No. 19-1291

In the Supreme Court of the United States

CHARLES HAMNER,

Petitioner,

v.

DANNY BURLS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION

OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center St., Ste. 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
VINCENT M. WAGNER
Deputy Solicitor General
ASHER L. STEINBERG
Assistant Solicitor General

QUESTIONS PRESENTED

(1) Whether courts of appeals may raise qualified immunity *sua sponte* in a case governed by the Prison Litigation Reform Act, which provides that courts must dismiss an action *sua sponte* if it "seeks monetary relief from a defendant who is immune from such relief."

(2) Alternatively, whether this Court should overrule its unanimous decision in *Pearson v. Callahan*, 555 U.S. 223 (2009), and order the court of appeals to decide whether Respondents violated Petitioner's constitutional rights, without disturbing its holding that Respondents are immune from Petitioner's suit.

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INTRODUCTION

Petitioner Charles Hamner raises what sound like weighty questions about qualified immunity: Can courts of appeals raise qualified immunity *sua sponte*? Should this Court overrule *Pearson v. Callahan*, 555 U.S. 223 (2009), and once again mandate lower courts to unnecessarily address the merits of constitutional claims before deciding whether qualified immunity bars them? But this case is an irredeemably flawed vehicle to decide both questions, and neither is cert-worthy anyway.

Hamner's first question asks whether the Eighth Circuit erred in raising qualified immunity *sua sponte* to affirm a dismissal entered on broader grounds. In an ordinary Section 1983 case, that might be the subject of reasonable debate. This case, however, is governed by the PLRA. And every court of appeals to address the issue has held that the PLRA doesn't just permit—but unambiguously mandates—*sua sponte* dismissal of immunity-barred claims. That makes this case an utterly unfit vehicle to address whether courts can raise qualified immunity *sua sponte* in ordinary Section 1983 litigation.

But even if this case weren't such a poor vehicle, review would still be unwarranted. Contrary to Hamner's wildly exaggerated claims, there is no split on excusing qualified-immunity forfeiture—just a case-by-case exercise of discretion that varies little from one circuit to another. Hamner's argument otherwise rests on little more than an arbitrarily selected

handful of cases that do not represent the wider body of circuit case law.

As for Hamner's request to overrule *Pearson*, he lacks standing to make it. But for his first question presented, which would moot the second were Hamner to prevail on it, Hamner does not attack the Eighth Circuit's grant of immunity. His request to overrule *Pearson*, therefore, boils down to a request that this Court order the Eighth Circuit to pen dicta on the constitutional questions presented by damages claims that he would have already lost.

Finally, even if Hamner had standing to ask the Court to overrule *Pearson*, he offers no justification for it to do so. The heart of his argument is the utterly unremarkable research finding that courts use the discretion *Pearson* gave them to bypass constitutional questions in about a quarter of qualified-immunity cases. If anything, that number should seem too low, and it certainly does not show, as Hamner claims, that *Pearson* has led to the stagnation of constitutional law. The petition should be denied.

STATEMENT

1. In 2017, Petitioner Charles Hamner filed this in forma pauperis action against several prison officials over the six-and-a-half months he had spent in administrative segregation two years prior. App. 3a-4a; Dist. Ct. R. 1, 3. Hamner claimed that his prison's procedures for reviewing housing assignments violated his procedural due process rights. App. 4a. He

also claimed that his initial assignment to administrative segregation violated the First Amendment because it was motivated by retaliation for certain grievances that he had filed. App. 4a. In addition to damages, he sought declaratory and injunctive relief. App. 4a; Dist. Ct. R. 2 at 6.

a. Before Respondents were served with Hamner's complaint, the district court screened it under 28 U.S.C. 1915A. App. 4a. That section of the PLRA requires district courts to screen a prisoner's suit "before docketing . . . or . . . as soon as practicable after docketing" and dismiss it *sua sponte* if, inter alia, it "fails to state a claim" or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. 1915A(a)-(b). Conducting that screening, the district court held that under circuit precedent, Hamner's placement in administrative segregation for less than seven months did not implicate a protected liberty interest and dismissed his due process claim with prejudice. Dist. Ct. R. 4 at 3 (magistrate's recommendation) (citing *Orr v. Larkins*, 610 F.3d 1032, 1034 (8th Cir. 2010) (holding placement in administrative segregation for nine months does not implicate a liberty interest)); Dist. Ct. R. 6 (adopting recommendation). But it determined that his allegations of retaliation stated a claim and ordered Hamner's complaint served on Respondents. App. 4a; Dist. Ct. R. 7.

Respondents moved to dismiss the retaliation claim on qualified immunity grounds and because doc-

uments attached to Hamner's complaint belied his allegations of retaliation. To the contrary, those documents demonstrated that Hamner had been placed in administrative segregation for permissible reasons. Dist. Ct. R. 17 at 5-8. Yet the district court denied Respondent's motion. Dist. Ct. R. 20 at 3-4 (magistrate's recommendation); Dist. Ct. R. 22 (adopting recommendation).

Respondents then sought summary judgment because Hamner had failed to exhaust his administrative remedies. Dist. Ct. R. 26. The magistrate judge recommended that motion be granted because Hamner had never filed a grievance alleging retaliation. Dist. Ct. R. 32 at 3-4. Hamner moved to amend his complaint, claiming his amendment would "fix whatever the court thinks is wrong with it." Dist. Ct. R. 33. The district court, acknowledging that an amendment likely would not cure Hamner's failure to exhaust, nevertheless granted his motion and rejected the magistrate's recommendation. Dist. Ct. R. 35.

b. Hamner then filed an amended complaint. App. 4a. His new complaint revived his due process claim, though it had already been dismissed with prejudice, and added two Eighth Amendment claims. One of those claims simply alleged that because of his mental health problems, it violated the Eighth Amendment to place him in administrative segregation. App. 11a.

The other claim alleged that Respondents were deliberately indifferent to his medical needs by depriving him of medication. App. 4a, 8a. Yet Hamner

did not add defendants who were responsible for Hamner's medication; he named only the officials he originally sued for placing him in administrative segregation. App. 4a, 9a. The grievances attached to Hamner's pleadings, moreover, showed that when he complained that a nurse had not dispensed his medications, superiors counseled the nurse and began reviewing Hamner's record to ensure that he received his medication. App. 9a.

Consistent with local practice limiting PLRA screening to first complaints, the district court did not screen Hamner's amended complaint. *But see* 28 U.S.C. 1915A(a) (mandating that a district court "shall review . . . as soon as practicable after docketing, *a complaint* in a civil action" filed by a prisoner against government officials) (emphasis added). Respondents were therefore obliged to file a responsive pleading, and they moved to dismiss.

In their motion, Respondents explained that Hamner's due process claim had already been dismissed with prejudice and that his amendment had not cured his failure to exhaust his retaliation claim. Dist. Ct. R. 38 at 1-2. Respondents also explained that Hamner's allegations of deliberate indifference failed to state a claim because Hamner did not allege that Respondents were to blame for the gaps in his medication. *Id.* at 3-4. And Respondents argued that Hamner's Eighth Amendment attack on his temporary administrative segregation failed to state a claim for the same reasons his due process claim had; if his

placement there did not even implicate a protected liberty interest, it could not possibly be cruel and unusual punishment. *Id.* at 5. The district court agreed on all points and granted Respondents' motion. App. 22a-27a (magistrate's recommendation of dismissal); App. 21a (adopting recommendation).

2. Hamner appealed. He did not challenge the dismissal of his retaliation claim. Appellant's Br. 14 n.10 (8th Cir. Oct. 23, 2018). Nor did he challenge the dismissal of his claims for prospective relief. Given his release from administrative segregation three years prior, he conceded those claims were moot. *Id.* at 14 n.11; App. 5a (citing concession at oral argument). Rather, he only sought the reinstatement of his due process and Eighth Amendment claims for monetary damages.

a. With the case having become a damages-only suit, and given the novelty of Hamner's claims, the Eighth Circuit requested supplemental briefing on whether it could and should affirm the district court on qualified immunity grounds. Order (8th Cir. Apr. 17, 2019). The court's order cited *Story v. Foote*, 782 F.3d 968 (8th Cir. 2015). That case held it was appropriate to affirm a district court's PLRA screening dismissal for failure to state a claim on the alternative ground of qualified immunity—even where qualified immunity was not argued by defendants on appeal—because the PLRA's screening provision mandates *sua sponte* dismissal where defendants are immune from monetary liability. *See Story*, 782 F.3d at 969-70 (citing 28 U.S.C. 1915A(b)(2)).

In his supplemental brief, Hamner attempted to distinguish *Story* on the ground that the defendants there had no opportunity to raise qualified immunity (except in their appellate briefing) because the district court dismissed the case pre-service. Appellant's Supp. Br. at 4-5 (8th Cir. May 17, 2019). Respondents argued that *Story* authorized affirming PLRA dismissals on the alternative ground of qualified immunity irrespective of pre- or post-service timing. Appellees' Supp. Br. at 1-2 (8th Cir. June 18, 2019). As a result, Respondents argued that, though they had not raised the defense below, they were entitled to qualified immunity on Hamner's remaining claims.[1]

b. In an opinion by Judge Colloton—and joined by Judges Gruender and Erickson—the Eighth Circuit affirmed. Heeding this Court's admonition that in qualified-immunity cases "'courts should think hard, and then think hard again, before turning small cases into large ones,'" the court declined to reach the novel constitutional questions Hamner's claims raised. App. 5a (quoting *Camreta v. Greene*, 563 U.S. 692, 707 (2011)). Instead, it held Hamner's suit was barred by qualified immunity. App. 8a-15a.

Relying on its decision in *Story*, App. 6a, the Eighth Circuit held it could affirm a dismissal on the alternative ground of qualified immunity if immunity

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[1] Hamner suggests Respondents did not raise immunity from his deliberate-indifference claim. Pet. 6. To the contrary, Respondents asserted they were immune from all the claims Hamner continued to press on appeal. *See* Appellees' Supp. Br. at v-vi, 5, 15.

was "evident on the face of a complaint." App. 7a. It concluded Respondents' contention that Hamner failed to allege a constitutional violation at all did not forfeit the "fallback position" that any right they violated was not clearly established. App. 6a. And it noted the parties had filed supplemental briefs concerning qualified immunity and that Respondents had made it clear they would "promptly assert" that defense on remand if the court reversed—meaning the qualified-immunity question "inevitably would return . . . in a second appeal." App. 7a. It saw "nothing to be profited by that procedural roundabout." *Id.*

On the substance of qualified immunity, the Eighth Circuit easily concluded that Respondents were immune from all of Hamner's claims. As to Hamner's deliberate-indifference claim, the court explained that he did not allege that Respondents "endorsed or deliberately ignored" his complaints about his nurse's mistakes; to the contrary, the court explained that prison officials had responded to them. App. 10a. No precedent, the court reasoned, clearly established that "fix[ing] problems that arise in a prison's health care system by responding to grievances and taking corrective actions" violated the Eighth Amendment. App. 11a.

As to Hamner's claim that his placement in administrative segregation alone violated the Eighth Amendment, the Eighth Circuit held that none of its precedents, nor a consensus of persuasive authority from other circuits, clearly established that placing an inmate with psychological disorders in administrative

segregation for six months violated the Eighth Amendment. App. 12a-13a. Indeed, the Eighth Circuit's own precedent held just the opposite. App. 12a (citing *Orr*, 610 F.3d at 1033-35).

Likewise, the Eighth Circuit held qualified immunity barred Hamner's due process claim because no circuit precedent held that placement in administrative segregation implicated a protected liberty interest. To the contrary, circuit precedent held that assignments of even longer duration than Hamner's did not violate due process. App. 14a-15a (citing *Orr*, 610 F.3d at 1033-34).

Judge Erickson, though fully "concur[ring] in the majority's analysis," App. 16a, wrote separately to call for the circuit to "reverse [its] precedent" holding that administrative segregation did not trigger a liberty interest sufficient to require heightened due process protections. App. 18a. Given that understanding of circuit precedent, however, he agreed that "our precedent precludes . . . the existence of a clearly established constitutional right giving sufficient notice to [Respondents]." *Id.*

3. The Eighth Circuit denied Hamner's petition for rehearing en banc over the dissent of three of its eleven members, including Judge Erickson. App. 29a.

REASONS FOR DENYING THE PETITION

I. The first question presented does not warrant review.

A. This case is an unsuitable vehicle to answer the first question presented.

Hamner's first question presented asks whether qualified immunity is "an affirmative defense that state actors must assert . . . or may federal appellate courts raise the defense *sua sponte*." Pet. i. He claims the courts of appeals are split on this question. Pet. 10-13. And in cases that do not involve the PLRA, there are some slight variations in how the circuits approach that question. But this case has nothing to do with those variations.

That is because this case is governed by the PLRA. And the PLRA does not just permit—but *requires*—courts to consider qualified immunity *sua sponte*. Indeed, simply applying the PLRA's unambiguous text and uniform circuit precedent, no circuit would have decided this case differently. And that means that whatever tension may exist between circuits concerning whether qualified immunity should be considered *sua sponte* in non-PLRA cases, granting review in this case would not resolve it. Review of the first question presented should therefore be denied.

1. The PLRA's provisions for *sua sponte* dismissal of claims against immune defendants—and a unanimous body of circuit precedent interpreting those provisions—make clear that they authorize *sua*

sponte dismissal on the basis of qualified immunity even after the filing of a responsive pleading.

a. The best-known of these provisions is the PLRA's screening provision, the statute on which the district court relied to initially dismiss Hamner's due process claim *sua sponte* for failure to state a claim. It provides that "before docketing, if feasible or, in any event, as soon as practicable after docketing," a district court must "review . . . a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee" of one. 28 U.S.C. 1915A(a). In that review, the court "shall . . . dismiss the complaint, or any portion of the complaint, if the complaint," inter alia, "seeks monetary relief from a defendant who is immune from such relief." *Id.* 1915A(b).

Qualified immunity, of course, is one kind of immunity from monetary relief. And given Section 1915A's application to suits against officer and employee defendants as well as governmental entities, its immunity provision "must [apply to] qualified immunity" as well as governmental immunities; otherwise that provision would have no application in those suits. *Chavez v. Robinson*, 817 F.3d 1162, 1168 (9th Cir. 2016). Section 1915A also authorizes post-service *sua sponte* dismissal. Though it does most of its work pre-service, nothing textually limits its application to that period; it only requires courts to screen complaints "as soon as practicable after docketing." 28 U.S.C. 1915A(a). In the case of an amended complaint like Hamner's, which was deemed served upon its

docketing, *see* Fed. R. Civ. P. 5(b)(2)(E), that review necessarily follows service. *See Echols v. Craig*, 855 F.3d 807, 810-11 (7th Cir. 2017) (approving Section 1915A screening of a second amended complaint after defendants' counsel moved to dismiss the two previous complaints).

Additionally, two other provisions of the PLRA unambiguously mandate *sua sponte* dismissal of immunity-barred claims at any time that a court determines defendants have immunity. Section 1915, applicable to *in forma pauperis* prisoner suits like here, *see* 28 U.S.C. 1915(a)(1), requires courts to "dismiss the case at any time if the court determines that . . . the action or appeal," inter alia, "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. 1915(e)(2). And 42 U.S.C. 1997e, applicable to any prisoner suit concerning "prison conditions," dictates that a "court shall on its own motion or on the motion of a party dismiss any [such] action . . . if the court is satisfied that the action . . . seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C. 1997e(c)(1).

These provisions can only be read to authorize raising immunity *sua sponte* throughout the duration of a case. Section 1915 mandates *sua sponte* dismissal "at any time," even on appeal. Section 1997e mandates immunity-based dismissal "on [a court's] own motion or the motion of a party," indicating both that it applies post-service and that it is indifferent to whether defendants raise immunity. Indeed, if these provisions did not authorize post-service *sua sponte*

dismissals, they would be mere repetitions of Section 1915A, which (at the least) authorizes pre-service *sua sponte* dismissal.

b. Unsurprisingly given that statutory text, every court of appeals to address the issue has held that the PLRA authorizes raising qualified immunity *sua sponte*, even after service and even if a defendant has not asserted immunity.

To begin with, nine courts of appeals—every one to confront the issue—have held that the PLRA authorizes courts to raise qualified immunity *sua sponte*. The D.C. Circuit, for example, much like the Eighth Circuit below, has held it may raise qualified immunity *sua sponte* to affirm a Section 1915 or Section 1915A dismissal entered on other grounds. *See Redmond v. Fulwood*, 859 F.3d 11, 13 (D.C. Cir. 2017) (Millett, J.). So have the Fourth, Sixth, and Eighth Circuits. *See Martin v. Duffy*, 858 F.3d 239, 250-51, 251 n.3 (4th Cir. 2017); *Small v. Brock*, 963 F.3d 539, 543 (6th Cir. 2020); *Story*, 782 F.3d at 969-70. The Third, Fifth, Ninth, Tenth, and Eleventh Circuits have each held district courts can raise qualified immunity *sua sponte* to dismiss PLRA suits. *See Doe v. Delie*, 257 F.3d 309, 312 & n.1, 322 n.13 (3d Cir. 2001); *Clay v. Allen*, 242 F.3d 679, 680, 682 (5th Cir. 2001); *Chavez*, 817 F.3d at 1167-69; *Banks v. Geary Cty. Dist. Ct.*, 645 F. App'x 713, 717 (10th Cir. 2016) (joined by Gorsuch, J.); *Manzini v. Fla. Bar*, 511 F. App'x 978, 983 (11th Cir. 2013). And the Seventh Circuit, albeit in dicta, has emphatically endorsed that view. *See Gleash v. Yuswak*, 308 F.3d 758, 760 (7th Cir. 2002)

(Easterbrook, J.) ("Both § 1915(e)(2)(B)(iii) and § 1915A(b)(2) *require* the judge to consider official immunity, which is an affirmative defense."); *Walker v. Thompson*, 288 F.3d 1005, 1010 (7th Cir. 2002) (Posner, J.) (same).

The bulk of these decisions, not surprisingly, involve pre-service dismissals. Courts have far fewer occasions to dismiss a case *sua sponte* after defendants have filed responsive pleadings. But every circuit confronted with the question of raising qualified immunity *sua sponte* post-service has held the PLRA authorizes it, and other circuits' reasoning logically commits them to agreeing.

Moreover, and most relevant here, three circuits—the Third, Tenth, and Eleventh—have directly addressed post-service *sua sponte* dismissals. And they uniformly hold the PLRA authorizes such dismissals. In *Rauso v. Giambrone*, for instance, the Third Circuit reviewed a Section 1915A, immunity-based dismissal entered after the defendant was served and failed to file a timely response. 782 F. App'x 99, 101 (3d Cir. 2019). That court held it could affirm without deciding if Section 1915A authorized post-service *sua sponte* dismissal, because Section 1915 "explicitly states that a court shall dismiss a case 'at any time' where the action seeks monetary relief against a defendant who is immune." *Id.*

Similarly, in *Manzini*, the Eleventh Circuit reviewed a Section 1915, post-service dismissal based on immunity. The defendant there moved to dismiss, failed to raise qualified immunity, and then raised it

for the first time on reply. 511 F. App'x at 983. Normally that would forfeit the argument. But the Eleventh Circuit held "the district court could reach the issue" because Section 1915 authorized it to raise qualified immunity *sua sponte*. *Id.*

And in *Williams v. Wilkinson*, the Tenth Circuit acknowledged its discretion to raise qualified immunity under Section 1915 even after defendants' motion to dismiss omitted the defense. 645 F. App'x 692, 696 n.5 (10th Cir. 2016).

In addition to those circuits, two other circuits' decisions confirm that they too would read Section 1915 to authorize raising qualified immunity *sua sponte* after service. In *Chavez*, the plaintiff argued to the Ninth Circuit that Section 1915 *only* authorized post-service immunity-based dismissals, not pre-service ones. 817 F.3d at 1167. The Ninth Circuit responded that "the clear text of the statute . . . requires a court to dismiss an action 'at any time' if the defendant is entitled to immunity. We divine no express or implied temporal limit in this phrase." *Id.* That holding is incompatible with a temporal limit to pre-service dismissal.

And in *Martin*, explaining why it could raise qualified immunity *sua sponte* where the district court had not, the Fourth Circuit stressed that Section 1915 even directs courts of appeals to order dismissal if they determine an "*appeal* seeks monetary relief against a defendant who is immune from such relief." 858 F.3d at 250 (alteration omitted) (quoting 28

U.S.C. 1915(e)(2)(B)(iii)). Thus, it too reads Section 1915's command as temporally unlimited.

c. Furthermore, none of the cases on which Hamner relies to claim a circuit split suggest there is any split on whether the PLRA authorizes courts to raise qualified immunity *sua sponte*, whether before or after service. Only two of the cases Hamner reads to bar raising qualified immunity *sua sponte* were even arguably subject to the PLRA. *See Greer v. Dowling*, 947 F.3d 1297 (10th Cir. 2020) (prisoner suit); *Bines v. Kulaylat*, 215 F.3d 381 (3d Cir. 2000) (prisoner suit, but filed before the PLRA's effective date).[2] Neither of those decisions even mentions the provisions of the PLRA that authorize raising immunity *sua sponte*, and both were decided by circuits that hold the PLRA authorizes that practice.

d. Ultimately, if the Court granted review to decide whether qualified immunity is "an affirmative defense that state actors must assert . . . or may federal appellate courts raise the defense *sua sponte*," Pet. i, it would be granting certiorari to decide a question on which—as applied to this case, an action governed by the PLRA—the circuits are in unanimous agreement. And given the unambiguity of the PLRA's provisions on that question, the Court would undoubtedly affirm without reaching the only issue on which the circuits

[2] *Id.* at 383 (suit filed in February 1996); *see Martin v. Hadix*, 527 U.S. 343, 350 (1999) ("[T]he PLRA became effective on April 26, 1996.").

are even arguably split: whether *non*-statutory doctrines of preservation and forfeiture permit courts to raise qualified immunity *sua sponte*. That makes this case an irredeemably flawed vehicle to decide that issue.

2. In response, Hamner might claim that whether the PLRA authorized the Eighth Circuit to raise qualified immunity would be a matter for remand, and that this Court's review would be limited to questions of non-statutory forfeiture doctrine. But Hamner's question presented is not limited to whether courts of appeals can raise qualified immunity *sua sponte* as a matter of forfeiture doctrine. It simply asks whether they can "raise the defense *sua sponte*." Pet. i; *cf. Yee v. City of Escondido*, 503 U.S. 519, 536-37 (1992) (holding the Court's review was limited to a particular theory of how the lower court erred only because the question presented explicitly limited itself to that theory). The answer to that question in a case governed by the PLRA is obviously yes.

Hamner might also suggest this Court could not address the PLRA because it was not the basis for the Eighth Circuit's judgment. But that's a difficult claim to make since the Eighth Circuit's opinion rests on circuit precedent explicitly grounded in the PLRA. Moreover, that the decision below ultimately rests on that framework is underscored by the fact that the Eighth Circuit has never raised qualified immunity *sua sponte* in a non-PLRA case. *See infra* at 30. And even if this Court thought the decision below did not rest on the PLRA, this Court "may 'affirm' a lower

court judgment 'on any ground permitted by the law and the record,'" *Dahda v. United States*, 138 S. Ct. 1491, 1498 (2018) (alterations omitted) (quoting *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017)), especially when the alternative ground is as "simpl[e]" as the one here. *Id.* Review of the first question presented should be denied.

3. For the same reasons that plenary review of the first question presented is unwarranted, summary reversal on that question (Pet. 23-25) is equally unwarranted. The Eighth Circuit's decision to raise qualified immunity was not just permissible; it was mandated by the PLRA.

In support of his request for summary reversal, Hamner suggests Respondents did not just forfeit but waived qualified immunity, and that, he claims, barred the Eighth Circuit from reaching immunity. Pet. 24. Even if that were true, summary reversal would be unwarranted. Whether even a true waiver of immunity overcomes the PLRA's mandate to dismiss immunity-barred claims is a novel question that no court of appeals has addressed, and Hamner's petition fails to address that issue.

In any event, there was no waiver here. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quotation marks omitted). What happened below was only—at most—the former. Hamner claims Respondents' mere failure to expressly raise qualified immunity in their motion

to dismiss his amended complaint amounts to waiver under *Wood v. Milyard*, where this Court found a State waived AEDPA's statute of limitations. But in *Wood*, after being directed to address timeliness, the State expressly responded—twice—that it would "not challenge" timeliness. 566 U.S. 463, 474 (2012). Nothing like that express abandonment of a defense happened here. Hamner's argument lacks merit, and summary reversal is not warranted.

B. There is no circuit split, even in non-PLRA cases.

Hamner portrays a stark circuit split embracing every regional circuit, with nine circuits declining to consider forfeited qualified immunity defenses, and three freely "inject[ing] qualified immunity" into cases even when no one asks. Pet. 12. To call this exaggeration is gross understatement.

Instead, what even a cursory survey of the courts of appeals' decisions reveals is that the vast majority of the circuits exercise case-by-case discretion in a fairly homogeneous manner: generally enforcing forfeitures, but occasionally excusing them where immunity is exceptionally clear, where not reaching it would unduly protract litigation, or in other exceptional circumstances. Indeed, only two circuits have yet to excuse a forfeiture of qualified immunity in a non-PLRA case, and one is the court below.

Moreover, even Hamner's distorted micro-sample of cases fails demonstrate a split. All but two of the decisions he claims conflict with the decision below

address different questions than the one at issue here: whether a court of appeals may raise qualified immunity *sua sponte* to *affirm* a judgment, as the courts of appeals often do with unraised arguments. Instead, they address whether courts of appeals may *reverse* a "denial" of immunity that was never raised, or whether a district court may raise immunity *sua sponte* to dismiss. Of his two cases that are on-point, one is in patent conflict with its circuit's precedent. The other is relatively new, has never been cited for its forfeiture holding, is a non-PLRA case, and is out of a circuit that raises qualified immunity *sua sponte* under the PLRA. There is no split.

1. The circuits Hamner claims refuse to consider qualified immunity sua sponte.

First Circuit. Hamner claims (Pet. 10) the decision below conflicts with the First Circuit's decision in *Guzmán-Rivera v. Rivera-Cruz*, 98 F.3d 664 (1st Cir. 1996). That is wrong. The question in *Guzmán-Rivera* was whether an official could appeal an interlocutory denial of qualified immunity after failing to raise it until his third summary-judgment motion. *Id.* at 668. The question this case presents is whether a court of appeals can affirm a dismissal on the alternative ground of qualified immunity when immunity was not raised below. On *that* question, the First Circuit has long held that it is "free to affirm a district court's decision on any ground supported by the record even if the issue was not pleaded, tried, or otherwise referred to in the proceedings below." *Doe v. Anrig*,

728 F.2d 30, 32 (1st Cir. 1984) (Breyer, J.) (quotation marks omitted).

Guzmán-Rivera is also no longer good law. Before *Guzmán-Rivera*, other First Circuit panels reviewed denials of forfeited qualified-immunity defenses for plain error. *See Lewis v. Kendrick*, 944 F.2d 949, 953 (1st Cir. 1991) (joined by Breyer, C.J., in relevant part). The First Circuit resolved these conflicting lines of authority in favor of the plain-error approach in *Chestnut v. City of Lowell*, 305 F.3d 18 (1st Cir. 2002) (en banc), taking the "realistic view" that the denial of a plain though unraised immunity is still an error because defendants will rarely intend to waive an immunity to which they are plainly entitled. *Id.* at 21; *see also Surprenant v. Rivas*, 424 F.3d 5, 14-15 (1st Cir. 2005) (applying *Chestnut* to qualified immunity). Here, where the immunity question is not close, the First Circuit would grant immunity.

Third Circuit. Hamner next contends (Pet. 10) the decision below conflicts with the Third Circuit's decision in *Bines v. Kulaylat*, 215 F.3d 381 (3d Cir. 2000). Like *Guzmán-Rivera*, *Bines* addressed a different question: whether the court could reverse the "denial" of qualified immunity when immunity wasn't raised below. *Id.* at 386. The answer was unsurprisingly negative. But where affirming on alternative grounds is concerned, the Third Circuit will "affirm on any ground supported by the record so long as the appellee did not *waive*—as opposed to *forfeit*—the issue," including issues "the appellees neither raised below nor on appeal." *TD Bank N.A. v. Hill*, 928 F.3d 259,

276 n.9 (3d Cir. 2019). Moreover, *Bines*'s forfeiture holding was dictum. The Third Circuit ultimately held it "lack[ed] jurisdiction to consider Kulaylat's qualified-immunity claim" because it was premised on a fact dispute. *Bines*, 215 F.3d at 385-86. And tellingly, since *Bines*, the Third Circuit has affirmed a *sua sponte* grant of qualified immunity in a non-PLRA case. *Torrey v. N.J. Dep't of Law & Pub. Safety*, 717 F. App'x 169, 171 (3d Cir. 2017) (Ambro, J.).

Fourth Circuit. Hamner also claims (Pet. 11) the decision below conflicts with two Fourth Circuit decisions. Again, those cases concerned the distinct issue of whether a court of appeals can reverse on the basis of an unraised immunity. *See Sales v. Grant*, 224 F.3d 293, 296 (4th Cir. 2000); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997). They shed little light on whether a court of appeals can affirm on that ground.

Since it decided those cases, the Fourth Circuit has also taken a far freer approach to addressing unraised qualified-immunity defenses. It has held it is not "precluded from considering [a qualified-immunity] defense that was not properly asserted in the trial court, if the court has nonetheless chosen to address it." *Ridpath v. Bd. of Govs. Marshall Univ.*, 447 F.3d 292, 305-06 (4th Cir. 2006). And as that court later explained, *Ridpath* held that "review of untimely [immunity] claims is within the discretion of the appellate court." *Noel v. Artson*, 297 F. App'x 216, 219 (4th Cir. 2008). Additionally, in at least one non-PLRA case, the Fourth Circuit addressed, without objection,

a qualified-immunity defense that a district court raised *sua sponte*. *Smith v. Gilchrist*, 749 F.3d 302, 306 & n.4 (4th Cir. 2014).

Fifth Circuit. Hamner further argues (Pet. 11) the decision below conflicts with the Fifth Circuit's decision in *Kelly v. Foti*, 77 F.3d 819 (5th Cir. 1996). *Kelly* is yet another case about whether courts of appeals may reverse on the basis of an unraised immunity defense, not whether they may affirm on that basis. *Id.* at 822. Moreover, *Kelly* acknowledged discretion to address unraised immunity defenses if declining to do so would result in "grave injustice," and only found such injustice lacking because, even had it addressed immunity, "litigation [would] proceed on [another] claim in any event." *Id.* By contrast, not reaching the immunity question here would have protracted the litigation. And since *Kelly*, the Fifth Circuit has held an argument that defendants did not violate a constitutional right preserved and "implicitly contain[ed] the lesser argument that the [rights] are not clearly established." *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 626 (5th Cir. 2006). Under that rule, Respondents would not be deemed to have forfeited qualified immunity at all.

Sixth Circuit. Hamner additionally claims (Pet. 11) the decision below conflicts with the Sixth Circuit's decision in *Summe v. Kenton County Clerk's Office*, 604 F.3d 257 (6th Cir. 2010). Somewhat closer to the mark, *Summe* concerned whether a district court could raise qualified immunity *sua sponte* in granting summary judgment. *Id.* at 269-70. But even that

question is a far cry from whether a court of appeals may raise qualified immunity *sua sponte* to affirm a judgment, and on that point the Sixth Circuit's general rule is that it "may affirm a district court's decision for any reason presented in the record, even if the reason was not raised below." *United States v. Bonds*, 839 F.3d 524, 530 (6th Cir. 2016).

Summe is also far from the Sixth Circuit's first or last word on unraised immunity defenses. Long before *Summe*, that court held it could reach a forfeited immunity argument if defendants were entitled to immunity "beyond any doubt." *Meador v. Cabinet for Hum. Res.*, 902 F.2d 474, 477 (6th Cir. 1990). Indeed, that court recently reached the merits of an *un*meritorious forfeited qualified-immunity defense, stressing the defense was only forfeited, not affirmatively waived. *See Berkshire v. Beauvais*, 928 F.3d 520, 530-31 (6th Cir. 2019); *see also Jacobs v. Alam*, 915 F.3d 1028, 1039 n.5 (6th Cir. 2019) (addressing whether a defendant had immunity from claims he did not even seek summary judgment on because the district court raised and denied immunity, "and the parties fully briefed the issues"). And like the Fifth Circuit, the Sixth Circuit has held that arguing a plaintiff has not alleged a constitutional violation suffices to preserve qualified immunity, reasoning that "[o]ne does not forfeit a qualified immunity defense by making arguments that, if accepted, establish the defense." *McNeal v. Kott*, 590 F. App'x 566, 569 (6th Cir. 2014) (Sutton, J.).

Seventh Circuit. Hamner further claims (Pet. 11-12) the decision below conflicts with two Seventh Circuit decisions. But like many of his authorities, both cases concern the distinct question of whether a court of appeals can *reverse* on the basis of a forfeited immunity defense—and even on that question, both acknowledged discretion to do so in cases of plain error. *See Narducci v. Moore*, 572 F.3d 313, 324-25 (7th Cir. 2009); *Walsh v. Mellas*, 837 F.2d 789, 800-01 (7th Cir. 1988). Moreover, the Seventh Circuit's practice is far from homogeneous. It has affirmed district courts' *sua sponte* grants of immunity in non-PLRA cases, *see Meadows v. Rockford Hous. Auth.*, 861 F.3d 672, 675, 678 (7th Cir. 2017), and acknowledged that "we have not determined with precision how a defendant must preserve a qualified immunity defense." *Alexander v. City of Milwaukee*, 474 F.3d 437, 443 (7th Cir. 2007).

Tenth Circuit. Hamner also contends (Pet. 12) the decision below conflicts with the Tenth Circuit's recent decision in *Greer v. Dowling*, 947 F.3d 1297 (10th Cir. 2020). Unlike most of the cases Hamner cites, *Greer* concerned the propriety of raising qualified immunity to affirm, and it purported to reject the practice. *Id.* at 1303.

But the Tenth Circuit is unlikely to follow *Greer*. First, *Greer*, a PLRA case, overlooked the PLRA's mandate to consider immunity *sua sponte*. Second, *Greer* conflicts with the Tenth Circuit's prior holdings that it "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us

on appeal." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (Gorsuch, J.). Third, it conflicts with the Tenth Circuit's prior holdings that district courts may raise qualified immunity *sua sponte*, *Scull v. New Mexico*, 236 F.3d 588, 600-01 (10th Cir. 2000), and that it may even consider an appellant's forfeited argument that he did not violate clearly established law "because the issue involves a pure matter of law." *Cox v. Glanz*, 800 F.3d 1231, 1246 n.7 (10th Cir. 2015); *see also Sayed v. Virginia*, 744 F. App'x 542, 546-47 (10th Cir. 2018) (excusing appellant's total forfeiture of qualified immunity under *Cox*). The Tenth Circuit's precedent is consistent with the decision below.

Eleventh Circuit. Hamner next claims (Pet. 12) the decision below conflicts with the Eleventh Circuit's decision in *Moore v. Morgan*, 922 F.2d 1553 (11th Cir. 1991). *Moore*, however, concerned whether a district court could raise qualified immunity *sua sponte*, *id.* at 1557-58, not whether a court of appeals could raise it to affirm on alternative grounds. And the Eleventh Circuit has receded from its disapproval of even the former practice in *Moore*. *See Lillo ex rel. Estate of Lillo v. Bruhn*, 413 F. App'x 161, 162 (11th Cir. 2011) (finding "no error on the part of the district court when it *sua sponte* raised the issue of qualified immunity"); *Shepard v. Davis*, 300 F. App'x 832, 836 n.7 (11th Cir. 2008) (criticizing district court for "inject[ing] the issue of qualified immunity into the case," but "address[ing] the merits" of immunity neverthe-

less "because qualified immunity issues should be addressed at the earliest opportunity").

D.C. Circuit. Hamner finally claims (Pet. 12) the decision below conflicts with the D.C. Circuit's decision in *Robinson v. Pezzat*, 818 F.3d 1 (D.C. Cir. 2016). *Robinson*—alone with *Greer* among the cases Hamner cites—refused to affirm on the alternative ground of qualified immunity where immunity was not raised below. *Id.* at 11. And unlike *Greer*, *Robinson* did not flout its circuit's precedent, or the PLRA. But even *Robinson* does not prove a split. First, it is hardly clear the D.C. Circuit would decide *this case* any differently than the Eighth Circuit. *Robinson* was not a PLRA case, and the D.C. Circuit has held the PLRA—at least—authorizes raising qualified immunity *sua sponte* pre-service. *See Redmond*, 859 F.3d at 13. Second, it is unclear the Eighth Circuit would reject *Robinson*; the Eighth Circuit has never excused the forfeiture of qualified immunity in a non-PLRA case. *Infra* at 30.

At most, then, Hamner has alleged a marginal conflict with only the D.C. Circuit, and that certainly would not warrant this Court's review. *Robinson* is hardly entrenched. It is only four years old and has never been cited by the D.C. Circuit for its forfeiture holding. Thus, the D.C. Circuit—like essentially all of its sister circuits—may well adopt a more lenient view on forfeitures of qualified immunity in time. And given this Court's choice to leave "[t]he matter of what questions may be taken up and resolved for the first time on appeal . . . primarily to the discretion of the

courts of appeals," *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), an arguable conflict with a decision of one other circuit on that matter does not merit this Court's review.

2. The circuits Hamner claims raise qualified immunity sua sponte.

Hamner also claims that the Second, Eighth and Ninth Circuits freely raise qualified immunity *sua sponte*. That claim would not justify review absent a split, but in any event, it bears mentioning that Hamner badly exaggerates their approach to qualified-immunity forfeiture. The Second and Ninth Circuits actually employ a quite nuanced approach and only occasionally excuse qualified-immunity forfeiture. And the Eighth Circuit has never excused qualified-immunity forfeiture in a non-PLRA case.

The only cases in which the Eighth Circuit has ever raised qualified immunity *sua sponte* are two PLRA cases: the decision below and *Story*. Hamner claims (Pet. 13) the Eighth Circuit also did so in one non-PLRA case, *Jacobson v. McCormick*. But as Hamner argued below, Appellant's Supp. Reply Br. 5 n.2 (8th Cir. July 3, 2019), the defendants in *Jacobson* raised qualified immunity in their answer and the plaintiff agreed the court should address it. 763 F.3d 914, 916-17 (8th Cir. 2014). In non-PLRA cases, the Eighth Circuit has consistently declined to address forfeited qualified-immunity defenses and arguments. *See, e.g.*, *Stearns v. Inmate Servs. Corp.*, 957 F.3d 902, 906 (8th Cir. 2020) ("Contrary to a great majority of our § 1983 cases, qualified immunity was not raised

[below]. Therefore, we are not asked whether ISC's policies violated a clearly established constitutional right."); *Lee v. Driscoll*, 871 F.3d 581, 584-85 (8th Cir. 2017) (affirming denial of qualified immunity because defendants' particular immunity argument had not been raised below).

As for the Second and Ninth Circuits, Hamner cites just three cases where those courts even arguably raised qualified immunity *sua sponte*. Pet. 12-13. These are not exemplars; they are outliers. Indeed, with a single exception, they are the only cases in which either circuit has ever done so. Far more often, those circuits have enforced forfeitures of immunity.[3]

And in the instances where they have raised qualified immunity *sua sponte*, one or another "exceptional circumstance[]" justified it. *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 845 n.23 (9th Cir. 2003). In *Graves*, for example, the defendants raised qualified immunity in their answer and the issue came to the court on a fully developed record. *Id.* In *Community House, Inc. v. City of Boise*, the defendants asserted qualified immunity from all claims, but did not "specifically" raise it as to some. 623 F.3d 945, 968 (9th Cir. 2010). In *Dean v. Blumenthal*, the defendant,

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[3] *See, e.g.*, *Harris v. Miller*, 818 F.3d 49, 63 (2d Cir. 2016); *Provost v. City of Newburgh*, 262 F.3d 146, 161 (2d Cir. 2001); *McCardle v. Haddad*, 131 F.3d 43, 51-52 (2d Cir. 1997); *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1087-88 (9th Cir. 2017); *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 974 (9th Cir. 2010); *Calabretta v. Floyd*, 189 F.3d 808, 817-18 (9th Cir. 1999).

Connecticut's Attorney General, did not raise qualified immunity until appeal because only then did the plaintiff clarify he was suing the Attorney General in his individual capacity. 577 F.3d 60, 67 n.6 (2d Cir. 2009); *see also Fabrikant v. French*, 691 F.3d 193, 212 (2d Cir. 2012) (addressing forfeited immunity defense where below defendants argued they hadn't acted under color of state law). There is no split, and this Court's review is not warranted.

II. The second question presented does not merit review.

A. Hamner lacks standing to seek review of the second question presented.

Hamner's second question presented asks the Court to overrule *Pearson v. Callahan*, 555 U.S. 223 (2009), and hold that in analyzing qualified immunity courts must (or at least usually should) address whether an official violated a constitutional right before deciding whether that right is clearly established. The Court would never reach that question unless it denied review or affirmed on Hamner's first question because if the Eighth Circuit erred in raising qualified immunity, there would be no reason to address how it should analyze qualified immunity.

Yet Hamner's *only* attack on the Eighth Circuit's grant of immunity is that the Eighth Circuit impermissibly raised it. His request to overrule *Pearson*, only challenges the court's decision not to address the

merits of his constitutional clams, not its ultimate decision that Respondents had immunity. Therefore, even if the Court reached the second question presented, overruled *Pearson*, and vacated the judgment below, it would leave the Eighth Circuit's immunity holding undisturbed, and Hamner would not recover damages. *See, e.g.*, *United States v. Myers*, 928 F.3d 763, 767 (8th Cir. 2019) (reinstating undisturbed holding of vacated opinion on remand); *United States v. Olsson*, 742 F.3d 855, 856 (8th Cir. 2014) (same).

In those circumstances, Hamner lacks standing to raise his second question presented. "Although rulings on standing often turn on a plaintiff's stake in initially filing suit, Article III demands that an actual controversy persist throughout all stages of litigation. The standing requirement therefore must be met by persons seeking appellate review, just as . . . by persons appearing in courts of first instance." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950-51 (2019) (quotation marks and citations omitted). To "invoke[e] the Court's authority," a "petitioner must show that he has suffered an injury in fact . . . that will be redressed by a favorable decision" of this Court. *Camreta v. Greene*, 563 U.S. 692, 701 (2011) (quotation marks omitted).

Those conditions are not met here. A victory on the second question could not help Hamner obtain damages. And Hamner has no standing to seek the purely "prospective effect," *id.* at 702, of an opinion holding the conduct he alleged violated his rights. For as Hamner conceded below, he had no standing to

seek prospective relief once he was released from administrative segregation—an event that preceded his filing of this case. App. 5a.

This Court held it lacked jurisdiction in materially identical circumstances in *Camreta*. There, defendants sought certiorari to challenge the lower court's holding that their conduct violated the plaintiff's rights; the plaintiff did not cross-petition to challenge that court's holding that the defendants had immunity. *Id.* at 700. The Court held the defendants had standing to challenge the judgment's "prospective effect." *Id.* at 702. But it held the plaintiff lacked an Article III "stake in preserving the court's holding." *Id.* at 710-11. Her failure to challenge the court's grant of immunity meant that she had no monetary interest, and post-certiorari developments deprived her of the prospective interest in "protection from the challenged practice" she once had. *Id.* at 711. Thus, the case was moot.

What the *Camreta* plaintiff sought to preserve, Hamner seeks to obtain: a holding at qualified immunity's first step with purely prospective effect. And here, where Hamner never had standing to seek prospective relief, he lacks standing to seek that kind of judgment. If this Court revisits *Pearson*, it should do so in a case where the plaintiff disputes immunity, or at least has standing to seek the protection of a constitutional ruling.

B. This Court should not overrule *Pearson*.

In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court mandated that courts decide the merits of plaintiffs' constitutional claims before deciding whether defendants had qualified immunity from them. Just eight years later in *Pearson* the Court unanimously overruled *Saucier*, concluding *Saucier*'s inflexible anti-avoidance procedure had proven unworkable. 555 U.S. at 236-42. Hamner now asks this Court to overrule *Pearson* and return to "the failed *Saucier* experiment." *Id.* at 235 (quoting *Morse v. Frederick*, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in part and dissenting in part)).

This Court has declined that misguided invitation before, *Surratt v. McClaran*, 138 S. Ct. 147 (2017), and it should again. *Pearson*'s grant of permission to decide constitutional questions and discretion to avoid them strikes the correct balance between doctrinal development and restraint, and nothing in Hamner's meager presentation of *Pearson*'s supposed faults justifies tipping the scales back to mandatory non-avoidance.

In *Pearson*, this Court acknowledged that deciding constitutional questions before addressing whether existing doctrine clearly established their answers was "often beneficial." 555 U.S. at 236. But it concluded that mandating that sequence in all cases had "come[] with a price" too great to bear. *Id.*

Indeed, the prices were many. *Saucier* required "a substantial expenditure of scarce judicial re-

sources" on non-dispositive questions. *Id.* It "disserve[d] the purpose of qualified immunity" itself by forcing officials to "litigat[e] constitutional questions" in cases where they were plainly immune. *Id.* at 237. It generated "factbound" precedent of little law-developing value in some cases, *id.*, while mandating constitutional decisionmaking against a parched factual backdrop in others. *Id.* at 239. It "create[d] a risk of bad decisionmaking" in the constitutional arena, both because parties often inadequately briefed issues that immunity rendered non-dispositive, and because courts might "devote [less] care" to such questions. *Id.* It made it difficult for immunized defendants to obtain review of constitutional rulings.[4] *Id.* at 240. And it "depart[ed] from the general rule" that courts ought not "pass on questions of constitutionality" unless they must. *Id.* at 241. For these reasons, the Court granted the lower courts discretion to choose their order of decisionmaking in individual qualified-immunity cases.

With such costs, this Court would need a "special justification" to return to the *Saucier* regime. *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) ("To reverse a decision, we demand a 'special justification.'"). Hamner offers none. He first complains that "[e]mpirical analyses" show that courts of appeals often "skip the constitutional question" after *Pearson*. Pet. 15-16. The

[4] That problem can still arise, even after this Court's decision in *Camreta*, when, for example, a defendant no longer works in law enforcement. *See Camreta*, 563 U.S. at 710 n.9.

same empirical analyses have been cited by petitioners seeking to overrule *Pearson* before to no avail. Pet. for Writ of Cert. 15, *Surratt* (No. 16-1492). That's not surprising given that those studies found courts of appeals decline to reach the constitutional question in a mere 19 to 27 percent of cases. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 34 (2015) (authors' findings); *id.* at 37 (collecting others'). And even excluding cases where courts find a clearly established right, "courts exercise[] their discretion to decide the constitutional question nearly two-thirds of the time."[5] *Id.* at 34.

When this Court denounced unnecessary constitutional adjudication in *Pearson*, it could not have found these relatively low levels of avoidance unforeseeable or objectionable. If anything, this Court likely expected more avoidance: Just two years later in *Camreta* it instructed lower courts to "think hard, and then think hard again" before opting to address the

[5] Hamner claims Nielson and Walker's study found that courts "skip" constitutional questions 54.5% of the time. Pet. 16. That claim badly misinterprets their study. Their finding is that in 45.5% of all qualified-immunity cases, courts reach the constitutional question even though the law is not clearly established. Nielson & Walker, 89 S. Cal. L. Rev. at 34. Of the 54.5% of cases left over, courts both reach the constitutional question *and* find a clearly established right in 27.7% of cases, leaving only 26.7% of cases where courts opt to avoid constitutional questions. *Id.*

constitutional question,[6] and said doing so was appropriate only in "select circumstances." 563 U.S. at 707. And three Justices even suggested the Court "end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity." *Id.* at 714 (Scalia, J., concurring) (citing *id.* at 727 (Kennedy, J., joined by Thomas, J., dissenting)).

Nor can it seriously be claimed that the figures above represent "constitutional stagnation," Pet. 16—especially in light of all the other settings for courts to resolve constitutional questions outside of individual-capacity damages suits. *See Pearson*, 555 U.S. at 242-43. Indeed, the very sorts of attacks on administrative segregation that Hamner claims *Pearson* frustrates (Pet. 21-22) are often adjudicated in injunctive actions. *See, e.g.*, *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019) (injunctive-relief action); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) (same).

Hamner's only other ground for overruling *Pearson* is that a "chorus" of judges has criticized it. Pet. i; Pet. 16-17 (enumerating choristers). That's hardly true. Most of the opinions he cites either merely explained why courts should reach constitutional questions "from time to time," *United States v. Warshak*, 631 F.3d 266, 282 n.13 (6th Cir. 2010), or stated far

[6] This Court "continue[d] to stress" that admonition three Terms ago in *District of Columbia v. Wesby*. 138 S. Ct. 577, 589 n.7 (2018).

broader misgivings about qualified immunity generally. *See Zadeh v. Robinson*, 902 F.3d 483, 498-500 (5th Cir. 2018) (Willett, J., concurring *dubitante*).

But granting that a couple jurists have suggested replacing *Pearson* with a "nudge" to engage in unnecessary law-elaboration, Pet. 19, criticisms by a handful of lower-court judges have never sufficed to overrule a precedent. When this Court overruled *Saucier*, that case had not merely been subject to fierce criticism by the lower courts. *See* 555 U.S. at 234, 239-40. It had also "defied consistent application by the lower courts," *id.* at 235, and it had been pilloried by half the members of this Court. *Id.*

And in any event, the answer to lower-court judges' stagnation concerns hasn't changed since *Pearson*: If judges fear avoiding constitutional questions causes stagnation, they should exercise their *Pearson* discretion to decide them. After all, *Pearson* "d[id] not prevent the lower courts from following the *Saucier* procedure; it simply recognize[d] that those courts should have the discretion to decide whether that procedure is worthwhile." *Id.* at 242. No further "nudge" is needed to license courts to make new law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
VINCENT M. WAGNER
Deputy Solicitor General
ASHER L. STEINBERG
Assistant Solicitor General

OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center St., Ste. 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

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