No. _____

IN THE

# Supreme Court of the United States

RILEY'S AMERICAN HERITAGE FARMS; AND JAMES PATRICK RILEY,

*MOVANTS,*

v.

JAMES ELSASSER; STEVEN LLANUSA; HILARY LACONTE; BETH BINGHAM; NANCY TRESER OSGOOD; DAVID S. NEMER; ANN O'CONNOR; BRENDA HAMLETT; AND CLAREMONT UNIFIED SCHOOL DISTRICT,

*RESPONDENTS.*

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

## MOTION TO DIRECT THE CLERK TO FILE PETITION FOR WRIT OF CERTIORARI OUT OF TIME


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## RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that Riley's American Heritage Farms has no "parent company," and no publicly held company owns 10% or more of the corporation's stock.

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## MOTION TO DIRECT THE CLERK TO FILE PETITION FOR A WRIT OF CERTIORARI OUT OF TIME[1]

Riley's American Heritage Farms ("Riley's Farm") and James Patrick Riley ("Mr. Riley"; collectively, "Movants") respectfully move this honorable Court for an order directing the Clerk to file their petition for writ of certiorari seeking review of a judgment of the Court of Appeals for the Ninth Circuit (the "Petition"), submitted for filing on August 8, 2022, on that ground that such date is within 90 days following May 9, 2022. That date was, according to the clear and express order of the Court of Appeal below, the effective date of entry of judgment after the Court of Appeals amended its original opinion, and of the final disposition of Movants' petition for rehearing ("Petition for Rehearing"). In the alternative, Movants hereby request that this motion be treated as an application for an extension of time *nunc pro tunc* within which to file a petition for a writ of certiorari for not more than 60 days.

## I. INTRODUCTION

Rule 13(3) of this Court provides that "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed,

[1] This Motion was originally submitted for filing on August 25, 2022, and entitled "MOTION TO DIRECT CLERK TO ACCEPT PETITION FOR CERTIORARI AS TIMELY SUBMITTED 90 DAYS FOLLOWING ENTRY OF JUDGMENT, OR IN THE ALTERNATIVE, APPLICATION TO JUSTICE KAGAN, AS CIRCUIT JUSTICE, FOR AN EXTENSION OF TIME *NUNC PRO TUNC* TO FILE PETITION." On Monday, August 29, a representative of the Clerk of this Court contacted Movants' counsel and stated that the Clerk would not file this Motion under that title, and that the Motion would therefore be returned and not accepted for re-filing unless titled as the Clerk proposed. (Declaration of Thomas J. Eastmond, in Movant's Appendix ("Mov. App.") B, p. 149.

and not from the issuance date of the mandate (or its equivalent under local practice)."

In this case, those dates were one and the same. The mandate and notice of the effective date of the entry of judgment were combined in a single document entered May 9, 2022 (the "May 9 Order"). This document followed the issuance on April 29, 2022 of an amended published opinion ("Amended Opinion") by the Court of Appeals, replacing its original published opinion ("Original Opinion"). The May 9 Order stated, **"The judgment of this Court, entered March 17, 2022, takes effect this date**."

Movants submitted their Petition for filing on August 8, 2022, the 90th day after the May 9 Order. On August 11, 2022, the Clerk of this Court returned the Petition, stating that it was "out-of-time" because "[t]he time for filing a petition for a writ of certiorari is not controlled by the issuance of the mandate."

The May 9 order, however, was not just the mandate. It was also the entry, or re-entry, of judgment, following the Court of Appeals' partial denial of the Petition for Rehearing, as well as the final adjudication of that petition.

Movants contend that, according to the plain meaning of the Court of Appeal's statement, May 9 was the "date when the judgment was entered," or was restored to effect after the Petition for Rehearing suspended it, and that the partial denial of the Petition for Rehearing was not effective until that date. They accordingly request that this Court determine that the August 8 submission of the Petition -- 90 days

after May 9 -- was timely, and direct the Clerk to file the Petition effective as of that date. In the alternative, Movants hereby apply for a brief extension of time, not to exceed 60 days, to file the Petition.

## II. BACKGROUND

After Mr. Riley posted his views regarding current affairs on social media, officials of the Claremont Unified School District retaliated by cutting off their longstanding, valuable field trip business with Riley's Farm. As the Court of Appeal confirmed in its opinions below, there was no evidence of substantive concerns about disruption to the District's operations that could outweigh Movants' First Amendment rights (Movant's Appendix ("Mov. App") A at pp. 26-28; B at pp. 72-75), and Movants submitted substantial evidence showing that any purported concerns of disruption were pretextual. Mov. App. A at pp. 10-11, 20-21; B at pp. 55-56, 66.

Nevertheless, the Ninth Circuit panel held, in two separate published opinions, that summary judgment was properly granted to Respondents based on qualified immunity. In its original published opinion dated March 17, 2022 (the "Original Opinion"), the panel's rationale was that "there was no case directly on point that would have clearly established" the unconstitutionality of Respondents' actions. Mov. App. A, p. 34. After Movants petitioned for rehearing and/or hearing en banc, the Court of Appeal issued the Amended Opinion on March 28, 2022. In it, the Court of Appeal changed its wording from "no case directly on point" to "... no case that placed the constitutional inquiry 'beyond debate.'" Mov. App. B, p. 79. Movants could only

overcome qualified immunity, the Court of Appeal held, if previous case law had specifically held "that a school district could not cease patronizing a company providing historical reenactments and other events for students because a company's principal shareholder had posted controversial tweets that led to parent complaints." Mov. App. B, p. 79. The Amended Opinion also added a holding (not present in the Original Opinion) that the appearance in the record of any public complaints about Mr. Riley's speech -- any at all, no matter how few or insubstantial -- meant that evidence offered to prove pretext could not create a triable issue of material fact precluding summary judgment on qualified immunity. Mov. App. B, pp. 79-80.

The Amended Order did not contain any language addressing the entry of judgment, nor was there any contemporaneous notation of the entry of a judgment on the Court of Appeal's docket. On May 9, 2022, the Court of Appeal filed a document captioned "Mandate," whose text, in its entirety, read as follows:

"The judgment of this Court, entered March 17, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure."

Mov. App. C, p. 87.

Upon receipt of the May 9 Order, Movants' counsel of record submitted it to his firm's calendaring department to have the firm's CompuLaw automatic calendaring system update any resulting deadlines. Because of the statement that the "judgment...takes effect this date," counsel identified it as the effective entry of

judgment following the Amended Opinion's modifications of the Original Opinion. Mov. App. F, pp. 147-149. Based on the classification of the May 9 Order as the effective entry of judgment, the CompuLaw system calendared the due date for a petition for writ of certiorari as August 8, 90 days after the May 9 Order, pursuant to 28 U.S.C. § 2101 and Rule 13, subsections (1) and (3). Mov. App. F, p. 148.

The Ninth Circuit's demand, in the Amended Opinion, for a "case directly on point" in all but name conflicts with this Court's holdings in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011), *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), *United States v. Lanier*, 520 U.S. 259 (1997), and *Hope v. Pelzer*, 536 U.S. 730 (2002). Further, by holding that a triable issue of material fact as to pretext in a First Amendment retaliation case does not preclude summary judgment on qualified immunity, the Ninth Circuit joins what is now a 7-2 minority in a circuit split. In fact, the Ninth Circuit's embrace of the minority view so thoroughly rejects evidence of pretext that it directly conflicts with this Court's holding in *Crawford-El v. Britton*, 523 U.S. 574 (1998) ("*Crawford-El*") (rejecting an "unprecedented proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent").

Accordingly, on August 8, 2022 -- 90 days after the May 9 Order -- Movants submitted their Petition for filing. Mov. App. D, passim and particularly p. 143 (receipt stamped cover page). The Petition argued that the Court of Appeal's decision, as outlined above, requires review. It also proposed that the fact that such issues keep recurring, no matter how hard courts strive to untangle the "mare's nest" of

qualified immunity, suggests intractable problems with the underlying doctrine itself. The unique context of this case presents a prime opportunity for this Court to reconsider or modify qualified immunity -- a "field test" of needed reform outside "the fact-bound morass" of qualified immunity cases involving law enforcement. *See Scott v. Harris*, 550 U.S. 372, 383 (2007).

On August 11, 2022, the Clerk of this Court returned the Petition, stating that it was "out-of-time" because "[t]he time for filing a petition for a writ of certiorari is not controlled by the issuance of the mandate." The clerk did not address the May 9 Order's statement that "[t]he judgment of this Court, entered March 17, 2022, takes effect this date." Mov. App. E, p. 145.

## III. ARGUMENT

### A. The Effective Date of Entry of Judgment, and Disposition of Movants' Petition for Rehearing, Was May 9.

This Court's Rule 13(1) provides that "a petition for a writ of certiorari to review a judgment ... entered by ... a United States court of appeals ... is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." This rule parallels 28 U.S.C. § 2101(c), which provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

"This 90-day limit is mandatory and jurisdictional. [The Court has] no authority to extend the period for filing except as Congress permits." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) ("*Jenkins*").

Rule 13(3) further provides:

> But if a hearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

"The consistent practice of the Court has been to treat petitions for rehearing that are timely and properly presented to the federal or state court below as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice §6.3, p. 6-15 (11th ed. 2019) ("Shapiro et al."), citing *Jenkins*, 495 U.S. at 45; *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942); *see Young v. Harper*, 520 U.S. 143, 147 n.1 (1977) ("*Young*") (timely petition for rehearing tolls the running of the 90-day period for filing a petition for certiorari until "disposition" of the rehearing petition"). "[W]hile the petition for rehearing is pending, there is no 'judgment' to be reviewed." *Jenkins*, 495 U.S. at 46 see also *Hibbs v. Winn*, 542 U.S. 88, 98-99 (2004) ("*Hibbs*") (timely petition

for rehearing "suspends" the finality of a judgment, tolling the start of the certiorari filing period).

Movants petitioned for a writ of certiorari to bring for review "the judgment of the Ninth Circuit Court of Appeals in this case," and specifically the judgment as it was materially altered by the Amended Opinion. Specifically, a central focus of the Petition was the Amended Opinion's extraordinary new holding that even substantial evidence of pretextual motive, in a First Amendment retaliation case, does not create a triable issue of material fact, precluding summary judgment on qualified immunity, when it is opposed by any quantum of evidence of potential "disruption" -- no matter how insubstantial. Mov. App. D, pp. 105-106, 116-125; *cf.* Mov. App. B, pp. 50, 79-80. Therefore, the key jurisdictional question here is the date of "the entry of such judgment or decree." 28 U.S.C. § 2101(c). A second, non-jurisdictional question arises from Rule 13(3), namely, on what date Movants' petition for rehearing was finally denied or "disposed of." (*See Young*, 520 U.S. at 147. n.1.) As set forth below, the answer to both questions is May 9, 2022 -- the date the Court of Appeal expressly stated that its March 17 judgment, suspended by Movants' petition for rehearing (*see Hibbs*, 542 U.S. at 98-99), took effect.

Like the "Order for Mandate" the Court examined in *Commissioner v. Estate of Bedford*, 325 U.S. 283 (1945) ("*Bedford*"), the May 9 Order, "[i]n spite of its title ... on its face fulfills the function of ... a judgment order." *Id.* at 286. In *Bedford*, the Court observed that unlike an earlier "opinion" issued by the Second Circuit Court of

Appeals, the phrasing of the "Order for Mandate" "plainly imports that this is the judgment and that it is then being rendered." *Id.* at 287. Comparably, here, the May 9 Order's simple statement, "The judgment of this Court, entered March 17, 2022, takes effect this date," also "plainly imports" that it, not the Amended Opinion, marked the effective date of the judgment following the issuance of the Amended Opinion.

Although Rule 13(3) refers to "the denial of the rehearing," it does not undertake a comprehensive definition of what the "denial" consists of, leaving that to local practice. For instance, in *Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978) ("*Marquette*"), the Court also found timely a petition for certiorari filed 90 days, not after the denial of a petition for rehearing, but a separate, later document the Court determined was the actual entry of judgment. *Id.* at 307, n.18, citing *Bedford* at 284-288 and *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 24-25 (1924) (three-month limitation period began to run from date of entering judgment, and not from date of the denial of rehearing upon which judgment was entered).

When, as here, local practice and possibly ambiguous drafting of orders by a lower court creates a potential conflict between how the certiorari deadline might be calculated, respectively, under 28 U.S.C. § 2101 (90 days from the date of the "entry of judgment") and Rule 13(3) (90 days from either (a) entry of judgment; (b) a subsequent granting of the entry of judgment if a petition for rehearing is "granted,"

or (c) "the date of the denial of rehearing"), this Court has the flexibility to exercise its discretion to avoid or resolve the conflict. "The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require. This discretion has been expressly declared in several opinions of the Court. See *Taglianetti v. United States*, 394 U.S. 316, n. 1 (1969); *Heflin v. United States*, 358 U.S. 415, 418 n. 7 (1959)." *Schacht v. United States*, 398 U.S. 58, 64 (1970) ("*Schacht*"). "'[I]t is axiomatic' that [court-prescribed procedural rules] 'do not create or withdraw federal jurisdiction.'" *Hibbs*, 542 U.S. at 99, quoting *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978).

Here, the Court of Appeal explicitly stated that the March 17 judgment -- suspended in its operation by the timely Petition for Rehearing -- was un-suspended effective May 9. ("The judgment ... takes effect this date," Mov. App. C, 87; see *Hibbs*, 542 U.S. at 98-99.) Under 28 U.S.C. § 2101, that would start the certiorari clock running. That would also be the result under Rule 13(3) if (as Movants contend) the effective date of the final "denial of rehearing" is understood to be the May 9 Order. There is only a potential conflict if the Amended Opinion itself is interpreted as the final adjudication of the Petition for Rehearing. If such a conflict is fairly avoidable, it should be avoided by the interpretation that gives effect to both the statute and the Rule.

The Court's Rules (which, as set forth above, do not seek to anticipate every possible variety of local practice) do not directly address the case, like here, of a **partial** denial of rehearing, when the petition has resulted in material amendments to the original opinion. Rule 13(3) only speaks of a petition being "denied" or "granted" -- all or nothing. In the latter case, the 90-day deadline runs from the date of "the subsequent entry of judgment," not the date of opinion. Where, as here, a petition for rehearing results in a material modification to a Court of Appeal's opinion issued in conjunction with its original judgment, the 90-day deadline should also run from "the subsequent entry of judgment," or (if no new judgment is entered) on the date the Court of Appeal indicates (either in the amended opinion itself, or in a separate docket entry) as the original judgment's effective date.

That is similar to how this Court resolved a comparable potential tension between the date of an opinion and the date of entry of a judgment in *Schofield v. NRLB*, 394 U.S. 423 (1969) ("*Schofield*"). There, the Court held that a petition for certiorari filed more than 90 days after the issuance of an opinion, but within 90 days of a subsequent decree entering judgment" was timely filed. *Id.* at 427. As was the case here, in *Schofield*,

> Petitioners...received a copy of the March 5 opinion, but were given no notice of any entry of judgment on that date, as would be required by Rule 36 of the new Federal Rules of Appellate Procedure, effective July 1, 1968. Since no notice was given and it could not have been clear to petitioners whether there was a March 5 judgment or not

> we hold ... that in this case the relevant date is that of the entry of the decree.

*Id.* (cleaned up). Here, unlike the Original Opinion (which was followed by a document explicitly giving notice that the Court of Appeal had "filed and entered the attached judgment in your case"; see Mov. App. A, p. 41), the Amended Opinion gave "no notice of any entry of judgment on that date, as would be required by Rule 36." Mov. App. B, 85; *cf. Schofield*, 394 U.S. at 427.

A judgment of a Court of Appeal "is entered when it is noted on the docket." Federal Rules of Appellate Procedure, Rule 36(a). "On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered." The Amended Opinion did not enter judgment, nor was judgment noted on the Court of Appeal's docket on its date. Mov. App. A, p. 41; *cf.* Mov. App. B, 85; *see* Mov. App. G, p. 155 (docket; statement "FILED AND ENTERED JUDGMENT" noted in conjunction with Original Opinion but not Amended Opinion). The only docket entry referencing judgment, giving notice of its effective entry date, was the May 9 Order. Mov. App. C, 87.

Although the Amended Opinion stated that the Petition for Rehearing was "denied," the nominal "denial" was qualified by the phrase "with these amendments." Mov. App. B at 51. Because the denial was less than complete and unqualified, and because unlike with the Original Opinion, no judgment was noted and noticed

pursuant to Rule 36 concurrently with the Amended Opinion, it was not immediately clear -- at the very least -- that judgment was being entered effective April 29. *Cf. Schofield*, 394 U.S. at 497. The May 9 Order resolved any uncertainty. The plain meaning of its first sentence ("The judgment of this Court, entered March 17, 2022, takes effect this date") is that the suspension of the March 17 judgment, entered the same date as the Original opinion, ended May 9. That, not the April 29 Amended Opinion (which contained no reference to judgment), was the actual, effective "disposition of the rehearing petition."

No other interpretation is logically coherent. If the March 17 judgment did not "take[] effect," as the Court of Appeal ordered, until May 9, then as far as it relates to the time for petitioning for certiorari, ""there [was] no judgment." *Jenkins*, 495 U.S. at 46. The judgment remained "suspended" until that date. If, on the other hand, the suspension of the March 17 judgment were to be deemed to have occurred earlier, on April 29, then, contrary to the May 9 Order, it would have "take[n] effect" on that date to start the certiorari clock running -- but for no other purpose. The May 9 Order contained no such exception to its categorical statement. May 9 was the effective date of the judgment, for all purposes.

Accordingly, May 9 marked the "final adjudication [which] marks the time from which the period allowed for a certiorari petition begins to run." *Hibbs*, 542 U.S. at 98-99. The Petition was timely submitted within 90 days of May 9.

B. Alternatively, Movants Request An Extension to File The Petition.

Rule 13(5) provides that "[f]or good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days." It further provides, "The application must be filed with the Clerk at least 10 days before the petition is due, except in extraordinary circumstances." These rules parallel 28 U.S.C. § 2101(c), which provides, "A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

As set forth above, Movants respectfully submit that the May 9 Order, "on its face," "plainly imports that [it] is the judgment and that it is then being rendered." Cf. *Bedford*, 325 U.S. at 286-287. If, however, it were to be concluded that the certiorari period actually began running with the Amended Opinion, Movants request an extension of time *nunc pro tunc* to permit the Petition to be re-submitted for filing, upon the ground that if the Court of Appeal did intend the period to begin with the Amended Opinion, its subsequent statement that the judgment "takes effect [May 9]" unreasonably and unnecessarily created ambiguity. The result of that ambiguity was that Movants excusably believed that May 9 was, as the Court of Appeal's language reasonably appeared to indicate, the date of entry of judgment and the final disposition of their Petition for Rehearing. This ambiguity created an "extraordinary circumstance" warranting the entertaining of an application to extend time, despite it being made outside the ordinary Rule 13(5) period for requesting extensions.

Rule 30(2) provides that "[w]henever a Justice or the Clerk is empowered by law or these Rules to extend the time to file any document, an application or motion seeking an extension shall be filed within the period sought to be extended." However, unlike Rule 13(5), Rule 30(2)'s limitation is not contained in 28 U.S.C. § 2101 or other law, and accordingly is not jurisdictional. "The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require. This discretion has been expressly declared in several opinions of the Court. [Citations]." *Schacht*, 398 U.S. at 64. "'[I]t is axiomatic' that [court-prescribed procedural rules] 'do not create or withdraw federal jurisdiction.'" *Hibbs*, 542 U.S. at 99.

Movants are mindful of the possibility that allowing litigants to seek *nunc pro tunc* extensions of time could, if not carefully cabined in their allowed scope, increase the number of extension requests, including some improperly seeking to circumvent 28 U.S.C. § 2101's jurisdictional 90-day limit. The simplest immediate way to avoid that would be to grant Movants' primary request by this Motion -- to confirm that May 9, 2022 was the effective date of the entry of judgment and disposition of Movants' petition for rehearing.

If, however, notwithstanding the Court of Appeal's statement that the judgment was effective May 9, any ambiguity in that statement is resolved in favor of the actual effective date having been April 29, the "ends of justice" do warrant an

exercise of this Court's discretion to extend the time to file the Petition outside the ordinary extension period. Because the provision that a motion or application seeking an extension "shall[2] be filed within the period sought to be extended" is not required by Congress in the operative statute, it is not jurisdictional. Where a Court of Appeal has created the ambiguity by which a party was misled (if Movants were indeed misled), and as a result Movants had no indication of any need to seek an extension of time to file within the ordinary period, the interests of justice urge flexibility with the Court's ordinary procedures to allow a *nunc pro tunc* extension.

The interests of justice will be served not only by allowing correction of an excusable procedural error (if it was an error), but also by allowing this Court to resolve, on the merits, a circuit split on a question of tremendous national importance: Whether the doctrine of qualified immunity, and particularly its rule that a constitutional violation must be "clearly established" for it not to apply, will be allowed to become even more "onerous," telling the public "that palpably unreasonable conduct will go unpunished." *Kisela v. Hughes*, 138 S. Ct. 1148, 1158 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting) -- or whether, consistent with the majority of Courts of Appeal and this Court's *Crawford-El* decision, evidence of intentionally wrongful, pretextual retaliatory motive, in cases where intent is an

[2] Though "shall" usually implies a mandatory obligation, it does not always do so -- particularly in the context of rules of procedure. See *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 433 fn. 9 (1995).

element of the constitutional wrong, precludes summary judgment on qualified immunity.

"To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly. (*Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part.) That perception, and the erosion of civic trust it engenders, should not be permitted to be reinforced by the Ninth Circuit's rigid new rule that pretextual intent is irrelevant if even a hint of a legitimate reason for adverse government action might conceivably exist. See Mov. App. B, pp. 79-80. "[I]t can never be objectively reasonable for a government official to act with an intent that is prohibited by law.'" *Reuland v. Hynes,* 460 F.3d 409 (2d Cir. 2006). If "no cheating" is not clearly understood to be so elementary a part of a public servant's obligation to the public trust that it goes without saying, we should not be shocked to see respect for the law and our institutions wane. It is therefore vital to the interests of justice that the Ninth Circuit's misstatements of the law be considered on the merits and corrected. Because of the Ninth Circuit's defiance of this Court's holding in *Crawford-El*, officials with nakedly retaliatory intent now need only the tiniest fig leaves of pretextual "justification" to require ignoring their actual unconstitutional motives. Delay in resolving this issue will expose the people living within the Ninth Circuit's jurisdiction -- a fifth of the Nation's population -- to serious infringements on their

fundamental rights, until another, similar case can wind its way through the lengthy appeals process.

Qualified immunity affords public officials extraordinary leeway for honest mistakes when the law is not "clearly established," a standard which the Amended Opinion has now defined so narrowly as to make it virtually insurmountable. It would be bitterly ironic if a petition for review of this unprecedented, unreasonably "onerous" standard were denied a hearing on the merits when -- if the Court of Appeal did not in fact mean to identify May 9 as the effective date of judgment following the Amended Opinion -- any other meaning was anything but "clearly established" by the May 9 Order.

## IV. CONCLUSION

Movants respectfully request that this Court determine that (1) the effective date of the entry of judgment, and of the partial denial of the Petition for Rehearing, was May 9, 2022, as the Court of Appeal stated in its order of that date, and accordingly (2) the Petition was timely submitted for filing on August 8, 2022; and that the Clerk be instructed to accept the Petition for filing as of that date. In the alternative, and only if the Court finds that the tolling of the period to file the Petition ended on April 29, 2022, Movants request an extension of time not to exceed 60 days

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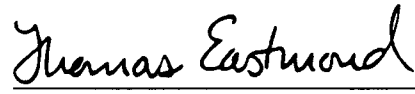
to re-submit the unchanged Petition for filing.

Dated: September 2, 2022.

Respectfully submitted,



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