No. 20-1438

In the
Supreme Court of the United States

TINA CATES, PETITIONER,

v.

BRUCE D. STROUD BRIAN WILLIAMS, SR.; JAMES DZURENDA; ARTHUR EMLING, JR.; MYRA LAURIAN, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of the American Civil Liberties Union of Nevada, National Lawyers Guild Las Vegas Chapter, Nevada Attorneys for Criminal Justice, and University of Nevada Las Vegas Policing and Protest Clinic, Mass Liberation Nevada, and Forced Trajectory Project as Amici Curiae in Support of Petitioner

Christopher M. Peterson*
Senior Staff Attorney
ACLU of Nevada
601 S. Rancho Dr. #B-11
Las Vegas, NV 89106
(702) 518-4202
*Counsel of record for amici curiae

Elizabeth L. MacDowell
Policing and Protest Clinic
Thomas & Mack Clinic
William S. Boyd School of Law
P.O. Box 71075
Las Vegas, NV 89170-1075
Telephone (702) 895-2080

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INTEREST OF AMICI CURIAE

Amici curiae are organizations from the State of Nevada who protect civil liberties, advocate on behalf of inmates incarcerated in the Nevada Department of Corrections (NDOC) and their families, and have regular contact with NDOC facilities. Amici share a common interest in ensuring that the NDOC and its staff are held accountable for constitutional violations. Amici have a shared expertise in Nevada law and practices including their inadequacies in punishing such violations.[1]

The American Civil Liberties Union of Nevada (ACLU of Nevada) is a nonprofit, nonpartisan organization dedicated to defending the principles embodied in the United States Constitution, the Nevada Constitution, and other civil rights laws. The ACLU of Nevada advocates on behalf of Nevadans, including those incarcerated in NDOC, meaning that ACLU of Nevada staff must regularly visit NDOC facilities to conduct investigations and consult with clients.

The Nevada Attorneys for Criminal Justice, Inc. (NACJ) is a Nevada nonprofit organization comprised of approximately 200 criminal defense attorneys who practice in both the public and private sectors. NACJ is a member affiliate of the National Association of Criminal Defense Attorneys. As NACJ members represent defendants in criminal cases at all stages of litigation, they must regularly visit NDOC facilities

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[1] Pursuant to this Court's Rule 37, amici state that this brief was not authored in whole or in part by counsel for any party and that no person or entity made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice of the filing of this brief was given to both parties, and both parties have consented in writing to its filing. This Court's April 15, 2020, standing order authorizes formatting under Supreme Court Rule 33.2 for "every document filed in a case prior to a ruling on a petition for a writ of certiorari."

to consult with clients.

The National Lawyers Guild Las Vegas Chapter (NLG-LV) is a progressive public interest association of lawyers, law students, paralegals, and other legal workers dedicated to promoting human rights and advancing social justice in the state of Nevada. Many members represent clients in NDOC and must regularly visit Nevada prison facilities.

The Policing and Protest Clinic of the William S. Boyd School of Law at the University of Nevada, Las Vegas (PPC), is a clinical law program dedicated to the legal empowerment of Nevadans most impacted by police violence and the suppression of civil liberties, including those incarcerated in NDOC and their families and other loved ones. Clinic members work on civil rights matters under Nevada and United States law through legal representation, legislative advocacy, and community legal education. PPC plans to work with NDOC inmates in coming semesters and will regularly visit prisons in Nevada.

Mass Liberation Nevada is a de-incarceration grassroots activism project focused on ending #Massincarceration in Nevada and beyond. Its members include those who are currently or formerly incarcerated in Nevada as well as individuals who visit family members and others in jails and prisons in Nevada.

Forced Trajectory Project is a media, public relations, and advocacy organization that documents the effects of police violence in Las Vegas with a focus on families who have lost their loved ones to police murder. One of FTP's primary objectives is to support the victim's family members by amplifying their collective

voice, provide them with a community platform, and aid their networking efforts where they can benefit from sharing resources. To this end, FTP works closely with clients impacted by police violence including many whose loved ones are or have been incarcerated in Nevada and who visit loved ones in Nevada carceral facilities.

Together, amici write to explain why granting certiorari is necessary to limit the doctrine of qualified immunity, particularly in the context of Nevada state prisons.

SUMMARY OF ARGUMENT

This Court should grant certiorari and overrule the Ninth Circuit's decision granting qualified immunity to the correctional officers who violated Tina Cates's Fourth Amendment rights. Nevada offers limited means under state law to hold State agencies and employees accountable for constitutional violations. A civil action under 42 U.S.C. § 1983 is often the only way for a person whose constitutional rights have been violated by a Nevadan State actor to seek recourse. Yet qualified immunity frequently closes off this avenue for redress. The Ninth Circuit's decision worsens this situation by enlarging qualified immunity to protect more officers who had reasonable notice that their conduct is wrong when they commit a constitutional violation, as was the case here. In the context of NDOC and other prison facilities, this lack of accountability results in substantial and tangible social costs.

This brief aims to provide a state-level perspective regarding the impact of qualified immunity. It discusses the importance of civil actions under 42 U.S.C. §

1983 when state law is inadequate to hold agencies like NDOC accountable for constitutional violations, the tangible impact that constitutional violations have in the context of a prison system like NDOC when they victimize visitors, and the fundamental injustice that results if the doctrine of qualified immunity is expanded to protect officers who act in bad faith and against their agency's directives, like those that strip searched Tina Cates.

ARGUMENT

I. Qualified immunity harms Nevadans visiting state prisons as there are minimal political or legal means under Nevada state law to hold NDOC or its staff accountable for constitutional violations

While the Nevada Constitution adopts the convention of a tripartite government, separating its branches into the Legislative Department, Executive Department, and Judicial Department, *compare* Nev. Const. arts. 3–6 *with* U.S. Const. arts. I–III, NDOC is uniquely unaccountable to the other branches of Nevada's government, exacerbating the need for a federal remedy when it violates constitutional rights. This lack of accountability is apparent in three ways. First, NDOC is largely free from oversight by the State Legislative Department because it is exempt from the Nevada Administrative Procedure Act. Second, NDOC is largely free from judicial oversight by the State Judicial Department because there is no state cause of action for violations under the Nevada Constitution. Finally, many NDOC employees, including corrections officers and investigators, are insulated from internal discipline by the agency due to a set of "Rights of Peace Officers," codified in

Nevada statute, that affords more protections to corrections officers under investigation for professional misconduct than to defendants subject to criminal prosecution.

NDOC acts unilaterally in creating and adopting agency regulations as it is exempt from the system of checks and balances that most administrative agencies must follow under Nevada's Administrative Procedure Act. Nev. Rev. Stat. § 233B.039(1)(b). Other agencies in Nevada begin this rigorous process by submitting proposed regulations to the Legislative Counsel for review at least 30 days before they are published. Nev. Rev. Stat. § 233B.063(1). During that period, they must also hold a workshop for interested persons to raise issues with the proposed regulation. Nev. Rev. Stat. § 233B.061(2). Agencies then must give the public a chance to comment on the proposal both in writing and at an oral hearing. Nev. Rev. Stat. § 233B.061(3). All comments must be recorded and fully considered before the final ruling can be promulgated. *Id.* NDOC, on the other hand, need not answer to the public nor the Legislative Counsel to pass rules that affect the lives of people incarcerated in Nevada. Nev. Rev. Stat. § 233B.039(1)(b).

For example, NDOC independently—without any guidance from Nevada's legislature—changed a policy that had an extensive impact on the families of Nevada's incarcerated population. In September of 2020, it began withholding 80% of the funds given to incarcerated individuals from their families, funds frequently needed by the incarcerated people to buy basic hygiene products and food when the "free" products distributed by detention facilities are inadequate. Dana Gentry,

Nevada prisons raid inmate accounts in delayed response to Marsy's Law, The Nevada Current, (Sept. 4, 2020), https://www.nevadacurrent.com/2020/09/04/nevada-prisons-raid-inmate-accounts-in-delayed-response-to-marsys-law/. This new rate was an increase from the prior policy, which withheld 40% of family gifts. *Id.* The change in policy was implemented without notice to families, friends, or incarcerated people themselves. *Id.* Indeed, this was without notice to anyone outside of NDOC, as was reflected by the considerable confusion generated at a subsequent meeting of the Governor, Attorney General, and Secretary of State, all of whom questioned the rationale for the sudden and significant increase. Michelle Rindels, *Nevada officials suspend policy of diverting 80 percent of funds sent to inmates to pay victim restitution*, The Nevada Independent (Oct. 8, 2020), https://thenevadaindependent.com/article/families-protest-new-nevada-policy-to-take-80-percent-of-funds-sent-to-inmates-to-pay-victim-restitution. When questioned, the NDOC made clear its belief that it had all the authority it needed to change this policy without oversight, broad effect notwithstanding.

Such actions reflect a wider trend of agency sprawl. Delegation of legislative authority to executive agencies has resulted in "a lot more law" that circumvents "the difficulties of the legislative process." J. Neil Gorsuch, *A Republic, If You Can Keep It* 59, 62 – 63 (2019). These difficulties, though, are "essential," "purposefully placed there to ensure that the laws would be more likely the product of deliberation than haste . . . ." *Id.* at 63. And circumventing this process undermines the political accountability presumed by separation of powers principles. *See id.* at 64. As

demonstrated by the inmate account withholding, NDOC's action was not subject to the vagaries of communication, comment, or compromise.

This dearth of legislative oversight, though, is exacerbated by the lack of state judicial oversight. Though Nevada's Constitution has the force of law, Nevada lacks a state civil action for deprivation of constitutional rights similar to 42 U.S.C. § 1983. *See* Nev. Rev. Stat. §§ 41.0305–41.039 (not including cause of action for civil damages for a violation of state constitution); *see generally* T. Hunter Jefferson, *Constitutional Wrongs and Common Law Principles: The Case for Recognition of State Constitutional Tort Actions Against State Governments*, 50 Vand. L. Rev. 1525 (1997). Without such an action, a plaintiff is left with a suit in torts as the nearest analogue. *See* Nev. Rev. Stat. § 41.0322 (actions by persons in custody of NDOC). But, as implicitly acknowledged by the cause of action available under 42 U.S.C. § 1983, traditional civil tort liability is insufficient to protect constitutional rights. Concepts like battery and negligence simply cannot address harms to the right to free speech, religion, or to be secure in one's person. Indeed, constitutional law—as acknowledged by the Court of Appeals below—recognizes the unique invasiveness of cavity searches. *See, e.g.*, Pet. App. at 13a–14a. This recognition reflects that this violation is more than the sum of its common law torts. Pet. App. at 13a (describing strip searches as "dehumanizing and humiliating," "the most grievous offenses against personal dignity and common decency," noting "intrusiveness . . . cannot be overstated").

Finally, NDOC employees such as corrections officers and investigators benefit from special procedural protections during investigations by the agency into alleged

misconduct, making it difficult for NDOC to have internal accountability. Corrections officers and investigators are considered "peace officers" under Nevada law, Nev. Rev. Stat. § 289.220, and are entitled to the rights enumerated under the "Rights of Peace Officers" during investigations by NDOC. Nev. Rev. Stat. §§ 289.020–289.120. These rights are in many ways more extensive than those afforded parties involved in a criminal investigation. An officer under investigation is entitled to written notice that he or she is under investigation 48 hours *before* any interrogation or hearing related to the investigation occurs. Nev. Rev. Stat. § 289.060(1). If there is no concurrent criminal prosecution related to the allegation or alternative provision in a collective bargaining agreement, the officer cannot be suspended without pay during the investigation regardless the seriousness of the allegation. Nev. Rev. Stat. § 289.057(2). Even if the officer is solely a witness to misconduct rather than the subject of the investigation, the officer is still entitled to have two representatives present during any interview, confidentiality in relation to those representatives, and have those representatives "explain" any answer given by the officer during the interview. Nev. Rev. Stat. § 289.080(2)–(7). Even if an allegation of misconduct is sustained against an officer, the agency must remove any record of the investigation and imposition of punitive measures from the officer's administrative file if it is agency policy or part of a collective bargaining agreement, and furthermore, the officer is entitled to review any notes, recordings, transcripts of interviews, or any other documents generated as part of the investigation. Nev. Rev. Stat. § 289.057(3). Finally, no evidence collected by the agency in violation of the rights enumerated in

Nev. Rev. Stat. §§ 289.020–289.120 may be used in either a criminal or civil action against the officer investigated, even if it is a third party bringing the action. Nev. Rev. Stat. § 289.085. In turn, considering the rights enumerated in Nev. Rev. Stat. §§ 289.020–289.120 in their totality, NDOC would be hard-pressed to hold its officers accountable with long term consequences even if it had the will to do so.

The absence of Nevada state law checks on NDOC and its employees highlights the importance of federal remedies. The State of Nevada may choose to allow its agency to operate without impediment, but federal courts must nonetheless ensure constitutional constraints are respected. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 98–9 (1980) ("one strong motive behind [the enactment of 42 U.S.C. § 1983] was grave congressional concern that the state courts had been deficient in protecting federal rights"); *McNeese v. Board of Ed.*, 373 U.S. 668, 671–72 (1963) ("The purposes [of 42 U.S.C. § 1983] were several-fold—to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice' . . . ."). Thus, for Nevada, the Ninth Circuit's broad application of qualified immunity poses a special problem: if the federal courts will not provide redress for violations of Nevadans' constitutional rights, who will?

II. Lack of accountability breeds systemic abuse and causes tangible harm to visitors to NDOC facilities

It is well understood by those who visit inmates for personal or professional reasons that association with inmates comes at a price when entering the prison.

While most people expect to be searched and understand the need for such security, researchers document the "needless indignities suffered during [prison] visitation, the most common of which is refusal of entry on any number of grounds, but which often extend to cavity searches and the off-hand insult." Donald Bramen, *Doing Time on the Outside: Incarceration and Family Life in Urban America* 120 (2007); *see also* Megan L. Comfort, *In the tube at San Quentin: The "secondary prisonization" of women visiting inmates*, 32 J. Contemporary Ethnography 77 (2003). In turn, deterring or preventing visitation causes harm to visitors and defeats the rehabilitative aims of criminal sentencing.

A. Deterring visitation harms families

Actions by prison staff members that functionally deny or deter visitation negatively impacts the families and loved ones of incarcerated persons. In this way, the families of the incarcerated are also mistreated by the penal system, becoming secondary victims. Brittnie L. Aiello & Jill A. McCorkel, *"It will crush you like a bug": Maternal incarceration, secondary prisonization, and children's visitation*, 20 Punishment & Soc'y 351 (2018). Although visitation alone does not solve the familial and societal problems caused by the incarceration of parents, visitation has a positive effect on the incarcerated and their families. Chesa Boudin, Trever Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 Yale L. & Pol'y Rev. 151, 151-152 (2013). Children in particular experience significant and varied negative consequences as the result of parental incarceration. Aiello & McCorkel, *supra* at 351-371.

As of 2012, an estimated 2.6 million children – or approximately 1 in every 33 – have a parent in jail or prison. Susan D. Phillips, *Video Visits for Children Whose Parents are Incarcerated*, The Sentencing Project, 1 (2012). In Nevada, between 2011 and 2012, approximately 55,000 children — 8 percent of all Nevada children — were growing up with an incarcerated parent. Annie E. Casey Foundation, *Children of Incarcerated Parents, a Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities* (April 18, 2016), available at https://www.aecf.org/publications/. Given that Nevada's prison population has grown significantly since 2012, there is good reason to believe that there are more children in Nevada with incarcerated parents today. Vera Institute of Justice, *Incarceration Trends in Nevada* (2019), available at https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-nevada.pdf (indicating that in 2018 there were 13,695 people in Nevada state prisons, a 40 percent increase since 2000).

Though innocent, children are harmed by the negative consequences of parental incarceration. Infants of incarcerated parents do not have the opportunity to form attachments with their parents and as a result miss out on a critical developmental task, often leading to emotional and behavioral problems. Ross D Park & Alison Clarke-Stewart, *Effects of Parental Incarceration on Young Children* 5 (2001). Young children of incarcerated parents have their existing attachment with parents disrupted, and this disruption is linked to varied psychological problems including anxiety, depression, anger, and aggression. Leila Morsy & Richard

Rothstein, *Mass Incarceration and Children's Outcomes*, Economic Policy Institute, 1-2 (2016). For example, children of incarcerated fathers have worse physical health and are more likely to suffer from health issues such as migraines, asthma, and high cholesterol, than children whose fathers are not incarcerated. *Id.* Children of incarcerated parents also experience higher rates of economic instability and are more likely to fall into poverty. *Id.* at 8-11.

School-aged children of the incarcerated face increased problems at school, including poor grades and instances of aggression. Park & Clark-Stewart, *supra* at 6. Furthermore, children of the incarcerated are more likely to drop out of school than other children. Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, National Institute of Justice, 1 (2017). Negative consequences continue to follow later in life, as children of parents who were incarcerated face higher rates of incarceration themselves. *Id.* at 2. Children of the incarcerated are therefore placed on a path of generational harm; they are more likely to later be incarcerated themselves, creating a cycle of harm against the family unit. Children of incarcerated parents also lose faith in public institutions, and as adults are less likely to vote, trust the government, or participate in community service. Morsy & Rothstein, *supra* at 12.

However, visitation has a positive impact on the family of the incarcerated and can mitigate the harm a parent's incarceration can have on children. Indeed, the opportunity to maintain contact with the incarcerated parent is considered a determinant of a child's ability to adjust. Park & Clarke-Stewart, *supra* at 8. Children

of incarcerated parents who have had a prior positive relationship with incarcerated parents tend to benefit psychologically from visits. *Id.* And the benefits of visitation reach the incarcerated parent as well. Research links strong family support with successful reentry into society. Martin, *supra* at 1 –3. Understandably, then, visits from family and loved ones reduces rates of recidivism among the incarcerated. *Id.* at 4; Minnesota Department of Corrections, *The Effects of Prison Visitation on Offender Recidivism* 18-27 (2011). Misconduct by prison staff directed towards visitors must be curbed so that visitation can play its role in mitigating the social harms of incarceration on both the incarcerated and their families.

B. Lawyers visiting inmates also experience abusive conduct by prison staff

While researchers have not focused on visitors providing professional services to inmates, lawyers and other service providers attempting to visit inmates also experience abusive conduct by prison staff. For example, attorney Bryan Stevenson recounts that he was strip searched by a prison guard when he visited a client on death row because the guard did not believe he was an attorney. Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* 194-95 (2014). Women lawyers have also described invasive searches and the prohibition of underwire bras. *See, e.g.*, Scott Dolan, *Portland Jail Tells Female Attorneys to Remove Detector-Triggering Bras Before Seeing Clients,* Portland Press Herald (Sept. 18, 2015) https://www.pressherald.com/2015/09/18/female-attorneys-forced-to-remove-underwire-bras-before-meeting-with-clients-at-portland-jail/; Deborah Becker &

Rachel Paiste, *Female Lawyers Allege Improper Searches on Prison Visits*, WBUR (Feb. 17, 2015), https://www.wbur.org/news/2015/02/27/woman-lawyers-prison-visits (describing a proposed search at MCI Norfolk facility). When officer misconduct impacts legal counsel and discourages attorneys from visiting their incarcerated clients, it interferes with the incarcerated clients' Fifth Amendment right to counsel and certainly violates the Fourth Amendment rights of the attorney as they perform their professional duties.

III. The Ninth Circuit's ruling expands qualified immunity to protect more officers acting in bad faith, exacerbating a doctrinal drift that is at odds with the original purpose of the doctrine

Whether its roots lie in common law or judicial fiat, qualified immunity was originally intended to apply only to officers acting in "good faith," as, "common law has never granted police officers an absolute and unqualified immunity." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). However, *Harlow v. Fitzgerald* transformed the doctrine so that officers would be liable solely for violations of "clearly established" constitutional rights; the stated purpose of this change was not justice but to avoid the costs of litigation related to discovery and trial, a reason untethered from both the text of 42 U.S.C. § 1983 and the common law. 457 U.S. 800, 813–14 (1982).

The grant of qualified immunity in this case illustrates the injustice of that drift. When the officers stripped Tina Cates and conducted a cavity search without giving her the opportunity to leave, they violated NDOC's own policies specifically forbidding such conduct. Nev. Dep't of Corr. Admin. Reg. 422.05, available at https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulation

s/AR%20422%20Search%20and%20Seizure%20Standards%20Final%2011-15-16.pdf. This is a policy that all NDOC employees are required to be familiar with. Nev. Dep't of Corr. Admin. Reg. 422, "Responsibilities". The officers in this case knew what they were doing was wrong, and yet they decided to act anyway.

Defining "clearly established" based solely upon rulings made by the circuit court where the incident occurred rather than the officer's actual knowledge and culpability divorces the law from reality. Looking specifically at this case, the NDOC policy does not specifically require its officers to be familiar with state or federal jurisprudence surrounding searches. This means that the law, as it stands, relies on information that an officer is unlikely to know to shield behavior that is indisputably wrong.

If qualified immunity returns to the principles of *Pierson*, the doctrine should not apply to officers who violate their agency's policies. This Court previously recognized the value of agency policies in the context of § 1983 lawsuits. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."). It has also used policies promulgated by law enforcement to determine what conduct violates the Fourth Amendment. *See Florida v. Wells*, 495 U.S. 1 (1990) (ruling that inventory searches must follow policies issued by the law enforcement agency to be constitutional under the Fourth Amendment). Holding officers accountable for

policies that they not only should know, but are required to know, is reasonable application of these principles.

CONCLUSION

The Court should grant certiorari and either eliminate qualified immunity or return to the original standard described in *Pierson*, applying the doctrine only in instances where officers act in "good faith."

Dated May 11, 2021

Respectfully submitted,

Christopher M. Peterson*
Senior Staff Attorney
ACLU of Nevada
* Counsel of record for amicus curiae

Elizabeth L. MacDowell
Policing and Protest Clinic
Thomas & Mack Clinic
William S. Boyd School of Law