No. _____

In the Supreme Court of the United States

RALPH DIAZ, *et al.*, *Petitioners*,
v.
PATRICIA POLANCO, *et al.*, *Respondents*.

RALPH DIAZ, *et al.*, *Petitioners*,
v.
MICHAEL HAMPTON, *et al.*, *Respondents*.

RALPH DIAZ, *et al.*, *Petitioners*,
v.
DONTE LEE HARRIS, *et al.*, *Respondents*.

RALPH DIAZ, *et al.*, *Petitioners*,
v.
KENNETH ALLAN COOPER, *et al.*, *Respondents*.

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

PETITION FOR A WRIT OF CERTIORARI

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December 29, 2023

QUESTION PRESENTED

This Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality" for purposes of the qualified immunity inquiry. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotation marks omitted). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam).

This petition concerns four recent appeals in which the Ninth Circuit denied qualified immunity in suits arising out of an outbreak of COVID-19 at a state prison. *See* Sup. Ct. R. 12.4. In *Polanco v. Diaz*, the panel majority held that prison officials violated a substantive due process right that was "clearly established" after pointing to "the combination of two of our precedents"—neither of which involved any sort of infectious disease. App. 17a. Two months later, the Ninth Circuit denied qualified immunity in *Hampton v. California*, this time holding that "the proper level of generality" in assessing an inmate's Eighth Amendment claim was "an inmate's right to be free from exposure to a serious disease." *Id.* at 101a-102a. A few days later, the Ninth Circuit invoked the "clearly established" right described in *Hampton* to deny qualified immunity with respect to nine additional prisoner lawsuits. *Id.* at 184a-185a. The question presented is:

Whether the Ninth Circuit improperly denied qualified immunity to prison officials in these cases by defining the relevant law at a high level of generality and failing to identify any precedent recognizing a constitutional violation on similar facts.

PARTIES TO THE PROCEEDING

Petitioners were the defendants-appellants in these four appeals in the Ninth Circuit.

In *Diaz v. Polanco*, petitioners are Ralph Diaz, former Secretary of the California Department of Corrections and Rehabilitation (CDCR); the Estate of Robert S. Tharratt, who was the Medical Director of California Correctional Health Care Services (CCHCS); Ronald Davis, the former warden of San Quentin State Prison (San Quentin); Ronald Broomfield, the former acting warden of San Quentin; Clarence Cryer, the former Chief Executive Officer for Health Care at San Quentin; Alison Pachynski, the Chief Medical Officer at San Quentin; and Shannon Garrigan, the Chief Physician and Surgeon at San Quentin.

In *Diaz v. Hampton*, petitioners are Ralph Diaz; Ronald Davis; Ronald Broomfield; Clarence Cryer; Alison Pachynski; Shannon Garrigan; the Estate of Robert S. Tharratt; Louie Escobell, the Chief Executive Officer for Health Care at the California Institution for Men (CIM); Muhammad Farooq, the Chief Medical Executive at CIM; Kirk A. Torres, the Chief Physician and Surgeon at CIM; the State of California; San Quentin; and CDCR.

In *Diaz v. Harris*, petitioners are Ralph Diaz; Ronald Davis; Ronald Broomfield; Clarence Cryer; Alison Pachynski; Louie Escobell; Kathleen Allison, the former Secretary of CDCR; Dean Borders, the former warden at CIM; and Joseph Bick, the Director of Health Care Services at CCHCS.

In *Diaz v. Cooper*, petitioners are Ralph Diaz; Kathleen Allison; Ronald Davis; Ronald Broomfield; Clarence Cryer; Alison Pachynski; Dean Borders; Joseph Bick; Louie Escobell; the Estate of Robert S.

Tharratt; Shannon Garrigan; Muhammad Farooq; Mona D. Houston; Kirk A. Torres; the State of California; CDCR; San Quentin; and CIM.

Respondents were plaintiffs-appellees in the court of appeals in these cases. In *Diaz v. Polanco*, respondents are Patricia Polanco; Vincent Polanco; Selena Polanco; and Gilbert Polanco, deceased. In *Diaz v. Hampton*, respondents are Jacqueline Hampton and Michael Hampton, deceased. In *Diaz v. Harris*, the respondent is Donte Lee Harris. In *Diaz v. Cooper*, the respondents are Kenneth Allan Cooper; Matthew K. Quale, Jr.; Karen Legg and Michelle Legg, individually and as successors in interest to David Reed, deceased; Tyrone Love; Joaquin Diaz, deceased; Hilda Diaz; Yadira Menchu; Blanca Diaz Houle; Daniel Ruiz, deceased, by and through his co-successors in interest; Santos Ruiz; Fernando Vera; Vanessa Robinson; Daniel Ruiz, Jr.; Angelina Chavez; Eric Warner, deceased; Henry Warner; and Reginald Thorpe.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit:

Polanco v. Diaz, No. 22-15496 (Nov. 16, 2023) (affirming district court's denial of motion to dismiss on qualified immunity grounds)

Hampton v. California, No. 22-15481 (Oct. 3, 2023) (affirming, in relevant part, district court's denial of motion to dismiss on qualified immunity grounds)

Harris v. Allison, No. 22-15921 (Oct. 13, 2023) (affirming, in relevant part, district court's denial of motion to dismiss on qualified immunity grounds)

Cooper v. Allison, No. 22-16088 (Oct. 13, 2023) (affirming, in relevant part, district court's denial of motions to dismiss on qualified immunity grounds)

U.S. District Court for the Northern District of California:

Polanco v. California, No. 3:21-cv-06516 (Mar. 3, 2022) (denying, in relevant part, motion to dismiss on qualified immunity grounds)

Hampton v. California, No. 3:21-cv-03058 (Mar. 20, 2022) (denying, in relevant part, motion to dismiss on qualified immunity grounds)

Harris v. Allison, No. 3:20-cv-09393 (May 18, 2022) (denying, in relevant part, motion to dismiss on qualified immunity grounds)

Cooper v. Allison, No. 3:22-mc-80066 (July 15, 2022) (denying, in relevant part, motions to dismiss on qualified immunity grounds in eight cases)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these four cases. Petitioners are filing "a single petition for a writ of certiorari" because the "judgments . . . sought to be reviewed" are from "the same court and involve . . . closely related questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

In *Polanco v. Diaz*, the opinion of the court of appeals (App. 1a-33a) is reported at 76 F.4th 918. The opinion and order of the district court (App. 34a-75a) is unreported but is available at 2022 WL 625076.

In *Hampton v. California*, the opinion of the court of appeals addressing qualified immunity and certain other issues (App. 78a-110a) is reported at 83 F.4th 754. A memorandum disposition resolving the remaining issues in that appeal (App. 111a-113a) is unreported but is available at 2023 WL 6443897. The amended opinion and order of the district court (App. 114a-148a) is unreported but is available at 2022 WL 838122.

In *Cooper v. Allison* and *Harris v. Allison*, the memorandum opinion of the court of appeals (App. 181a-186a) is not published in the Federal Reporter but is available at 2023 WL 6784355. The opinion and order of the district court in *Cooper* (App. 187a-212a) is unreported but is available at 2022 WL 2789808. The opinion and order of the district court in *Harris* (App. 213a-236a) is unreported but is available at 2022 WL 2232525.

JURISDICTION

In *Polanco*, the judgment of the court of appeals was entered on August 7, 2023, and the court denied a timely petition for rehearing en banc on November 16, 2023. App. 1a, 76a. In *Hampton*, the judgment of the court of appeals was entered on October 3, 2023. App. 78a. In *Cooper* and *Harris*, the judgment of the court of appeals was entered on October 13, 2023. App. 183a. In each case, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App. 237a-238a.

INTRODUCTION

Government officials are entitled to qualified immunity unless their conduct violated "clearly established" law that "placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (internal quotation marks omitted). That "exacting standard" allows "government officials breathing room to make reasonable but mistaken judgments." *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611 (2015) (internal quotation marks omitted). When lower courts disregard it, they impose "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). That is why this Court has found it "necessary" to "issue[] a number of opinions reversing federal courts in qualified immunity cases" and "reiterat[ing] the longstanding principle that

'clearly established law' should not be defined 'at a high level of generality.'" *White*, 580 U.S. at 79.

The Ninth Circuit ignored that principle in each of these appeals, and this Court should reverse those mistaken judgments and once again reiterate the requirements of the qualified immunity doctrine. The facts of these cases are undeniably tragic. In the early months of the COVID-19 pandemic, when little was known about the disease and testing supplies were limited, the defendant officials attempted to protect the lives of scores of vulnerable inmates who were confined in a prison where the virus was rampant. They transferred those inmates to San Quentin State Prison, which later experienced its own outbreak of COVID-19. The plaintiffs in the 11 lawsuits directly at issue here—and over 40 other lawsuits that have been filed regarding that outbreak—now allege that the defendants took inadequate precautions to minimize the risk of disease transmission in San Quentin when they transferred those inmates.

As observed by the dissenting judge in the first of these cases to reach decision in the Ninth Circuit, "[h]indsight is 20/20, and we cannot view the clearly established inquiry through the lens of what we know or believe to be true now." App. 26a (Nelson, J., dissenting). "COVID-19 presented prison officials with a rapidly emerging and evolving challenge," and the circumstances faced by the officials in this case were "simply different in kind from" circumstances in prior cases involving violations of the Constitution. *Id.* at 31a (Nelson, J., dissenting). At the time of the transfer, "[n]o clearly established law placed the Defendants on notice that their alleged mismanagement of the COVID-19 pandemic at San Quentin prison was unconstitutional such that every 'reasonable official

would [have understood] that what he is doing violates that right.'" *Id.* at 32a-33a (Nelson, J., dissenting).

The Ninth Circuit majority nonetheless held that the defendants violated a "clearly established" due process right after "employing the high level of generality that the Supreme Court has chastised [that circuit] for." App. 27a (Nelson, J., dissenting). It then compounded that error by holding—in three subsequent appeals—that the defendants had also violated a "clearly established" Eighth Amendment right. Not one of those decisions identified any precedent that squarely governed the factual circumstances here. The Ninth Circuit instead relied on general legal principles and cases with dissimilar facts—sometimes piecing together isolated aspects of multiple decisions in an effort to manufacture a "clearly established" legal rule. That approach sets a "dangerous" example for other courts and litigants in the Nation's largest judicial circuit, *id.* at 32a (Nelson, J., dissenting)—in the context of COVID-19 lawsuits and beyond. This Court should either summarily reverse or grant plenary review.

STATEMENT

A. Factual Background

Little was known about how the virus that causes COVID-19 could spread in early 2020, as outbreaks began in the United States. *See* Murphy, *Surfaces? Sneezes? Sex? How the Coronavirus Can and Cannot Spread*, N.Y. Times, May 26, 2020. For several months, government officials struggled to obtain adequate testing supplies and to effectively screen individuals for the virus. *See* Mervosh & Fernandez, *Months into Virus Crisis, U.S. Cities Still Lack Testing Capacity*, N.Y. Times, July 6, 2020. The lawsuits at

issue here arose from outbreaks of COVID-19 in state prisons during those early months of the pandemic.

By May 2020, an outbreak at the California Institution for Men (CIM) had infected hundreds of inmates and killed nine. App. 3a-4a. To protect 122 inmates who had high-risk medical conditions, prison officials moved them from CIM to San Quentin State Prison, where there had not yet been any reported cases of COVID-19. *Id.* at 4a. Prison officials took steps to mitigate the risks from that transfer, including screening inmates for symptoms, checking temperatures, limiting the number of inmates on transfer buses, isolating some symptomatic inmates, and testing potentially exposed inmates after transfer. *Cooper v. Allison*, No. 22-16088, C.A. Dkt. 17-5 at 157-180. According to the allegations in these lawsuits, however, the transferred inmates were not adequately tested or screened for symptoms before transport and they were not quarantined upon arrival. App. 4a.[1]

Shortly after the transfer, some of the inmates who had been transferred to San Quentin tested positive for COVID-19. App. 5a. In the following weeks the virus spread. *Id.* Thousands of inmates at San Quentin were ultimately infected with COVID-19; twenty-six inmates and one correctional officer died. *Id.* at 83a.

B. Procedural Background

As of December 2023, over 50 lawsuits have been filed against prison officials connected with the 2020

[1] Because each of these cases arises from the denial of qualified immunity at the motion to dismiss stage, the court of appeals assumed the truth of the allegations in the complaints. App. 3a n.1, 80a.

San Quentin outbreak, each alleging constitutional violations under 42 U.S.C. § 1983 and seeking damages. Eleven of those cases are directly at issue here.

1. *Polanco v. Diaz.* The first case to reach decision in the Ninth Circuit was filed by the family of Sergeant Gilbert Polanco, the correctional officer who died in August 2020. App. 1a-33a. The complaint asserts substantive due process claims under the Fourteenth Amendment against various prison officials involved in the transfer decision and medical treatment of inmates at CIM and San Quentin. *Id.* at 6a. It alleges that the defendants violated Polanco's rights by exposing him to the risk of contracting COVID-19. *Id.* The district court denied defendants' motion to dismiss that complaint on qualified immunity grounds in relevant part (while granting the motion with respect to defendants who worked at CIM). *Id.* at 35a. It held that the complaint adequately alleged a violation of a clearly established due process right on the part of defendants who worked at San Quentin and the California Department of Corrections and Rehabilitation. *Id.* at 66a.

A divided panel of the Ninth Circuit affirmed the denial of qualified immunity in a published opinion. App. 2a. The majority held that the complaint "sufficiently allege[d] a violation of Polanco's due process right to be free from a state-created danger," based on the theory that the defendants acted affirmatively and with deliberate indifference to expose Polanco to a particularized danger at his workplace. *Id.* at 8a; *see id.* at 8a-16a. After examining "the intersection of multiple cases," *id.* at 17a n.8, the majority also concluded that the alleged due process violation was "'clearly established at the time of the violation.'" *Id.* at 16a-17a. In particular, the majority held that "the combination

of two of our precedents"—neither of which involved infectious disease—put defendants on notice that they could be liable for "affirmatively exposing their employees to workplace conditions that they knew were likely to cause serious illness." *Id.* at 17a, 19a.

Judge Nelson dissented. App. 25a. His analysis focused on this Court's qualified immunity precedent, which instructs that "[t]he standard for clearly established law is 'demanding' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 26a (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (internal quotation marks omitted)). In his view, the panel majority's reliance on weaving together two cases involving dissimilar facts defied this Court's warning that a constitutional right must be clearly established "in light of the specific context of the case, not as a broad general proposition." *Id.* at 32a; *see Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam). He concluded that "[b]ecause the law is not clearly established, . . . the Defendants are entitled to qualified immunity." *Id.* at 25a.

Petitioners filed a petition for rehearing en banc, which the court of appeals denied. App. 77a.

2. *Hampton v. California.* The second case was brought by the wife of Michael Hampton, a deceased inmate. App. 79a. In relevant part, the complaint asserted an Eighth Amendment claim under 42 U.S.C. § 1983 and sought damages from the defendant officials. *Id.* at 84a. Similar to the complaint in *Polanco*, the *Hampton* complaint alleged that prison officials acted with deliberate indifference to a substantial risk of serious harm by transferring inmates from CIM to San Quentin without taking adequate precautions. *Id.* at 95a-98a. The district court denied defendants'

motions to dismiss on qualified immunity grounds. *Id.* at 114a-115a.

The court of appeals again issued a published opinion affirming the denial of immunity. App. 92a-106a. As to whether the complaint adequately alleged an Eighth Amendment violation, the court examined whether the alleged deprivation "was, objectively, 'sufficiently serious'" and whether the defendants subjectively acted "with 'deliberate indifference' to inmate health or safety." *Id.* at 95a. It concluded that the objective test was satisfied because "involuntarily exposing inmates to [COVID-19] violated then-current standards of decency." *Id.* at 96a. And it held that its recent decision in *Polanco* (the correctional-officer case) "control[led]" the analysis as to the subjective test, because *Polanco* held that similar factual allegations "described a 'textbook case of deliberate indifference[.]'" *Id.* at 96a-97a.

Next, the court of appeals held that the Eighth Amendment violation was clearly established. App. 103a (citing *Polanco v. Diaz*, 76 F.4th 918, 931 (9th Cir. 2023)). It acknowledged that the plaintiff had not identified any "prior case holding that prison officials can violate the Eighth Amendment by transferring inmates from one prison to another during a global pandemic." *Id.* at 101a. But it defined "the right at issue here" at a higher "level of generality," describing it as "an inmate's right to be free from exposure to a serious disease." *Id.* at 101a, 102a. Defined in that way, the court asserted that the "right has been clearly established since at least 1993, when the Supreme Court decided *Helling v. McKinney*, 509 U.S. 25, 33 (1993)," which recognized an Eighth Amendment claim based on an inmate's exposure to "a cellmate who smoked five packs of cigarettes a day." App. 102a. The court

of appeals also discussed circuit precedents involving inadequate ventilation and exposure to asbestos. *Id.* at 103a.

3. *Cooper v. Allison* & *Harris v. Allison*. Within days of its decision in *Hampton*, the court of appeals reached the same result in *Cooper* and *Harris*. Those appeals addressed nine lawsuits filed by inmates or their families, alleging (in relevant part) Eighth Amendment violations and seeking damages from the state defendants. App. 183a, 184a. In each case, the district court denied defendants' motions to dismiss on qualified immunity grounds, and the defendants appealed. *Id.* at 190a, 215a. The court of appeals affirmed, this time in a memorandum disposition. *Id.* at 183a. Relying exclusively on its decision in *Hampton*, the court concluded that "each Complaint at issue here states an Eighth Amendment claim that was clearly established at the time of the underlying events." *Id.* at 184a.

The appeal in *Cooper*, which was also captioned "*In re: CIM SQ Transfer Cases*," arose from a single district court decision directly addressing eight cases, including one putative class action. App. 187a, 194a n.7. Because numerous cases have been filed based on the same facts, the Chief Judge of the Northern District of California has assigned many of the cases to one judge for the limited purpose of addressing common issues, including the defendants' qualified immunity defense. *Id.* at 188a-189a. The district court decision denying qualified immunity in *Cooper* has since been extended to over 40 additional cases. *E.g.*, *Cooper v. Allison*, N.D. Cal. No. 3:22-mc-80066, Dkts. 91, 99, 114. Five more appeals challenging orders in those cases are currently before the Ninth Circuit and are stayed pending resolution of this petition. *See Nickerson v.*

Allison, No. 22-16513; *Lee v. Allison*, No. 22-16884; *Crittenden v. Allison*, No. 23-15132; *Ulep v. California*, No. 23-15806; *Mills v. Allison*, No. 23-15945. A sixth appeal was also recently filed. *See Jackson v. Allison*, No. 23-4271.

REASONS FOR GRANTING THE PETITION

Government officials are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 583 U.S. 48, 62-63 (2018). For conduct to violate a "clearly established" right, "existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam). It is not sufficient for a court to invoke "general statements of the law" that are "inapplicable or too remote." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam). A right is "clearly established" only where "the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id.*

"This Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela*, 138 S. Ct. at 1152 (internal quotation marks omitted); *see also City and County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015) (same); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (same). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam). "This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* (internal quotation marks omitted).

The Ninth Circuit ignored those requirements in the four appeals at issue in this petition. It began, in *Polanco*, by describing a "clearly established" due process right based on a "mishmash" of "the most compelling attributes" of two prior circuit decisions from markedly different factual contexts—which "cannot have put the officers on notice that their conduct in handling COVID-19 would be unconstitutional." App. 29a, 31a (Nelson, J., dissenting). It followed a similar approach in *Hampton*, invoking a broad legal principle to hold that the defendants violated a "clearly established" Eighth Amendment right in their early efforts to respond to a novel and evolving pandemic. *Id.* at 100a-103a. It then compounded that error when it applied *Hampton* as controlling authority in *Harris* and *Cooper*. *Id.* at 184a. The broad principles relied on by the Ninth Circuit below are "far too general . . . to control th[ese] case[s]." *Sheehan*, 575 U.S. at 613. And the precedents cited by the court "are simply too factually distinct to speak clearly to the specific circumstances here." *Mullenix*, 577 U.S. at 18.

Those repeated errors improperly expose government officials to the burdens of discovery and the possibility of substantial monetary damages. They also reflect a "dangerous" trend with implications extending far beyond these four cases—not only for over 40 additional cases involving the same outbreak that are pending in the lower courts, but also for future Section 1983 cases generally. App. 32a (Nelson, J., dissenting). This Court has not hesitated to reverse prior Ninth Circuit judgments that ignored the requirements of the qualified immunity doctrine. *See, e.g.*, *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (per curiam) (summary reversal); *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam) (summary reversal); *Kisela*, 138 S. Ct. at 1155 (summary reversal);

Sheehan, 575 U.S. at 617 (reversal following plenary review); *al-Kidd*, 563 U.S. at 744 (reversal following plenary review). It should do so here as well.

I. THE NINTH CIRCUIT HAS REPEATEDLY RUN AFOUL OF THIS COURT'S QUALIFIED IMMUNITY PRECEDENT

In each of these cases, the Ninth Circuit committed the exact error that this Court has warned against: it premised the denial of qualified immunity on "general statements of the law," without identifying any "case where an officer acting under similar circumstances . . . was held to have violated the" Constitution. *White*, 580 U.S. at 79-80. That approach "misunderstood the 'clearly established' analysis." *Id.* at 79.

A. *Polanco* Denied Qualified Immunity Based on a Purported Due Process Violation That Is Not Clearly Established

The majority in *Polanco* relied on the general principle that state officials could be liable "under the state-created-danger doctrine" for "deliberate indifference to workplace conditions posing serious health risks." App. 18a. It cited prior Ninth Circuit cases applying that principle. *Id.* at 16a-20a. But "[e]ven a cursory glance at the facts" of those cases "confirms just how different [they are] from this one." *Sheehan*, 575 U.S. at 614. None of the cited cases gave the defendants "'fair and clear warning'" (*id.* at 617) that their actions in moving vulnerable inmates to protect them from a novel contagious disease in the early days of a global pandemic violated Polanco's substantive due process rights.

Because it could not identify any prior decision recognizing a due process claim based on exposure to infectious disease in a prison workplace, the Ninth

Circuit majority relied on "the combination of" two prior Ninth Circuit decisions. App. 17a. The first, *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), involved facts that "deeply contrast with those here." App. 27a (Nelson, J., dissenting). The plaintiff in *Grubbs* was a prison nurse who was "assaulted, battered, kidnapped and raped." 974 F.2d at 120. The defendant prison officials had told her that she would not be required to work alone with violent sex offenders, but then they assigned her to work alone with "a violent sex offender who had failed all treatment programs at the institution" and was "considered very likely to commit a violent crime if placed alone with a female." *Id.* The defendants thus affirmatively exposed an employee to a known risk of sexual violence and "enhanced [her] vulnerability to attack by misrepresenting to her the risks attending her work." *Id.* at 121. Those facts "do[] nothing to clearly establish the law for the constitutional standards" governing "an invisible, non-human, and novel global virus wafting through the air." App. 28a (Nelson, J., dissenting).

The second decision invoked by the majority, *Pauluk v. Savage*, 836 F.3d 1117 (9th Cir. 2016), did not involve a prison workplace or an infectious disease. The plaintiff was a state office-worker assigned to a building with a known, pervasive, and chronic toxic-mold problem. *Id.* at 1119. The defendants did not respond to the plaintiff's protests and requests for transfer over multiple years. *Id.* at 1119-1120. And they "actively tried to conceal the amount of, and danger posed by, the mold." *Id.* at 1125. Thus, the "state-created danger in *Pauluk* was both open and notorious": the defendants "fully understood the risks of mold exposure and refused to remedy the problem or permit Pauluk to remedy it himself by transferring

workplaces for years." App. 29a (Nelson, J., dissenting).

The "differences between" *Pauluk* and *Polanco* "leap from the page." *Kisela*, 138 S. Ct. at 1154. The COVID-19 risk encountered by Polanco was "rapidly emerging and evolving," "did not persist over a matter of years," and was never "raised" by Polanco in a request for transfer or reassignment. App. 30a, 31a (Nelson, J., dissenting). Indeed, "[r]ather than request transfer or reassignment, Polanco volunteered to take on more shifts" during the pandemic. *Id.* at 30a-31a (Nelson, J., dissenting).

Despite the stark dissimilarity of the facts in *Grubbs* and *Pauluk* to the facts in this case, the Ninth Circuit majority selectively combined different aspects of those decisions to identify the "clearly established" law that petitioners are alleged to have violated. The majority concluded that *Grubbs* and *Pauluk* collectively establish liability when an employee encounters "danger in the course of carrying out employment duties in a correctional facility" and the danger arises from factors including "work[ing] in close proximity" to other people, "the physical conditions of the workplace," and "breathing contaminated air." App. 19a. But that hodgepodge approach to the qualified immunity inquiry only underscores the fact that "none of [the] precedents 'squarely governs' the facts here." *Mullenix*, 577 U.S. at 15. The majority "seems to have cherry-picked the aspects of [prior] opinions" that conceivably relate to the unique factual circumstances in this case. *al-Kidd*, 563 U.S. at 743.

Not only did *Grubbs* and *Pauluk* fail to give "fair notice" that the conduct alleged here clearly violated substantive due process, other authority shows that it

did not. This Court has explained that public employers have no general constitutional duty to "provide . . . employees with a safe working environment." *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992). To rise to the level of a due process violation, state-created workplace dangers must be "arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 128. Circuit courts have repeatedly rejected due process claims brought by prison employees who were exposed to dangerous conditions in their workplace.[2] And the First Circuit recently held that *Pauluk* was "not sufficiently analogous" to a case involving a public employee's exposure to COVID-19 in an institutional setting "to have clearly established" a violation of that employee's due process rights. *Ablordeppey v. Walsh*, 85 F.4th 27, 34 (1st Cir. 2023) (distinguishing facts in *Pauluk* from "the rapidly evolving situation at" state-funded healthcare facility "in the face of a global pandemic").

B. The Ninth Circuit Has Now Repeatedly Applied *Polanco*'s Erroneous Approach in the Eighth Amendment Context

Within two months of its decision in *Polanco*, the Ninth Circuit applied the same mistaken understanding of qualified immunity in *Hampton*, where it addressed an inmate's Eighth Amendment claim

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[2] *See Kaucher v. County of Bucks*, 455 F.3d 418, 421, 428 (3d Cir. 2006) (prison officials did not violate due process by "creating unsanitary and dangerous conditions" that led to correctional officers contracting staph infections); *Fraternal Order of Police Dep't v. Williams*, 375 F.3d 1141, 1144-1147 (D.C. Cir. 2004) (prison officials did not violate due process by creating dangerous conditions when they reduced number of guards while increasing number of inmates); *Wallace v. Adkins*, 115 F.3d 427, 427, 430 (7th Cir. 1997) (prison officials did not violate due process by assigning guard to work near a "particularly violent inmate").

supported by "virtually identical allegations." App. 80a. After surveying Supreme Court and circuit precedent, the court "described the 'contours' of the relevant Eighth Amendment right" as "an inmate's right to be free from exposure to a serious disease." *Id.* at 101a, 102a. Even if that were an accurate characterization of modern Eighth Amendment jurisprudence, it "is far too general a proposition to control this case." *Sheehan*, 575 U.S. at 613. And once again, the Ninth Circuit failed to identify any "existing precedent [that] 'squarely governs' the specific facts at issue" here and would have provided the defendants with "fair notice that [their] conduct was unlawful." *Kisela*, 138 S. Ct. at 1152, 1153.

In the *Hampton* court's view, the right allegedly violated by defendants was "clearly established since at least 1993, when the Supreme Court decided *Helling v. McKinney*, 509 U.S. 25 (1993)." App. 102a. That case held that an inmate's Eighth Amendment claim based on sustained exposure to a cellmate "who smoked five packs of cigarettes a day" could be premised on the "risk of serious damage to his future health" rather than an allegation of "current serious health problems." *Helling*, 509 U.S. at 28, 34, 35. In explaining that holding, the Court offered a hypothetical aside, positing that it would not reject a claim that prison officials were "deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious *current* symptoms." *Id.* at 33 (emphasis added); *see also id.* ("[A] prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery."). But the Court's acknowledgment that there may be *some* circumstances in which deliberate exposure to a communicable disease could violate the

Eighth Amendment hardly establishes (clearly or otherwise) "the violative nature of [the] *particular* conduct" alleged here, concerning defendants' attempts to grapple with the evolving COVID-19 pandemic. *Mullenix*, 577 U.S. at 12.[3]

Nor do any of the circuit cases invoked by the *Hampton* panel establish that the conduct alleged here clearly violates the Eighth Amendment. Two of those cases involved general concerns about poor ventilation in prison facilities. *See Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985). The third affirmed a class-certification order in a case presenting wide-ranging allegations of systemic Eighth Amendment violations. *See Parsons v. Ryan*, 754 F.3d 657, 662 (9th Cir. 2014) (reviewing "numerous policies and practices of statewide application governing medical care, dental care, mental health care, and conditions of confinement"). In the final case, an inmate was forced to clean insulation containing asbestos from a prison attic for 45 hours. *See Wallis v. Baldwin*, 70 F.3d 1074, 1075 (9th Cir. 1995). By contrast, a more recent circuit decision *sustained* a qualified immunity defense on facts more analogous to the present case. *See Hines v. Youseff*, 914 F.3d 1218, 1223, 1229 (9th Cir. 2019) (holding that any Eighth Amendment right of inmates

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[3] *Helling* also cited a Fifth Circuit decision, *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), holding that inmates suffered an Eighth Amendment violation in a case where the defendant prison officials "admitted" that their facility had "rampant" unsafe and "[u]nsanitary conditions." *Id.* at 1300, 1303. As part of a long inventory of those conditions, the Fifth Circuit mentioned that "[s]ome inmates with serious contagious diseases are allowed to mingle with the general prison population." *Id.* at 1300. But that consideration was neither necessary to the holding nor sufficient to support it.

"to be free from heightened exposure to Valley Fever," an airborne disease, "was not clearly established").

It is perhaps telling that, when the court below analyzed the threshold question of whether the complaint "has alleged a violation of Hampton's Eighth Amendment rights," it identified *Polanco* as the "control[ling]" circuit authority on the subjective component of its analysis. App. 93a, 97a. Of course, *Polanco* was decided long *after* the conduct alleged here. So that decision "could not have given fair notice" to the defendants named in Hampton's complaint. *Kisela*, 138 S. Ct. at 1154; *see id.* ("[A] reasonable officer is not required to foresee judicial decisions that do not yet exist" at the time of his actions). If the relevant constitutional right at issue here was clearly established in 1993 (as the panel asserted, *see* App. 102a), then the panel's near-exclusive reliance on *Polanco* for the subjective portion of its constitutional analysis would have made little sense, *see id.* at 96a-100a.

And unlike all of the pre-*Polanco* cases relied on by the panel below, *Hampton* involved a novel and highly contagious disease, about which public health "guidance was uncertain, developing, and consistently changing" at the time of the alleged conduct. App. 29a-30a. The Ninth Circuit denied qualified immunity without identifying any "case where an officer acting under similar circumstances . . . was held to have violated the" Eighth Amendment. *White*, 580 U.S. at 79; *see also* App. 181a (affirming the denial of qualified immunity in *Cooper* and *Harris*). "Qualified immunity is no immunity at all if 'clearly established' law can simply be defined" as a broad and absolute right—divorced from any context—to be free from exposure to a serious disease. *Sheehan*, 575 U.S. at 613.

II. THIS PETITION PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

This Court has emphasized that "qualified immunity is important to 'society as a whole.'" *White*, 580 U.S. at 79. As "an immunity from suit rather than a mere defense to liability," *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), qualified immunity is intended to spare government officials not only the obligation to stand trial, but also "the burdens of 'such pretrial matters as discovery,'" which "'can be peculiarly disruptive of effective government,'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (emphasis omitted). When lower courts improperly allow suits to proceed against government officials, it "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

With those considerations in mind, this Court "'repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Pearson*, 555 U.S. at 232. And when lower courts ignore the requirements of this doctrine, the Court has "found [it] necessary" to "issue[] a number of opinions reversing federal courts in qualified immunity cases"—and to "reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White*, 580 U.S. at 79.

The decisions of the Ninth Circuit here warrant similar treatment. By defining clearly established law at a high level of generality in the context of the "due process right to be free from a state-created-danger," App. 8a, the *Polanco* decision threatens to expand the scope of liability in suits brought by public employees

advancing novel theories of exposure to injury, illness, or other harm. That could chill the good-faith efforts of government officials to manage crises and protect individuals who are already in danger—due to a well-grounded fear that taking *any* action might create some risks to employees that could spawn litigation. *See, e.g.*, *Anderson*, 483 U.S. at 638. And the Ninth Circuit's broad conception in *Hampton* of what is "clearly established" under the Eighth Amendment will only compound that concern in the prison context.

More broadly, the court of appeals' "rel[iance] on the intersection of multiple cases" with dissimilar facts to support its "clearly established" legal rule (App. 17a n.8) provides a template for litigants and courts to evade the requirements of qualified immunity—by "cherry-pick[ing]" certain aspects of prior opinions in disparate cases, *al-Kidd*, 563 U.S. at 743. The *Polanco* majority reserved the possibility that defendants "may be entitled to qualified immunity at a later stage of this litigation," App. 20a n.9, but that is "cold comfort," *id.* at 30a n.2 (Nelson, J., dissenting). It ignores the fact that "[t]he 'driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery.'" *Id.* (Nelson, J., dissenting).

The dissent below predicted that if the decision in *Polanco* remained in place it would be "dangerous to . . . future precedent" in the Ninth Circuit. App. 32a (Nelson, J., dissenting). That prediction was borne out within two months, when the Ninth Circuit relied on *Polanco* to deny qualified immunity in *Hampton* based on a purported Eighth Amendment right defined at a similarly high level of generality. *Id.* at 92a-103a.

Days later, the Ninth Circuit invoked the "clearly established" Eighth Amendment right recognized in *Hampton* to deny qualified immunity in nine additional prisoner lawsuits. *Id.* at 184a-185a.

Those rulings will have dramatic and immediate practical consequences, given that the May 2020 inmate transfer allegedly infected over two thousand inmates. App. 83a. The outbreak has already led to over 50 lawsuits in total, and the Ninth Circuit's recent decisions may encourage the filing of additional complaints.[4] Absent this Court's intervention, the prison officials in those cases will soon be subject to contentious discovery and other burdensome proceedings—even though they never had a "'fair and clear warning'" that their conduct at the outset of an unprecedented pandemic violated the Constitution. *Sheehan*, 575 U.S. at 617.

But the harmful consequences of these decisions will not be limited to litigation about a particular outbreak of COVID-19. If the decisions in *Polanco* and *Hampton* remain in place, they will exacerbate the risk that courts in the Nation's largest judicial circuit will continue to circumvent this Court's qualified immunity precedent by defining clearly established law at a high level of generality. This Court has summarily reversed or granted plenary review with respect to prior judgments of the Ninth Circuit that created similar dangers for future precedent, and the Court's intervention is warranted here as well.

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[4] *Cf. Martinez v. Gomez*, 137 F.3d 1124, 1124-1126 (9th Cir. 1998) (per curiam) (recognizing statute of limitations as long as four years for inmate civil rights claims).

CONCLUSION

The petition for a writ of certiorari should be granted.

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