No. 18-761

In the Supreme Court of the United States

DENNIS DAHNE, PETITIONER,

v.

THOMAS RICHEY, RESPONDENT.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF OF THE STATES OF ARIZONA, ALASKA, IDAHO, MONTANA, NEBRASKA, AND OREGON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Do prison inmates have a First Amendment right to include threatening, abusive, and irrelevant language in grievances?

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INTEREST OF *AMICI CURIAE*

The amici States of Arizona, Alaska, Idaho, Montana, Nebraska, and Oregon have an interest in the treatment of prison grievances generally and in the regulation of disrespectful or threatening language contained in such grievances in particular. The incarcerated population of America was approximately 1.5 million persons in 2016, the most recent year with available data.[1] The use of written grievances by this diverse and complex inmate population is a critical correctional tool for resolving internal prison disputes. Across the nation, written grievances serve as a legally endorsed method enabling prisoners to communicate with prison officials and vice versa.

But this communication method is not isolated from the realities of prison life. Abusive language by inmates that attacks the personal dignity of prison staff harms staff morale and undermines the ability of States to manage the prison population. Low morale, high stress, and fear for personal safety among prison personnel make it more difficult for States to hire corrections officers, even as the prison population continues to grow. Prison employees work in difficult and highly complex environments.

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[1] *See* Bureau of Justice Statistics, Corrections Statistical Analysis Tool (CSAT) - Prisoners: Yearend Jurisdiction Population: Prisoners Under the Jurisdiction of State or Federal Correctional Authorities, December 31, 2018, available at https://perma.cc/7XJY-9HQZ.

This Court recognized the demands of this work in *Turner v. Safley*, noting that prison administration is "an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources." 482 U.S. 78, 84–85 (1987). When this Court decided *Turner* in 1987, the nation's prison population was 585,084.[2] Since then, the population has grown to almost three times that size. The difficulties that prison officials face has correspondingly increased during the years since the Court decided *Turner* in 1987.

Similarly, the number of prison grievances has greatly increased. Grievances document the myriad internal conflicts that arise on a daily basis between prisoners and prison staff, and, where litigation ensues, they play an important role in documenting the alleged misconduct and tracking the prison officials' response. This Court recognized that the federal statute requiring inmates to use grievance procedures, the 1996 Prison Litigation Reform Act (PLRA), was specifically "enacted … in the wake of a sharp rise in prisoner litigation in the federal courts." *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). The PLRA is "designed to bring this litigation under control," and its centerpiece provision "is an 'invigorated' exhaustion provision." *Id.* (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). Congress's motivation for this legislation was exemplified by a prisoner lawsuit about peanut butter, as explained by Senator Dole while

[2] Bureau of Justice Statistics, *supra*.

introducing the 1996 bill on the Senate floor. Elana M. Stern, *Completely Exhausted: Evaluating the Impact of* Woodford v. Ngo *on Prisoner Litigation in Federal Courts*, 166 U. Pa. L. Rev. 1511, 1515 (2018). That lawsuit featured a prisoner who pursued a civil lawsuit for two years because a Nevada state prison had sent him a jar of smooth peanut butter instead of the chunky peanut butter he had demanded. *Id.*

Despite Congress's efforts to curb trivial lawsuits, the amici States continue to endure the burden of insubstantial lawsuits filed by prisoners. The percentage of civil filings in federal courts by prisoners has actually increased since *Woodford*, 25.3% in 2016. Stern, *Completely Exhausted, supra* at 1522–23. According to a review of data from four federal districts including the District of Arizona, the "proper" exhaustion requirement of *Woodford* did not impact the number of federal filings by prisoners at all. *Id*. at 1524–28. The author of that study noted that "*Woodford* does not appear to have actually deterred prisoners from filing 'improperly' exhausted claims." *Id*. at 1529.

The amici States are equally concerned with the correct application of the doctrine of qualified immunity. Indeed, this Court articulated some of the same concerns about trivial prisoner lawsuits years before Congress did in the PLRA. The Court articulated these concerns in a series of qualified immunity decisions from 1974 to 1982. John C. Williams, *Qualifying Qualified Immunity*, 65 Vand. L. Rev. 1295, 1299–1302 (2012). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court expressed

concern that too many prisoner lawsuits necessarily required jury trials to adjudicate disputes. *Harlow*, 457 U.S. at 816. Such litigation required "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Id*. at 817. Such inquiries "can be peculiarly disruptive of effective government." *Id*. In expressing the legal standard for qualified immunity that remains in place today, the Court emphasized the importance of eliminating insubstantial claims, noting that the Court had previously "admonished that 'insubstantial' suits against high public officials should not be allowed to proceed to trial." *Id*. at 819 n.35.

The amici States file this brief to urge the Court to vindicate the PLRA's requirement of proper exhaustion and to continue its work from recent years of protecting public servants through the doctrine of qualified immunity.

INTRODUCTION

The facts of this case are not far removed from the peanut butter lawsuit that Senator Dole referenced in 1996. The Respondent's underlying grievance arose from his missing a single shower and being denied time on the recreation field one day. App. 109a. It is doubtful that these facts could support a federal claim for violating the Constitution. Nonetheless, the missed shower and recreational time have now snowballed into seven

years of federal litigation, with a jury trial still to take place absent intervention from this Court.

Congress built prison grievances into the PLRA requirements for the very purpose of curbing litigation over trivial issues. By elevating the content of those grievances to the level of protected speech, the Ninth Circuit ignored the statutory context for why grievances exist at all, in addition to ignoring the careful analysis of correctional goals this Court mandated in *Turner*.

On the subject of qualified immunity, this Court's repeated admonitions to the Ninth Circuit were insufficient to persuade the panel below to conduct the appropriate inquiry. The Court has specifically admonished the Ninth Circuit four times since 2015 for erroneously defining the contested conduct at a level of generality that erases important factual distinctions and makes qualified immunity illusory. *City of Escondido v. Emmons*, No. 17-1660 (U.S. Jan. 7, 2019); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *Mullenix v. Luna*, 136 S. Ct. 305 (2015); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015). Even before 2015, the Court noted in 2011 that it has "repeatedly" instructed the Ninth Circuit on this issue in cases dating back to 2004. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (citing *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004)). Despite this history, the panel improperly relied on a generalized proposition to conclude that the law governing abusive grievances was clearly established. As it has in the past, the Court should correct this error

and complete the work it began in *Escondido*, *Kisela*, *Mullenix* and *Sheehan*.

SUMMARY OF ARGUMENT

Abusive and threatening prison grievances do not warrant the protections of the First Amendment. Amici not only agree with Petitioner's reasons for that conclusion, but also point to the liability exposure of prison officials caused by hostile work environments when inmates are permitted to abuse prison staff. The proper analysis for balancing these factors is to faithfully apply *Turner*, which the panel did not do.

The panel also erred in applying the doctrine of qualified immunity, by relying on generalized precedent that failed to clearly establish the right at issue. The panel did not analyze the point that several circuits and state supreme courts disagree with the panel. Moreover, a recent opinion from the Ninth Circuit calls the panel's reasoning into question, further compounding the lack of clarity of the right at issue.

ARGUMENT

I. The Ninth Circuit Decision Ignores the Nature and Purpose of Prison Grievances.

Petitioner has presented the Court with excellent arguments why abusive and threatening prison grievances do not warrant the protections of the First Amendment. Amici agree with those points but add another: prison officials can be successfully sued for failing to take action against prisoners' abusive behavior toward fellow inmates or prison employees. In *Freitag v. Ayers*, the Ninth Circuit held that "[n]othing in the law suggests that prison officials may ignore sexually hostile conduct" by inmates that harass prison employees. 468 F.3d 528, 539 (9th Cir. 2006). This principle was true, the court held, whether the victims of the hostile conduct "be guards or inmates." *Id*. Yet, in its decision below, the Ninth Circuit precludes prison officials from regulating the very same type of threatening language. These contradictory viewpoints create a trap for prison officials. The solution, however, already exists in this Court's precedent. Under *Turner*, States are free to regulate inmate speech for the orderly administration of correctional facilities. *Turner*, 482 U.S. at 89–91. Had the Ninth Circuit faithfully applied *Turner* and its progeny, it would have avoided the catch-22 that now awaits prison administrators in the nation's largest circuit.

In *Shaw v. Murphy*, 532 U.S. 223, 229–30 (2001), prison officials charged and convicted an inmate for disciplinary violations for the act of writing a letter to another inmate. *Id.* at 226. The sanctions included ten days of detention and demerits that affected the inmate's custody level. *Id.* Nevertheless, the Court held that there was no heightened First Amendment protection for an inmate's letter that provided legal advice to another inmate and that *Turner*'s deference to prison regulations applied. *Id.* at 230 (explaining that the *Turner* test does not permit an "increase in constitutional protection" based on "valuations of content"). Here, Washington's requirement that inmates rewrite grievances that violate basic standards of conduct presents a far easier case than *Shaw*. Yet rather than accord Washington's rules the deference that *Turner* requires, the panel extended full First Amendment protection to inmates' language in grievances.

Apparently aware of this legal innovation but seeking to cabin it, the panel declared that its protection for grievances should not be "construed as suggesting that prisoners have a right to publicly use disrespectful language in the broader prison environment." App. 6a. If anything, the purpose and context of prison grievances supports the opposite hierarchy of speech protections. Prison grievances are a method prescribed by federal statute to resolve or reduce conflict and to reduce the burden on government officials in dealing with

trivial inmate lawsuits. The Ninth Circuit's holding turns that rationale on its head by protecting language that is unworthy of constitutional protection and does nothing to advance the legitimate purposes of prison grievances. To the contrary, the holding below will increase trivial inmate litigation by allowing inmates to sue prison authorities for their efforts at curbing abusive and threatening language, efforts that the Ninth Circuit has already recognized as legitimate.

Unsurprisingly, the decision here is contrary to the holdings of several other federal courts of appeals and state supreme courts. Pet. 20–25. The Court should grant certiorari to rectify the Ninth Circuit's error and restore consistency among the lower courts in how they approach inmate grievances.

II. The Ninth Circuit Denied Qualified Immunity Based on Generalizations Rather than Precedent Placing the Issue Beyond Debate.

The panel also committed clear error in its qualified-immunity analysis. Qualified immunity is unavailable only if the right was clearly established, meaning that the question must be "beyond debate." *Kisela*, 138 S. Ct. at 1152. This Court has not yet squarely considered the right at issue here. Thus, the panel should have examined whether clearly established law could still be found in a "'robust consensus of cases of persuasive authority.'"

Sheehan, 135 S. Ct. at 1778 (quoting *al-Kidd*, 131 S. Ct. at 2084). No such consensus exists. The panel asserted that the Ninth Circuit recognized the specific right at issue when it decided *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009). But *Brodheim* was not clear because it involved facts that are not remotely similar to Respondent's claim here. In addition, the panel ignored the fact that every other court that has addressed this issue—five federal circuit courts and several state supreme courts, *see* Pet. 20–25—has disagreed with the panel's holding.

Brodheim involved a prison official who responded in writing to a grievance: "I'd also like to warn you to be careful what you write." *Brodheim*, 584 F.3d at 1265. The Ninth Circuit panel first noted the existence of a highly generalized right: "[P]risoners have a First Amendment right to file prison grievances." *Id.* at 1269. It analyzed in detail how that right fit into a free-speech retaliation claim under the First Amendment. *Id.* (discussing the "five basic elements of a 'viable claim of First Amendment retaliation' in the prison context") (citing *Rhodes v. Robinson*, 408 F.3d 559 (9th Cir. 2005)). A successful retaliation claim requires an adverse action by a prison official. *Rhodes*, 408 F.3d at 567-68. *Brodheim* held that threatening harm against a prisoner was sufficient: "[T]he mere *threat* of harm can be an adverse action, regardless of whether it is carried out." *Brodheim*, 584 F.3d at 1270.

Focusing solely on the conclusion that a prison official had arguably threatened the prisoner, *Brodheim* offered no analysis and made no holding on other First Amendment rights that might inhere in a prisoner's grievance. It made clear to prison officials that when a prisoner writes a grievance, a prison official responding to the grievance must do so without threatening the prisoner or otherwise causing a change in the prisoner's conditions out of anger or annoyance for the contents of the grievance. *Id.* But it did not even suggest that merely refusing to process a prison grievance because it contained threatening or abusive language prohibited by prison regulations would violate the First Amendment. Thus, the panel had to extend the holding in *Brodheim* to make it apply here. Consequently, *Brodheim* did not clearly establish the law in this situation, and the panel erred by denying qualified immunity. *See Sheehan*, 135 S. Ct. at 1776 ("[E]ven if a controlling circuit precedent [from a single circuit] could constitute clearly established federal law . . ., it does not do so here." [citation omitted].)

The panel asserted that *Brodheim* should not be read so narrowly, because to do so "would require that we ignore the *Brodheim* court's reasoning, and that we disregard the broader First Amendment framework under *Turner*." App. 5a. This statement is all but an admission that the panel is extending *Brodheim* beyond the circumstances in which it clearly established the law. It is, of course, possible to deny qualified immunity in novel circumstances, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), but this

requires an "obvious case[ ]," *id*. at 738; *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Existing precedent must have put the right's existence "beyond debate." *Kisela*, 138 S. Ct. at 1152. To avoid qualified immunity, the plaintiff must identify a case "where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." *White v. Pauly*, 137 S. Ct. 548, 552 (2017). *Brodheim* does not do that.

Compounding this error is the fact that the Ninth Circuit recently issued an opinion calling the reasoning of *Brodheim* into question. *Lane v. Swain*, 2018 WL 6693491 (9th Cir. Dec. 20, 2018). In *Lane*, a prisoner authored letters to government officials that contained threatening language. 2018 WL 6693491 at *1–2. In its published opinion, the Ninth Circuit held that prison regulations prohibiting the use of threatening language serve "legitimate governmental interests." *Id*. at *4. This holding clouds the rationale underlying the panel's conclusion, especially given that Respondent's grievances contained implicit threats, namely references to the recent murder of a Washington corrections officer. App. 109a–10a. *Lane* proves the panel's error in failing to recognize that, at the very least, its holding was not foretold and was subject to qualified immunity.

If the Ninth Circuit had, in fact, clearly established a rule in *Brodheim* in 2009, seven years of litigation might never have occurred. Under a clear rule, the State of Washington would have been

on notice to review its prison regulations that forbid profanity and disrespectful language. Being forewarned, officials would have had an opportunity to bring the regulations into compliance before Respondent authored his abusive and threatening grievances two years later in 2011. And Petitioner would have been on notice that the grievance should be reviewed, notwithstanding its obnoxious and dangerous content.

But *Brodheim* provided no such guidance. No Ninth Circuit opinion put it beyond debate that a prison official violates a prisoner's First Amendment right to petition the government by rejecting a grievance because the prisoner insists on using abusive and threatening language. And numerous other courts had issued opinions that, at the very least, cast doubt on the notion. Qualified immunity is therefore appropriate to relieve Petitioner of the burden of this litigation.

CONCLUSION

The petition should be granted and the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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