No. 19–1291

In the Supreme Court of the United States

CHARLES HAMNER,

Petitioner,

v.

DANNY BURLS, Warden, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PROFESSORS OF CIVIL PROCEDURE AND FEDERAL COURTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici curiae Erwin Chemerinsky, Craig Futterman, Alan Mills, David Rudovsky, and Joanna Schwartz are law professors and scholars of constitutional litigation and federal civil procedure. Amici have an interest in the proper interpretation of the authority of the federal courts.

Erwin Chemerinsky is the Dean of Berkeley Law, where he serves on faculty as the Jesse H. Choper Distinguished Professor of Law. Dean Chemerinsky has authored eleven books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. He also is the author of more than 200 law review articles.

Craig Futterman is a Clinical Professor of Law at the University of Chicago Law School and Director of the Civil Rights and Police Accountability Project of the Mandel Legal Aid Clinic with expertise in civil rights and constitutional matters, with a special focus on racial discrimination, education, and police brutality.

Alan Mills is an Adjunct Professor at Northwestern Pritzker School of Law with an

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[1] Pursuant to Rule 37.6, amici certify that no counsel for a party has authored this brief in whole or in part and that no one other than amici and their counsel has made any monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

expertise in prison litigation and is also the Executive Director of the Uptown People's Law Center in Chicago.

David Rudovsky is a Senior Fellow at the University of Pennsylvania Law, teaching courses in criminal law, evidence, and constitutional criminal procedure. He has authored numerous publications on constitutional law and criminal constitutional procedure. Professor Rudovsky is one of the nation's leading civil rights and criminal defense attorneys, and is a founding partner at Kairys, Rudovsky, Messing & Feinberg.

Joanna Schwartz is Professor of Law at UCLA School of Law, teaching courses in civil procedure and police accountability. Professor Schwartz is one of the country's leading experts on police misconduct litigation. Her recent work has explored the extent to which qualified immunity doctrine achieves its intended goal of shielding government officials from the costs and burdens of litigation.

SUMMARY OF THE ARGUMENT

This Court has been clear: qualified immunity is an affirmative defense that defendants themselves must invoke and plead. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 & n.24 (1982). Nonetheless, the Eighth Circuit disposed of the appeal below by asserting qualified immunity *sua sponte* on behalf of the defendants and then

resolving the issue in defendants' favor.[2] See Pet. at 5. In so holding, the Eighth Circuit joined a minority of appellate circuits that permit appellate courts to invoke *sua sponte* a qualified immunity affirmative defense not raised below. See Pet. 10-13. This Court should intervene to resolve the inter-circuit split in accordance with foundational principles of federal appellate procedure.

A court's *sua sponte* invocation of an affirmative defense violates the central tenets of the adversarial model: that courts act as passive and neutral decisionmakers, reviewing only the legal and factual disputes presented for adjudication by the parties. It also circumvents rules governing waiver and forfeiture of non-jurisdictional affirmative defenses on appeal, transforming the appellate courts into courts of first view rather than courts of review. That the affirmative defense invoked in this case was qualified immunity—a judicially-imposed restriction on statutorily-authorized civil rights actions—makes the *sua sponte* invocation a particularly problematic expansion of the judiciary's role.

The Eighth Circuit believed qualified immunity to be a more efficient way to dispose of the case at hand and suggested that "there was nothing to be profited" by requiring the defendants to assert their own affirmative defense. Pet. App.

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[2] Amici adopt the facts set forth in the Statement of the Case in the Petition for a Writ of Certiorari ("Pet."), at pages 2-7.

7a. To the contrary, fidelity to accepted federal civil procedure, including party presentation of arguments and enforcement of waiver and forfeiture on appeal, serves critical functions. It consolidates power in the hands of the litigants and away from the judiciary, promotes litigant autonomy and acceptance of judicial decisions, prevents gamesmanship, ensures long-term judicial economy, and maintains the court's neutrality, in both practice and perception. Allowing appellate courts to invoke waived or forfeited non-jurisdictional affirmative defenses *sua sponte*, in turn, damages judicial legitimacy by placing appellate courts in the role of litigants, making decisions about the best legal arguments to resolve a case. This Court should grant the petition for certiorari.

ARGUMENT

I. An appellate court's *sua sponte* assertion of a non-jurisdictional affirmative defense contravenes core precepts of the adversarial process.

The *sua sponte* invocation of qualified immunity defenses by appellate courts violates core tenets of the American adversarial system. It is well-established that in our adversarial system, "[courts] do not, or should not, sally forth each day looking for wrongs to right" and instead "normally decide only questions presented by the parties." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quotation omitted); *see also Greenlaw v. United States*, 554 U.S. 237, 243 (2008). The

American adversarial system differs from its European inquisitorial counterparts in that its central features are "party presentation of evidence and arguments" for resolution before a "neutral and passive decision maker[]." Adam Milani & Michael Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 272 & n.143 (2002); *see also Sineneng-Smith*, 140 S. Ct. at 1579; *Greenlaw*, 554 U.S. at 243 (2008); *Wood v. Milyard*, 566 U.S. 463, 472 (2012). The judge "does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006) (quotation omitted). Likewise, "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)..

The American system is "designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Sineneng-Smith*, 140 S. Ct. at 1579 (quotation omitted). Operating pursuant to this premise, applied equally to all parties in the legal case, courts act as "essentially passive instruments of government." *Id.* (quotation omitted).

These structural features serve important functions. They consolidate power in the hands of

the parties rather than the judiciary. *See, e.g.*, Monroe Freedman, *Our Constitutionalized Adversary System*, 1 Chapman L. Rev. 57, 85-87 (1998). They avoid the risk of partiality and premature commitment to one side that arises when courts stray from a passive role. *Greenlaw*, 554 U.S. at 243; Milani & Smith at 273-278; Stephan Landsman, *The American Approach to Adjudication* 2 (1988). They avoid the appearance of bias. Milani & Smith at 279-82; *Burgess v. United States*, 874 F.3d 1292 (11th Cir. 2017). They afford litigants autonomy and control over the litigation and increase acceptance of judicial decisions. Freedman at 87-88; Milani & Smith at 282-286. And they further the search for truth. *See, e.g.*, Milani & Smith at 247 & n.3.

When appellate courts invoke non-jurisdictional affirmative defenses *sua sponte*, they abandon these core principles in favor of a more inquisitorial approach, blurring the line between advocate and decisionmaker. *See Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *Arizona v. California*, 530 U.S. 392, 412-13 (2000); *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1109 (D.C. Cir. 2019). The resulting attendant costs include subversion of party control of the litigation, an appearance of judicial bias and partiality, reduction of litigant and societal acceptance of judicial decisions, and damage to appellate court legitimacy.

Allowing courts to invoke non-jurisdictional affirmative defenses *sua sponte* also impermissibly gives courts "*carte blanche* to depart from the

principle of party presentation basic to our adversary system." *Wood*, 566 U.S. at 472. In this case, the Eighth Circuit's primary rationale for considering qualified immunity—expediency—would justify the *sua sponte* invocation of any affirmative defense in civil or criminal litigation. It would likewise legitimize the assertion of new claims or theories on a plaintiff's behalf to dispose of a *defendant's* appeal. As one judge observed in the criminal context, such judicial shortcuts, while tempting, create a slippery slope:

> Should we be willing to overlook counsel's failure to raise a clearly winning argument—even in civil cases—if by doing so we can save the expense of a new trial (or other societal costs)? . . . .
>
> When judges think of themselves as bearing responsibility for the results dictated by a neutral application of the law, whether in the civil or criminal field, they tend to exceed appropriate bounds of judicial restraint. By compromising its neutrality, I think the court does so here. That "cost" far exceeds the costs of a new trial[.]

United States v. Pryce, 938 F.2d 1343, 1355 (D.C. Cir. 1991) (Silberman, dissenting). This Court should grant the petition for certiorari to restore the paramount principles of party presentation and neutral, passive, decision-making in judicial consideration of affirmative defenses.

II. An appellate court's consideration of a forfeited or waived qualified immunity defense weakens important procedural constraints on appellate review.

An appellate court's adjudication of a qualified immunity defense not raised before the trial court also weakens important procedural constraints on appellate review. While an appellate court may affirm on any basis supported by the record, "[a]ppellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance." *Wood*, 566 U.S. at 473; *see also Angarita v. St. Louis Cty.*, 981 F.2d 1537, 1548 (8th Cir. 1992). This Court has made clear that a federal appellate court may not address a non-jurisdictional affirmative defense that the government has consciously waived. *Wood*, 566 U.S. at 474.

Even forfeited non-jurisdictional affirmative defenses—those not pressed below because of mere inadvertence—may be "resurrect[ed]" by a reviewing court only "in a small number of narrow, carefully defined contexts," and, even then, only in "exceptional" cases. *Maalouf*, 923 F.3d 1095, 1109 (discussing *Wood*, 566 U.S. at 471; *Arizona*, 530 U.S. at 412-13; *Day v. McDonough*, 547 U.S. 198 (2006); & *Granberry v. Greer*, 481 U.S. 129 (1987)).

As this Court has explained, "good reason" exists for these tight constraints on appellate review. *Wood*, 566 U.S. at 473. An appellate court is to act as "a court of review"—not "one of first view"—and must maintain respect for the trial

court's "processes and time investment." *Id.* at 473-74. When litigants have "steered" the trial court away from affirmative defenses and "towards the merits," an appellate court that raises such defenses on its own motion disregards the entire course of the trial court's adjudication. *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1201 (10th Cir. 2014); *see also Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 269-70 (6th Cir. 2010); *Arreola-Castillo v. United States*, 889 F.3d 378, 384 (7th Cir. 2018) (refusing to "effectively discount the district court's efforts.").

Permitting appellate courts to consider waived and forfeited non-jurisdictional defenses also promotes gamesmanship, encouraging defendants to seek a merits adjudication from the trial court and, if they fail to get traction, to suggest the defense on appeal as a fallback strategy. It also "invite[s] strategic use" of late-asserted affirmative defenses as a dilatory tactic "by defendants who stand to benefit from delay." *See Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 668 (1st Cir. 1996).

Restraint in considering waived or forfeited affirmative defenses on appeal "is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would have anticipated in developing their arguments on appeal." *Wood*, 566 U.S. at 473. Appellate adjudications made prior to development of the record can compromise accuracy. Here, for example, the Eighth Circuit's *sua sponte* invocation of qualified immunity deprived Mr. Hamner of the

ability to seek leave to replead or conduct discovery to unearth evidence that defeats the defense, such as records showing that Defendants violated the law knowingly or purposefully. *See generally Gomez*, 446 U.S. at 640-41 (recognizing that "whether [qualified] immunity has been established depends on facts peculiarly within the knowledge and control of the defendant").

As many circuits have recognized either expressly or implicitly, a qualified immunity defense not raised before the trial court "does not implicate the 'exceptional conditions' that justify [appellate] review of newly raised issues." *WBY, Inc. v. DeKalb Cnty.*, 695 F. App'x 486, 492 (11th Cir. 2017) (unpublished); *see also, e.g.*, *Lewis v. Kendrick*, 944 F.2d 949, 953 (1st Cir. 1991); *Calabretta v. Floyd*, 189 F.3d 808, 818 & n.34 (9th Cir. 1999); *Walsh v. Mellas*, 837 F.2d 789, 800-801 (7th Cir. 1988).[3]

Qualified immunity is an "obvious" potential defense in civil rights suits, as the Eighth Circuit recognized in its ruling. Pet. App. 5a. Government officials are savvy enough to know how to assert the defense; when they choose not to, courts should presume that the decision was strategic and decline to intervene. *See, e.g., Walls v. Bowersox*, 151 F.3d 827, 833 (8th Cir. 1998) (reviewing courts presume counsel's conduct to be "within the range of competence demanded of attorneys under like

[3] As the Petition for Certiorari sets forth, a majority of appellate circuits refuse to consider qualified immunity defenses not raised below. *See* Pet. at 10-13.

circumstances.") (citation omitted). Moreover, federal civil procedure affords government officials multiple opportunities to raise qualified immunity, and thus they suffer no "manifest injustice" when their waiver or forfeiture is recognized at one early stage in the litigation. *Bines v. Kulaylat*, 215 F.3d 381, 385 (3d Cir. 2000).

Judicial invocation of qualified immunity *sua sponte* also exceeds any arguable implicit Congressional mandate for the defense. Qualified immunity is a judicially-imposed limit on statutorily-authorized civil rights actions that is "for the official to claim." *Gomez*, 446 U.S. at 640; *see also* 42 U.S.C. § 1983; *Malley v. Briggs*, 475 U.S. 335, 341 (1986); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1801 (2018). Because the underlying basis for qualified immunity is from a common law crafting, and not by statute, this Court cautions that the judicial role in implementing qualified immunity must be circumspect: "[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and . . . we are guided in interpreting Congress' intent by the common-law tradition." *Malley*, 475 U.S. at 342. In other words, appellate courts should not subvert the will of Congress by taking qualified immunity too far beyond its common law roots. *Id.*; *see also Imbler v. Pachtman*, 424 U.S. 409, 421 (1976) (immunities are "not products of judicial fiat"; rather they must honor "the immunity historically accorded the relevant official at common law and the interests behind it.").

Admittedly, over the years, the Court has on occasion expanded qualified immunity beyond its common law roots. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (discussing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). This evolution, however, has provoked vociferous disagreement. *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) (admonishing that the Court "should not substitute our own policy preferences for the mandates of Congress" by exceeding the doctrine's common law origins). When appellate courts invoke the defense *sua sponte*, even after the litigant's waiver or forfeiture, such rulings take the judicially-created qualified immunity defense far beyond its common law precedent.

Appellate court *sua sponte* consideration of waived or forfeited non-jurisdictional affirmative defenses should be limited to defenses that "squarely implicate the institutional interests of the judiciary," as opposed to mere policy concerns. *Maalouf*, 923 F.3d at 1109. For example, courts may assert timeliness defenses to *habeas* actions *sua sponte* to accommodate "considerations of comity, federalism, and judicial efficiency to a degree not present in ordinary civil actions" that "eclipse the immediate concerns of the parties." *Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002). As a majority of circuits have recognized, a qualified immunity defense not asserted before the trial court does not satisfy this requirement. *See* Pet. 10-12; *WBY, Inc.*, 695 F. App'x at 492.

III. Appellate courts' interests in efficiency do not justify departure from established procedure.

The primary justification for the minority rule permitting *sua sponte* consideration of qualified immunity defenses on appeal is that divergence from norms would be more efficient in the case upon review. *See, e.g.*, Pet. Appx. 7a. Yet this approach fails to account for the broader, longer-term effects of such an outcome on judicial economy. For instance, when the Eighth Circuit here invoked immunity *sua sponte*, the need for supplemental briefings caused delay, caused the total party briefings to exceed the word-count permitted by the Rules, and pre-empted an issue that ordinarily would have been decided by the district court on summary judgment, if defendants chose to raise it at all. In contrast, had the Eighth Circuit deferred, defendants could have chosen to raise the defense in a motion for judgment on the pleadings or at summary judgment, the lower court would then have adjudicated the defense based on a developed record and already-completed briefings, and, depending on the state of the evidence, the losing party might not have even elected to appeal.

The far more efficient procedure is to allow defendants to choose whether to assert their waivable affirmative defenses below. "Over the long term," holding parties to the consequences of their forfeiture or waiver will encourage consolidation of arguments before district and appellate courts. *Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 322

(3d Cir. 2015); *see also E. Coast Test Prep LLC v. Allnurses.com, Inc.*, 2016 WL 5109137, at *3 (D. Minn. Sept. 19, 2016) ("Litigants and federal courts are all better off when parties consolidate their defenses" to "best serve[] principles of efficiency and judicial economy.").

More generally, valuing judicial efficiency above all else has an unfairly pro-defense bent in civil litigation because the most "efficient" result—without regard for other values such as accuracy and party acceptance of the judicial process and decision—favors dismissal of a case. Short-term efficiency should not eclipse other values promoted by adversarial appellate procedure. *See, e.g., In re Illinois Marine Towing, Inc.*, 498 F.3d 645, 652 (7th Cir. 2007); *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, Louisiana, Inc.*, 37 F.3d 193, 197 n.9 (5th Cir. 1994).

CONCLUSION

The minority rule permitting *sua sponte* invocation of a waived or forfeited qualified immunity defense on appeal deviates from the adversarial model and weakens important protections against appellate court consideration of waived and forfeited affirmative defenses. This Court should accordingly grant the petition for certiorari to clarify the applicable law, vacate the Eighth Circuit decision, and remand the matter with an order to address the sole disputes presented on appeal by the parties for decision: whether Mr. Hamner's solitary confinement offends the Fourteenth and Eighth Amendments.

Respectfully submitted,

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