 (5th Cir. 2012) (whether prison doctors may remove a prisoner's ovary and lymph nodes without her consent during a hysterectomy).

held in prison for over two decades on an erroneously obtained conviction. He is owed at least that much.

CONCLUSION

For all these reasons, this Court should reverse the district court's decision. If not, it should at least address both prongs of the qualified-immunity analysis and decide the constitutional question presented.

Dated: November 21, 2022

Respectfully submitted,

By: */s/Athul K. Acharya*
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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