

No. 21-606

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In the  
**Supreme Court of the United States**

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DONALD SHOOTER,  
*Petitioner,*

v.

ARIZONA, ET AL.,  
*Respondents.*

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

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**JOINT BRIEF IN OPPOSITION**

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December 22, 2021

## QUESTIONS PRESENTED

1. Whether the Court should review a decision affirming dismissal of a damages action brought under 42 U.S.C. § 1983 to consider the underlying factual allegations, which the Ninth Circuit held failed to state a claim as a result of pleading failures or qualified immunity.
2. Whether the Court should review a decision in which the Ninth Circuit strictly relied on this Court's precedent, including following the *Hope v. Pelzer* decision, to affirm the district court's decision holding that qualified immunity bars the asserted damages claims.
3. Whether the Court should review a decision that creates no circuit split, but carefully evaluates the relevant decisions from other circuits and district courts to harmonize the decisions and confirm they do not place the merits of the alleged due process claim beyond debate.
4. Whether the Ninth Circuit properly affirmed the district court's decision, holding that qualified immunity barred the asserted due process claims.
5. Whether the Court should review a decision affirming dismissal of an equal protection claim based on the petitioner's failure to plead discriminatory intent based on sex.
6. Whether the Court should review a decision affirming dismissal for failure to state a claim upon which relief could be granted based on the Ninth Circuit's (a) decision not to recite every allegation in its

opinion, (b) reliance on a public record central to the underlying complaint, and (c) holding that the district court did not abuse its discretion in failing *sua sponte* to grant leave to amend.

## **PARTIES TO THE PROCEEDING**

Petitioner Donald Shooter is a former member of the Arizona House of Representatives.

Respondent Kirk Adams is the former Chief of Staff for the Office of the Governor of the State of Arizona. Respondent Javan “J.D.” Mesnard is the former Speaker of the Arizona House of Representatives and a current member of the Arizona Senate.

Janae Adams and Holly Mesnard are the spouses of Messrs. Adams and Mesnard. Mrs. Adams and Mrs. Mesnard were named as defendants-appellees in the Ninth Circuit proceeding from which Mr. Shooter appeals. Mr. Shooter does not identify Mrs. Adams or Mrs. Mesnard as respondents before this Court.

The State of Arizona was a defendant-appellee in the Ninth Circuit proceeding from which Mr. Shooter appeals. Mr. Shooter does not, however, identify the State of Arizona as a respondent before this Court.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the Maricopa County Superior Court in the State of Arizona and the Arizona Supreme Court:

*Donald M. Shooter v. State of Arizona, et al.*, Maricopa County Superior Court No. CV2019-050782 (motions to dismiss granted May 27, 2020; summary judgment granted September 10, 2021 and December 2, 2021) (entry of stipulated final judgment pending)

*Javan “J.D.” Mesnard and Holly Mesnard v. Hon. Theodore Campagnolo*, Arizona Supreme Court No. CV-20-0209-PR (June 30, 2021) (opinion issued)

There are no other proceedings currently pending in state or federal trial or appellate courts directly related to this case within the meaning of this Court’s Rule 14.1(b)(iii).

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## **BRIEF FOR THE RESPONDENTS IN OPPOSITION**

### **INTRODUCTION**

Exercising power granted by the Arizona Constitution, the Arizona House of Representatives (the “House”), on February 1, 2018, expelled Petitioner Donald Shooter for conduct unbecoming of a member of the House. The expulsion vote, which passed by a margin of 56 to 3, followed an investigation the House commissioned into myriad sexual harassment allegations against Mr. Shooter and another member of the House, which investigation concluded Mr. Shooter engaged in conduct creating a “hostile work environment.” Mr. Shooter concedes the power of the House to expel him, but contends the proceedings preceding the expulsion violated his equal protection and due process rights and give rise to a claim for damages under 42 U.S.C. § 1983. Applying settled law from this Court and the Ninth Circuit, the district court dismissed Mr. Shooter’s claim with prejudice.

The unanimous Ninth Circuit decision affirming dismissal does not warrant review. After dutifully applying this Court’s precedents, the Ninth Circuit held Mr. Shooter did not state a claim for relief under 42 U.S.C. § 1983 related to his expulsion from the House. Applying fundamental pleading standards, the Ninth Circuit concluded Mr. Shooter’s failure to plead discriminatory intent based on a protected class required dismissal of his equal protection theory. [App. 12a-13a (*citing* *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005); *Ashcroft v. Iqbal*, 556

U.S. 662, 678-80 (2009)).] The Ninth Circuit further correctly stated and applied this Court’s precedents requiring any alleged due process rights to be “clearly established” by precedent or a robust consensus of case law that place the merits of the claim “beyond debate.” [See App. 14a-19a (*citing, inter alia, Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 741-42 (2011)).] Finding no such clearly established law, the Ninth Circuit affirmed dismissal of Mr. Shooter’s Section 1983 claim based on qualified immunity.

Mr. Shooter’s Petition is based on a mischaracterization of the Ninth Circuit’s opinion and does not warrant this Court’s review. The Ninth Circuit’s decision does not conflict with this Court’s precedents: it follows them. It does not create any circuit split: it analyzes and harmonizes the decisions from other circuits. It does not depart from established principles of procedure: it accurately states and applies those principles. Mr. Shooter’s hyper-focus on allegations relating to motive or “corruption” also does not warrant review. The alleged facts about which he complains do not bear on the legal issues requiring dismissal of his Section 1983 claim: whether Mr. Shooter pleaded discriminatory intent based on a protected class and whether the alleged due process rights about which Mr. Shooter complains were clearly established.

Finally, this case provides a poor vehicle for certiorari review. The legal and factual issues at the crux of the Petition involve application of a uniquely state law matter—one which the Arizona Constitution commits solely to the House. Mr. Shooter effectively

asks this Court to instruct the state legislature on how to carry out its duties and powers relating to expulsion of a member. In related proceedings, Arizona state courts have confirmed the infirmity of Mr. Shooter's claims, including on legislative immunity grounds. See *Mesnard v. Campagnolo in and for County of Maricopa*, 251 Ariz. 244, ¶¶ 17-27, 489 P.3d 1189, 1194-97 (Ariz. 2021) (confirming legislative immunity for acts within the jurisdiction of the House, including relating to the expulsion, and the investigation and report that preceded the expulsion). The issues in the Petition, rooted deeply in state law, do not warrant review.

The Petition should be denied.

#### **OPINIONS BELOW**

The Ninth Circuit opinion is reported at 4 F.4th 955 and reproduced at App. 1a-27a. The district court's opinion is unreported, but is reproduced at App. 28a-48a.

#### **JURISDICTION**

The Ninth Circuit entered its opinion on July 22, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Section 1983 of Title 42 of the United States Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

Article IV, Part 2, Section 11 of the Arizona Constitution provides: "Each house may punish its members for disorderly behavior, and may, with the

concurrence of two-thirds of its members, expel any member.” Ariz. Const. Art. IV, Pt. 2, § 11.

#### STATEMENT OF THE CASE

##### **A. The Arizona House Of Representatives Votes To Expel Mr. Shooter For Engaging In Conduct Unbecoming Of A Member Of The House**

Mr. Shooter is a former member of the Arizona House of Representatives. [App. 50a.] In the fall of 2017, another member of the House, Michelle Ugenti-Rita, asserted sexual harassment allegations against Mr. Shooter. [App. 60a.] Mr. Shooter, in turn, asserted that Ms. Ugenti-Rita had engaged in sexual harassment or other inappropriate conduct directed toward a third-party. [App. 61a-62a.] Thereafter, numerous additional individuals alleged Mr. Shooter had engaged in sexual harassment or other inappropriate conduct. [App. 97a-98a; *see also* App. 77a, 84a; Petition at 14-15.]

At Mr. Shooter’s request, Speaker of the House Javan “J.D.” Mesnard agreed the House would investigate the allegations against Mr. Shooter and those against Ms. Ugenti-Rita. [App. 61a-63a.] The House retained the law firm of Sherman & Howard to conduct the investigation. [App. 63a.] Over the course of eleven weeks, Sherman & Howard interviewed more than 40 witnesses and accusers, interviewed Mr. Shooter to allow him to respond to each of the allegations against him, and attempted to discern corroborating evidence against which to evaluate the allegations. [App. 99a-101a; *see generally* 96a-264a.]

Ultimately, on January 29, 2018, Sherman & Howard issued a lengthy report (the “Report”) documenting its investigatory process, findings, and conclusions. [App. 96a-264a.] Sherman & Howard concluded that “a majority of the claims against Mr. Shooter were found not to constitute sexual harassment[.]” [App. 77a.] With respect to other claims against Mr. Shooter, however, Sherman & Howard found “credible evidence that [Representative] Shooter has violated the [Arizona House of Representatives] Policy” on workplace harassment and “created a hostile working environment” during the time he served as a member of the House and during his previous tenure in the Arizona Senate. [App. 263a-264a.]

On February 1, 2018, the House found Mr. Shooter engaged in a “pattern of conduct dishonorable and unbecoming of a member of the House of Representatives[.]” “undermined the public’s confidence” in the House, and “violated the order and decorum necessary to complete the people’s work in the State of Arizona.” [Ninth Circuit Court of Appeals Case No. 19-16248, Supplemental Excerpts of Record (“SEOR”), Dkt. 29, pp. 6-7.] Exercising “the power granted to it by Article IV, part 2, section 11” of the Arizona Constitution, the House voted 56 to 3 to expel Mr. Shooter. [*Id.*; *see also* App. 9a, 28a, 84a.]

**B. Mr. Shooter Initiates Litigation Against Speaker Mesnard And Mr. Adams Under 42 U.S.C. § 1983**

On January 29, 2019, Mr. Shooter initiated litigation against the State of Arizona, Speaker Mesnard (and his spouse), and Mr. Adams (and his

spouse). [See App. 49a-50a.] As the sole federal claim, Mr. Shooter alleged the House expelled him without due process and in violation of his equal protection rights. [App. 89a-90a.] Mr. Shooter asserted the actions taken were the result of an animus and conspiracy against him in an alleged effort to stop Mr. Shooter's actions to reveal corruption in state government. [App. 77a, 78a.] Mr. Shooter did not allege in his complaint that he was treated differently from Ms. Ugenti-Rita or others on the basis of his sex.<sup>1</sup>

All defendants moved to dismiss the Section 1983 claim for failing to state a claim on which relief can be granted. [App. 35a-36a.] Among other legal bases requiring dismissal, Messrs. Adams and Mesnard moved to dismiss on the grounds that qualified immunity barred Mr. Shooter's Section 1983 claim in its entirety. [App. 35a-36a, 38a.] Mr. Shooter's responses to the motions to dismiss merely incorporated by reference case law he cited in response to a separate justiciability challenge. [See App. 38a.]

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<sup>1</sup> Mr. Shooter's Petition contains multiple assertions of fact not pled in the complaint and not otherwise part of the record before this Court. [See, e.g., Petition at 12 (stating "Mesnard later admitted this action in a deposition in another case"), 13 (referencing "lewd and nude texting"), 16 (alleging that Speaker Mesnard "edited" the Sherman & Howard Report), 25 (alleging that the members of the House "were denied the opportunity to hear Shooter's responses and rebuttals"), 34 (alleging that a "known victim of Ugenti-Rita ... provided her account, documentary evidence (lewd and nude texting) and corroborating contemporaneous witnesses to sexual harassment").] Mr. Shooter improperly suggests that this Court must accept these unpled assertions as true and incorrectly faults the Ninth Circuit for not addressing them in its opinion.

At oral argument on the motions to dismiss, Mr. Shooter failed to identify any factually analogous cases establishing his expulsion proceeding was unconstitutional. [See App. 43a.] Mr. Shooter further did not request leave to amend his complaint to attempt to cure any pleading deficiencies. [See App. 27a.]

### **C. The District Court Grants Motions To Dismiss Mr. Shooter’s Section 1983 Claim**

On June 7, 2019, after carefully analyzing each case and legal argument presented by the parties, the district court dismissed Mr. Shooter’s Section 1983 claim. [App. 28a-44a.] The district court noted that, although multiple grounds may support dismissal of Mr. Shooter’s claim, qualified immunity provided “the clearest and narrowest path forward[.]” [App. 37a.]

With respect to qualified immunity, the district court correctly noted Mr. Shooter bears the burden to show he pled a violation of clearly established law. [App. 37a-38a.] The district court next set forth the settled legal standards for evaluating qualified immunity, faithfully following the test this Court articulated in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011), and as subsequently applied by the Ninth Circuit following this Court’s precedent. [App. 37a-38a.] The district court correctly stated:

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that

the right was “clearly established” at the time of the challenged conduct.

[App. 37a (*quoting al-Kidd*, 563 U.S. at 735).] The district court focused its analysis on the second prong—whether the alleged right was “clearly established.”<sup>2</sup> [App. 38a-44a.]

To evaluate whether Mr. Shooter’s alleged due process rights were “clearly established,” the district court dutifully reviewed in detail each of the cases the parties cited regarding qualified immunity. [App. 38a-42a.] The district court concluded Mr. Shooter did not plead a violation of a “clearly established” statutory or constitutional right supported by precedent that “placed the statutory or constitutional question beyond debate.” [App. 37a-38a (citation and quotation marks omitted), 43a-44a.] Accordingly, the district court dismissed Shooter’s Section 1983 claim with prejudice on the basis of qualified immunity. [App. 48a.]

#### **D. The Ninth Circuit Affirms**

In a unanimous opinion authored by Judge Collins, the Ninth Circuit affirmed the district court’s dismissal of Mr. Shooter’s Section 1983 claim with prejudice, holding that Mr. Shooter’s complaint failed to state a claim under either equal protection or due process theories. [App. 5a, 11a-13a, 13a-15a, 27a.] In so

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<sup>2</sup> The district court found Mr. Shooter had abandoned any equal protection argument by failing to substantively address it in his briefing on the motions to dismiss and by failing to raise the theory during oral argument, instead focusing solely on due process. [App. 35a n.5.]

holding, the court of appeals expressly followed settled precedent from the Ninth Circuit and from this Court. [See, e.g., App. 13a, 14a-18a.]

The court of appeals began by addressing Mr. Shooter's equal protection theory. [App. 12a.] The court disagreed with the district court's finding that Mr. Shooter abandoned this theory, noting that Mr. Shooter addressed the theory, albeit briefly, in his opposition to the motions to dismiss. [*Id.*] As to the sufficiency of pleading, however, the court agreed Mr. Shooter failed to state a claim for relief. [App. 12a-13a.] The court explained that a claim for relief under 42 U.S.C. § 1983 for violation of the Equal Protection Clause of the Fourteenth Amendment requires a plaintiff to plead discriminatory intent "based upon membership in a protected class." [*Id.* (quoting *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013)).] In his complaint, Mr. Shooter did not plead discriminatory intent; rather, he pled that he was treated differently than others "due to Mesnard's and Adams's asserted desire 'to end Representative Shooter's attempts to uncover evidence of corruption related to high priced no-bid contracts and other noncompetitive procurement processes.'" [App. 13a.] Because Mr. Shooter did not plead facts raising a plausible inference of discriminatory intent based on his sex, the court of appeals held that the district court properly dismissed the equal protection theory. [*Id.*]

The court of appeals next addressed Mr. Shooter's due process theory, under which Mr. Shooter alleged that Mr. Adams and Speaker Mesnard violated 42 U.S.C. § 1983 by depriving him of a "protected liberty

interest’ without due process of law in that he ‘lost his seat’ in the Arizona House ‘and was defamed at the same time.’” [App. 13a-14a.] The court set forth the legal standard for evaluating qualified immunity, as stated in this Court’s precedent, *Ashcroft v. al-Kidd*:

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct. A government official “violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Although there need not be a case directly on point, “existing precedent must have placed the statutory or constitutional question beyond debate.”

[App. 14a-15a (*quoting al-Kidd*, 563 U.S. at 735, 741).] The court of appeals further relied on this Court’s decisions in *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019), *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015), and *White v. Pauly*, 137 S. Ct. 548, 552 (2017), admonishing the Ninth Circuit in particular “not to define clearly established law at a high level of generality.” [See App. 16a-17a.]

Applying this standard, the court of appeals held that the district court correctly dismissed Mr. Shooter’s Section 1983 due process theory. [App. 13a-27a.] The court of appeals addressed and dismissed Mr. Shooter’s

general due process legal arguments, explaining that they sought to define Mr. Shooter’s alleged rights at such a high level of generality, they violated this Court’s precedents in *Kisela*, 138 S. Ct. at 1152, and *White*, 137 S. Ct. at 552. [App. 16a-18a.] The court of appeals performed a detailed review of each case the parties cited addressing due process in the context of a legislative expulsion, as well as case law the court of appeals independently identified. [App. 18a-25a.] The court determined that the limited case law did not “place the merits of Shooter’s claim ‘beyond debate.’” [See App. 24a (*quoting Stanton v. Sims*, 571 U.S. 3, 10-11 (2013)); *see also* App. 18a-25a.]

Finally, the court of appeals addressed Mr. Shooter’s argument that the district court abused its discretion in dismissing the Section 1983 claim with prejudice, without leave to amend. [App. 27a.] The court of appeals referenced Mr. Shooter’s failure to request leave to amend and held: “[B]ecause Shooter has failed to show that he could plead any additional facts that would warrant a different conclusion, the district court did not abuse its discretion in failing *sua sponte* to grant him leave to amend.” [*Id.* (citation omitted).]

#### **E. Related Proceedings Further Support Dismissal Of Mr. Shooter’s Section 1983 Claim**

In the Petition, Mr. Shooter argues that the Ninth Circuit erred in failing to grant him never-previously-requested leave to amend, suggests that immunity may somehow be *per se* unavailable if a party alleges corruption, and criticizes the court of appeals’

expressed federalism concern. Decisions in the related proceedings, however, establish Mr. Shooter's arguments to be untenable.

In the related state court proceeding in Maricopa County Superior Court, Mr. Shooter had the opportunity to amend his complaint to attempt to cure its deficiencies. Even after amendment, Mr. Shooter could not state a viable claim for relief against Mr. Adams or Speaker Mesnard. On June 30, 2021, the Arizona Supreme Court determined that Mr. Shooter's claims were, in part, barred by legislative immunity. *See Mesnard v. Campagnolo in and for County of Maricopa*, 251 Ariz. 244, 489 P.3d 1189 (Ariz. 2021). And on September 10, 2021 and December 2, 2021, the Maricopa County Superior Court granted summary judgment in favor of Mr. Mesnard, Mr. Adams and the State, and against Mr. Shooter, on all claims remaining in the state court proceeding, including Mr. Shooter's defamation and conspiracy claims. *See Donald M. Shooter v. State of Arizona, et al.*, Maricopa County Superior Court No. CV2019-050782 (summary judgment granted September 10, 2021 and December 2, 2021) (entry of stipulated final judgment pending).

#### **REASONS FOR DENYING THE PETITION**

The convoluted Petition is based on a misconstruction of the opinion below. The Ninth Circuit correctly stated and applied the law, including this Court's precedents. The opinion is thorough and well-reasoned. It does not conflict with decisions of this Court or decisions from any sister circuits. It also involves unique and highly state-law specific considerations relating to the power of a state

legislature to expel one of its members. The facts of this case are not likely to reoccur with any frequency. There are simply no compelling reasons supporting this Court's grant of certiorari review.

The Petition should be denied.

**I. THE NINTH CIRCUIT CORRECTLY STATED AND APPLIED THIS COURT'S PRECEDENTS IN AFFIRMING DISMISSAL OF PETITIONER'S SECTION 1983 CLAIM**

**A. This Court Should Not Grant Review To Consider Due Process Claims Not Determined By The Courts Below**

The Petition urges this Court to accept review to determine the Fourteenth Amendment due process rights of a state legislator facing expulsion—an issue not addressed in the Ninth Circuit's opinion. Mr. Shooter's argument is premised on the following false assertion:

Shooter has steadfastly maintained that a due process right of a legislator facing expulsion is a public hearing by a Committee of peers involving, *inter alia*, opening statements, presentation of documents, examination and cross-examination of witnesses and confrontation of accusers. The Ninth Circuit's rejection of that right is erroneously premised on six mistakes.

[Petition at 22.] The Ninth Circuit did not, however, "reject" Mr. Shooter's alleged due process rights because, following this Court's precedents and the

required qualified immunity test, the Ninth Circuit did not need to consider whether the conduct at issue violated those alleged rights.

The two-pronged qualified immunity test this Court established and the Ninth Circuit followed is not in dispute. Qualified immunity bars Mr. Shooter's Section 1983 claim unless: (1) the alleged conduct at issue violated a statutory or constitutional right; and (2) the right was "clearly established" at the time of the challenged conduct. *See, e.g., al-Kidd*, 563 U.S. at 735; *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Failure of either prong entitles the defendant to qualified immunity and bars the claim. *See, e.g., Pearson*, 555 U.S. at 236. The Ninth Circuit has "discretion to decide which of the two prongs of [the] qualified-immunity analysis to tackle first." *al-Kidd*, 563 U.S. at 735. Here, exercising its discretion, the Ninth Circuit tackled the second prong first. [See App. 14a-15a ("We have discretion to address the clearly established prong of the qualified immunity test first; if we conclude that the relevant law was not clearly established, we need not address the other prong concerning the underlying merits of the constitutional claim." (quotation marks omitted) (citing *Pearson*, 555 U.S. at 236; *James v. Rowlands*, 606 F.3d 646, 651 (9th Cir. 2010)).] Because the Ninth Circuit concluded the alleged constitutional due process rights at issue were not "clearly established," it did not consider the underlying merits of Mr. Shooter's due process claim. [App. 25a.] The Ninth Circuit's approach and analysis follows this Court's precedents and does not provide a basis for certiorari review.

Mr. Shooter attempts to persuade the Court that the Ninth Circuit somehow erred by, among other alleged acts, purportedly failing to consider “key allegations in the Complaint” [Petition at 22; *see also id.* at 24-26], assuming the Sherman & Howard Report “is an acceptable substitute for a Committee public hearing” [*id.* at 24], noting federalism concerns [*id.* at 26], and not accounting for the lack of a state law remedy [*id.* at 27]. Setting aside for purposes of this Opposition the inaccuracy of Mr. Shooter’s statements, each of his arguments focuses on the same core complaint: the Ninth Circuit did not hold that the alleged conduct at issue violated due process. Again, in view of the Ninth Circuit’s determination that qualified immunity barred Mr. Shooter’s Section 1983 claim because he could not satisfy the “clearly established” law prong, the Ninth Circuit did not need to address whether the alleged conduct violated any alleged due process rights. Mr. Shooter’s arguments misconstrue the Ninth Circuit’s analysis and are but an irrelevant distraction.

**B. The Ninth Circuit Opinion Does Not Conflict With *Hope v. Pelzer***

Ignoring the Ninth Circuit’s correct application of this Court’s precedents concerning qualified immunity, Mr. Shooter argues that the court of appeals’ opinion conflicts with *Hope v. Pelzer*, 536 U.S. 730 (2002). Review of the Ninth Circuit’s opinion demonstrates the

falsity of this assertion Mr. Shooter raises for the first time in his Petition.<sup>3</sup>

The Ninth Circuit dutifully followed this Court’s precedents, including this Court’s admonitions to the Ninth Circuit regarding qualified immunity. As set forth above, the panel relied upon this Court’s opinion in *al-Kidd* in reciting and then following the required, two-pronged test for evaluating qualified immunity. [App. 14a-15a (*quoting al-Kidd*, 563 U.S. at 735).] The court of appeals rightly confirmed that a case directly on point is not required; instead “existing precedent must have placed the statutory or constitutional question beyond debate.” [App. 14a-15a (*quoting al-Kidd*, 563 U.S. at 741).] And, in addressing Mr. Shooter’s arguments, the court of appeals confirmed the necessary “clearly established law” to defeat qualified immunity should not be defined at a high level of generality. [App. 16a-17a (“[I]n addressing qualified immunity, the Supreme Court has ‘repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.’” (*citing Kisela*, 138 S. Ct. at 1152; *Emmons*, 139 S. Ct. at 503; *Sheehan*, 575 U.S. at 613; *al-Kidd*, 563 U.S. at 742)).]

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<sup>3</sup> Mr. Shooter did not cite *Hope v. Pelzer* in any briefing before the district court or court of appeals, nor otherwise argue that the district court’s decision conflicted with that case. [See Ariz. District Court Case No CV-19-01671-PHX-DWL, Dkt. 15; Ninth Circuit Court of Appeals Case No. 19-16248, Dkt. 21; Dkt. 37.] Mr. Shooter raised the case for the first time during oral argument before the Ninth Circuit, in connection with his assertion that the “novel” circumstances regarding his expulsion did not support qualified immunity.

Applying these settled legal standards, the Ninth Circuit explained that Mr. Shooter’s reliance on generalized due process principles would not have given fair warning that the alleged conduct was unconstitutional, particularly in view of the unique legislative context in which the claims arise. [App. 17a-18a.] The court of appeals did not state, as the Petition contends, that a constitutional right cannot be clearly established in the “absence of a specific case on the facts of this case.” [See Petition at 20.] Instead, the court of appeals strictly followed this Court’s decisions to conclude not that the absence of a case exactly on point barred Mr. Shooter’s claim, but that the general authorities Mr. Shooter cited could not “be understood as having ‘clearly established’ that his rights were violated in connection with his expulsion.” [App. 16a-18a.] The opinion follows the principles articulated in *Hope*; it does not conflict with them.

The fact that qualified immunity was rejected in *Hope* but found here is not evidence of a conflict; it is a reflection of the material differences in the nature of the alleged rights and conduct at issue in each case. In *Hope*, the Court addressed the practice of prison guards at the Alabama Department of Corrections in handcuffing prisoners to a hitching post for multiple hours, after any threats had been subdued, without adequate water or the ability to use the bathroom, and while the prisoners experienced significant sunburn, dehydration, muscle pain, and burning. *Hope*, 536 U.S. at 736-38. After confirming the conduct violated the Eighth Amendment, the Court addressed whether the prison guards’ use of the hitching post in these circumstances violated “clearly established statutory or

constitutional rights of which a reasonable person would have known.” *Id.* at 739 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Relying on Eleventh Circuit precedent, which held the practice of handcuffing inmates to a fence for prolonged periods unconstitutional, an Alabama Department of Corrections regulation requiring water and bathroom breaks during the use of a hitching post, and a Department of Justice report advising the Alabama Department of Corrections of the unconstitutionality of its hitching post practices, the Court “readily conclude[d] that the respondents’ conduct violated ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Id.* at 741-45 (quoting *Harlow*, 457 U.S. at 818; citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974)).

The facts of *Hope* bear no relation to the allegations in this case. Moreover, unlike *Hope*, here, there is (and was) no precedent, regulation, Department of Justice report, or any other authority advising Messrs. Adams or Speaker Mesnard of the unconstitutionality of the conduct at issue (the Speaker of the House retaining a law firm to investigate sexual harassment allegations, interview Mr. Shooter and allow him to respond to each allegation, and report its findings to the House, prior to House voting on Mr. Shooter’s expulsion). Indeed, the sole guiding authority—the Arizona Constitution—indicated only Mr. Shooter’s entitlement to a two-thirds vote of his peers prior to the expulsion. Ariz. Const. Art. IV, Pt. 2, § 11. The 56 to 3 vote to expel Mr. Shooter satisfied that requirement.

Mr. Shooter’s suggestion that the Ninth Circuit improperly relied on this Court’s precedent after *Hope* is also incorrect. The Ninth Circuit relied on this Court’s decisions in *al-Kidd*, *Kisela*, *White*, *Emmons* and *Sheehan* in setting forth the relevant legal standards for evaluating qualified immunity—the same fundamental legal standards addressed in *Hope* and upon which Mr. Shooter relies to suggest a “conflict.” [App. 14a-18a.] See, e.g., *al-Kidd*, 563 U.S. at 741 (explaining that qualified immunity does “not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate”); *Kisela*, 138 S. Ct. at 1152-53 (stating “this Court’s caselaw does not require a case directly on point for a right to be clearly established” and recognizing that “general statements of the law are not inherently incapable of giving fair and clear warning to officers” (*citing White*, 580 U.S. at 551-52)). No conflict exists.

### **C. There Is No “Conflict” Among The Circuits**

There is also no conflict among the circuits. Mr. Shooter states: “The Ninth Circuit’s decision in this case upholding a law firm report as acceptable process creates a conflict with other Circuits recognizing a due process interest of a legislator to the due process of a committee hearing[.]” [Petition at 31 (*citing McCarley v. Sanders*, 309 F. Supp. 8 (M.D. Ala. 1970), and *Monserate v. N.Y. State Senate*, 599 F.3d 148, 158 (2d Cir. 2010)).] Mr. Shooter’s conflict argument rests again on an erroneous construction of the Ninth Circuit’s opinion in this case. The Ninth Circuit did not “uphold a law firm report as acceptable process,” as it

did not address—let alone determine—whether the alleged actions violated Mr. Shooter’s alleged constitutional due process rights. Instead, as noted above, the Ninth Circuit focused exclusively on the second prong of this Court’s qualified immunity test: whether the alleged conduct violated “clearly established” law. [App. 14a-15a.] Because the Ninth Circuit did not address whether a due process violation occurred in the first instance, it does not and cannot conflict with decisions from other circuits or district courts on that issue.

Mr. Shooter’s attempt to create a conflict also misstates the holdings of *McCarley* and *Monserate*. Contrary to Mr. Shooter’s assertion, those decisions do not expressly recognize a “due process interest of a legislator to the due process of a committee hearing.” Although the cases do address due process, at most, they require only that a legislator faced with expulsion receive notice of the allegations and an opportunity to defend himself or herself. *See Monserate*, 599 F.3d at 159-160 (stating that the legislator “received a sufficient opportunity to clear his name—and that is all the constitution requires”); *McCarley*, 309 F. Supp. at 11-12 (explaining that *McCarley* “received no adequate notice” and did not have “an opportunity to defend himself...”).<sup>4</sup>

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<sup>4</sup> Mr. Shooter incorrectly asserts “The Ninth Circuit rightly seems to recognize that the three-judge district court decision in *McCarley* ... is entitled to weight in a clearly established law inquiry[.]” [Petition at 31.] The Ninth Circuit did not recognize *McCarley* as “entitled to weight.” Instead, it noted that a three-judge district court decision is weighted the same as any other district court decision. The Court then prefaced its discussion of

As the Ninth Circuit correctly concluded, the *Monserate* and *McCarley* decisions, viewed individually or collectively, do not constitute clearly established law that place the merits of Mr. Shooter’s claim “beyond debate.” Rather, the decisions suggest Mr. Shooter received any process to which he was entitled, including notice of the allegations and an opportunity to respond. Simply stated, no conflict exists and certiorari review is unwarranted.

#### **D. Allegations Of Motive Are Irrelevant To The Qualified Immunity Analysis**

Mr. Shooter argues that applying qualified immunity to the alleged conduct in this case “effectively immuniz[es] a deliberate effort to prevent anti-corruption inquiries[.]” [Petition at 33.] In other words, because Mr. Shooter has alleged malicious or corrupt intent, those bare allegations (not evidence) overcome the defense of qualified immunity. That is not the law. As this Court has long recognized, the second prong of the qualified immunity analysis turns on the objective reasonableness of the conduct, and alleged subjective intent is irrelevant. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) (“[A] defense of qualified immunity may not be rebutted by evidence that the defendant’s conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant’s subjective intent is simply irrelevant to that defense.”); *Harlow*, 457 U.S. at 817-18 (“[W]e

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*McCarley* by stating: “Even assuming that this decision is entitled to any significant weight in the clearly-established-law inquiry, ... it is of no assistance to Shooter.” [App. 22a.]

conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.”). To hold otherwise would allow any plaintiff to “convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging” improper motive. *See White*, 137 S. Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (addressing the requirement that the “clearly established law must be ‘particularized’ to the facts of the case,” or the plaintiff would be able to create “virtually unqualified liability simply by alleging violation of extremely abstract rights”)).

Mr. Shooter’s allegations of corruption and improper motive are simply that—unproven allegations. Nevertheless, the district court and court of appeals expressly assumed the truth of Mr. Shooter’s allegations for purposes of considering the motions to dismiss. Both correctly concluded that the allegations did not defeat qualified immunity. The allegations of motive are irrelevant and do not present grounds for certiorari review.

#### **E. Failure To Plead Discrimination Based On A Protected Class Bars An Equal Protection Claim**

Discriminatory intent or purpose based on membership in a protected class is a required element of a claim under 42 U.S.C. § 1983 for violation of the Equal Protection Clause. *E.g.*, *Thornton*, 425 F.3d at 1167; *Barren v. Harrington*, 152 F.3d 1193, 1194-95 (9th Cir. 1998) (“To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of

the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.”). The Ninth Circuit correctly noted this foundational standard, which Mr. Shooter failed to meet. [App. 12a-13a (explaining Mr. Shooter did not plead sufficient facts to raise a plausible inference of discrimination based on sex).]

Mr. Shooter does not dispute the relevant legal standard. Instead, he complains “the plain error of the Ninth Circuit is that acting with the intent to end Shooter’s efforts to uncover corruption does not exclude also acting with discriminatory intent ... because of sex.” [Petition at 34.] Fatal to Mr. Shooter’s argument, the Ninth Circuit did not suggest the “intent to end Shooter’s efforts to uncover corruption” and discriminatory intent “based on sex” were mutually exclusive. Instead, the court of appeals explained that while Mr. Shooter pled the former, he did not plead discriminatory intent based on sex. [App. 12a-13a.] The Petition reinforces this reality, as even Mr. Shooter’s restatement of his allegations still does not allege discriminatory intent based on sex. [See Petition at 34.] The Ninth Circuit correctly concluded that Mr. Shooter did not state a plausible equal protection theory. Mr. Shooter’s contortions of the Ninth Circuit’s opinion do not warrant review.

#### **F. The Ninth Circuit Did Not “Depart From Established Principles”**

For his final argument, Mr. Shooter suggests the Ninth Circuit “departed from established principles” by failing to recite in its opinion every allegation within

the lengthy complaint Mr. Shooter deems material, referring to the Sherman & Howard Report in its opinion, and concluding the district court did not abuse its discretion in not *sua sponte* granting Mr. Shooter leave to amend following dismissal of his claim under 42 U.S.C. § 1983. These arguments strain, if not defy, credibility and ignore the procedural history of this dispute. None of them warrant this Court's exercise of its discretionary certiorari review.

First, the Ninth Circuit is not obligated to recite in its opinion every allegation in Mr. Shooter's 193-paragraph complaint, let alone to attempt to discern and then recite the allegations Mr. Shooter deems "material." In reviewing the district court's dismissal of Mr. Shooter's Section 1983 claim on qualified immunity grounds, the Ninth Circuit stated the very principle Mr. Shooter espouses: "For purposes of reviewing the district court's dismissal for failure to state a claim, we 'accept[ ] all factual allegations in the complaint as true and constru[e] them in the light most favorable to the nonmoving party.'" [App. 5a (*quoting Fields v. Twitter, Inc.*, 881 F.3d 739, 743 (9th Cir. 2018) (alterations in original)).] Mr. Shooter presents no basis for the Court to assume the Ninth Circuit correctly stated, but then refused to apply, this principle.

Second, Mr. Shooter misstates the scope of materials the Ninth Circuit could properly consider in evaluating whether Mr. Shooter pled facts that state a plausible claim for relief under 42 U.S.C. § 1983. In addition to considering well-pled factual allegations in the complaint, the Ninth Circuit was further permitted

(if not obligated) to consider “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The Sherman & Howard Report discussed in the Ninth Circuit opinion is undoubtedly central to the complaint. It is referenced repeatedly throughout the complaint, quoted in the complaint, and its findings are cited in support of Mr. Shooter’s claims, including Mr. Shooter’s allegation that “[a]ccording to the report, a majority of the claims against Mr. Shooter were found not to constitute sexual harassment....” [See App. 77a; see also App. 61a, 67a, 73a-75a, 77a-79a, 81a, 84a.] Accordingly, Mr. Adams attached the Report to his motion to dismiss in the district court—to which Mr. Shooter neither objected, nor argued that the attached copy of the Report was not authentic. [See Ariz. District Court Case No CV-19-01671-PHX-DWL, Dkt. 12 at 2; Dkt. 12-1 at Ex. 2; Dkt. 15.]

The fact of the Report’s issuance and the fact of its contents are alleged in the complaint and are further matters of public record, of which the Ninth Circuit could take judicial notice. [See App. 21a, n.5 (explaining that the Ninth Circuit considered the Sherman & Howard Report, but did not assume the truth of the statement in the Report).] Particularly in view of the Ninth Circuit’s limited consideration of the Report, Mr. Shooter’s belated objection and arguments regarding the merits of the underlying sexual harassment allegations contained within the Report are unfounded.

Third, Mr. Shooter’s assertion that the Ninth Circuit erred when it “upheld the District Court’s denial of leave to amend the original Complaint” rests on an inaccurate characterization of the record. Mr. Shooter did not request leave to amend the original complaint. As he did not request leave, the district court necessarily did not deny the never-asserted request. As the Ninth Circuit correctly reasoned, the district “did not abuse its discretion in failing *sua sponte* to grant him leave to amend.” [App. 27a (*citing Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1144 (9th Cir. 2015)).] *See also, e.g., Alaska v. United States*, 201 F.3d 1154, 1163–64 (9th Cir. 2000) (“Where a party does not ask the district court for leave to amend, the request on appeal to remand with instructions to permit amendment comes too late.” (alterations and quotation marks omitted)).

Mr. Shooter’s arguments fail to present any valid basis for this Court’s exercise of discretionary certiorari review.

## II. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW

As demonstrated above, given the Ninth Circuit’s fidelity to this Court’s precedents, Mr. Shooter’s Petition, at its core, challenges the Ninth Circuit’s application of undisputed, governing precedents to the facts of this case. However, “[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Supreme Court Rule 10. Error correction is particularly unwarranted here. The Ninth Circuit, in

a thorough opinion, considered the well-pled allegations in Mr. Shooter's complaint and determined Mr. Shooter failed to meet the second prong of this Court's qualified immunity test. Mr. Shooter asks this Court to revisit the allegations he deems "material" and engage in purported error correction. The Court should reject Mr. Shooter's invitation and, consistent with its practice under Rule 10, deny the Petition.

As the Ninth Circuit noted in its opinion, this case also raises unique federalism concerns involving the inner workings of a state legislature, which further counsels against granting certiorari. The House, with a greater than two-thirds vote of its members, took action expelling Mr. Shooter for conduct they found "dishonorable and unbecoming of a member," which "undermined the public's confidence in this institution and violated the order and decorum necessary to complete the peoples' work in the State of Arizona." [Ninth Circuit Court of Appeals Case No. 19-16248, SEOR, Dkt. 29, pp. 6-7.] Mr. Shooter attempts to circumvent the House's two-thirds vote through a claim for damages under Section 1983 and the Fourteenth Amendment. Yet, this Court has recognized that "the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment." *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991); *cf. Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977) ("We find nothing in the First or Fourteenth Amendments or in 42 U.S.C. s 1983 that can justify this attempt to inject the Federal Judiciary into the internal procedures of a House of a state legislature."). Federal courts likewise should not wade

into the inner workings of a state legislature and the conduct expected of its members.

Finally, separate and apart from the Ninth Circuit's qualified immunity analysis, significant developments in related proceedings in Arizona state courts demonstrate the infirmity of Mr. Shooter's claims against Speaker Mesnard and Mr. Adams. For example, on June 30, 2021, the Arizona Supreme Court held that absolute legislative immunity barred certain claims Mr. Shooter asserted against Speaker Mesnard based on his alleged conduct in connection with the investigation and expulsion of Mr. Shooter, including allegations regarding his alleged alteration of the Report. *See Mesnard*, 251 Ariz. at ¶¶ 17-27, 489 P.3d at 1196-97. The Maricopa County Superior Court further dismissed (or entered judgment against Mr. Shooter as to) all of the asserted state law claims, including for alleged defamation and civil conspiracy, even after Mr. Shooter received the opportunity to amend his original complaint. *See, e.g., Donald M. Shooter v. State of Arizona, et al.*, Maricopa County Superior Court No. CV2019-050782, (motions to dismiss granted May 27, 2020; summary judgment granted September 10, 2021 and December 2, 2021) (entry of stipulated final judgment pending). In view of the significant developments in the state court proceedings, Mr. Shooter's continued suggestion that the alleged conduct by Speaker Mesnard and Mr. Adams violated any of Mr. Shooter's rights or that he can somehow salvage a claim for monetary damages under Section 1983 is meritless.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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