No. 23-722

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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

In opposing certiorari, respondents focus on the admittedly tragic facts of these cases. *See* Opp. 1-10, 13-16. But this Court has recognized that qualified immunity may apply even when the conduct of government officials results in a loss of life, because a tragedy does not in itself justify exposing public servants to extensive liability. *See, e.g.*, *White v. Pauly*, 580 U.S. 73, 79-80 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. 7, 14 (2015) (per curiam). The operative question is whether precedent at the time of the conduct "clearly established" a constitutional violation—meaning that the "constitutional question [was] beyond debate." *White*, 580 U.S. at 79 (internal quotation marks omitted).

Even assuming that respondents' complaints adequately "allege[d] a constitutional violation" here, "it is not one that was clearly established" in May 2020—"a time which, it bears repeating, was during one of the most novel and disruptive pandemics in a century." Pet. App. 25a (Nelson, J., dissenting). Like the Ninth Circuit, respondents seek to avoid that conclusion by defining the relevant rights at a high level of generality: a broad due process right against "affirmatively expos[ing] an employee to workplace conditions" that are "likely to cause serious illness," Opp. 23, and an expansive Eighth Amendment right of inmates "to be free from exposure to a serious disease," Opp. 17. That approach ignores Supreme Court decisions admonishing lower courts and litigants for relying on "broad general proposition[s]" of law instead of precedent that gave public officials fair notice that particular conduct would violate the Constitution. *E.g.*, *Mullenix*, 577 U.S. at 12 (internal quotation marks omitted).

In light of the harmful consequences of the decisions below, *see* Pet. 19-21, the Court should either grant plenary review or summarily reverse—as it has repeatedly done when the Ninth Circuit has disregarded the requirements of qualified immunity. Respondents argue that the Court "cannot" take up this petition because of "disputed facts" that necessarily have not been resolved "at this motion-to-dismiss stage." Opp. 4, 16. But disputes of fact are irrelevant at this stage because the *alleged* facts do not state a violation of clearly established law. Respondents also ignore this Court's instruction that qualified immunity should be resolved "at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (internal quotation marks omitted). And respondents' suggestion that this case is unimportant (Opp. 29-32) cannot be reconciled with the reality that the decisions below directly affect scores of pending lawsuits, and portend a "dangerous" trend threatening "future precedent" in the Nation's largest judicial circuit, Pet. App. 32a (Nelson, J., dissenting).

ARGUMENT

I. THE NINTH CIRCUIT CONTRAVENED THIS COURT'S QUALIFIED IMMUNITY PRECEDENTS

"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 v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotation marks omitted); *see* Pet. 11-12. When courts fail to comply with that directive, they dodge the "dispositive question": "'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 577 U.S. at 12. That is precisely what the Ninth Circuit majority and respondents have done here.

1. Like the Ninth Circuit, respondents contend that circuit precedent "clearly established" that a government employer violates due process when it "affirmatively exposes an employee to workplace conditions that the employer knew were likely to cause serious illness." Opp. 23; *see* Pet. App. 19a (decision below).

Respondents principally rely on *Pauluk v. Savage*, 836 F.3d 1117 (9th Cir. 2016), asserting that it "does almost all the analytical work" here. Opp. 23-24. As the dissent below explained, however, "*Pauluk* does not clearly establish the law here with sufficient specificity": the "rapidly emerging and evolving challenge" of state prison officials' response to the early months of the COVID-19 pandemic was "simply different in kind" from the facts in *Pauluk*. Pet. App. 31a & n.4; *see* Pet. 13-14. Those facts included a "known and obvious danger" of toxic mold over several years; a government agency's "long and tortured history of pervasive mold problems in multiple buildings"; the defendants' decision to force an employee to work in one of those buildings; their indifference to his repeated complaints and transfer requests; and evidence that they "actively tried to conceal the amount of, and danger posed by, the mold." *Pauluk*, 836 F.3d at 1119, 1125.

Pauluk held that those particular facts amounted to a due process violation. It may support the broad proposition that, under some circumstances, government misconduct that exposes employees to obviously unsafe work conditions may be unconstitutional. But *Pauluk* hardly made it clear "beyond debate" (*White*, 580 U.S. at 79) (internal quotation marks omitted) that the very different conduct alleged here—in petitioners' transfer of vulnerable inmates to protect them

from a novel contagious disease—would violate Mr. Polanco's due process rights. To defeat qualified immunity, "precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). Respondents cannot satisfy that "demanding" requirement by invoking *Pauluk*. *Id.*; *see also Ablordeppey v. Walsh*, 85 F.4th 27, 34 (1st Cir. 2023) ("[G]iven the rapidly evolving situation at [a healthcare facility] in the face of a global pandemic, *Pauluk* is not sufficiently analogous to the present case so as to have clearly established that Appellees would be violating Appellant's rights.").[1]

Even the court below recognized that *Pauluk* alone did not "put public officials on notice" that the circumstances here would violate due process. Pet. App. 19a. It instead relied "on the intersection of multiple cases," contending that "the combination of" *Pauluk* and *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), clearly established that the conduct alleged here was unconstitutional. Pet. App. 17a & n.8, 19a.

But the majority's assertion that "*Grubbs* presents a close analogy to this case" (Pet. App. 18a) is untenable. As Judge Nelson recognized, "[t]he facts of *Grubbs* deeply contrast with those here." *Id.* at 27a. The defendants in *Grubbs* affirmatively exposed the plaintiff to a known risk of rape by a violent sex offender, then "enhanced [her] vulnerability to attack by misrepresenting to her the risks attending her work." 974 F.2d at 121; *see* Pet. 13. That case "does nothing to clearly

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[1] Contrary to respondents' assertion (Opp. 27), the First Circuit's holding about *Pauluk* did not turn on the fact that the outbreak in *Ablordeppey* occurred slightly before the outbreak here.

establish the law for the constitutional standards of an invisible, non-human, and novel global virus wafting through the air." Pet. App. 28a (Nelson, J., dissenting). It is telling that respondents all but disclaim reliance on *Grubbs*, invoking it only for the narrow (and uncontested) proposition that the state-created danger doctrine can apply in prisons. *See* Opp. 23-25.

2. As to the Eighth Amendment, respondents track the Ninth Circuit in describing the "clearly established" constitutional rule as the right of an inmate "to be free from exposure to a serious disease." Opp. 17 (quoting Pet. App. 102a). They insist that "the law clearly put [petitioners] on notice of the relevant legal principle[] that ignoring a known risk of communicable disease is unlawful." *Id.* at 21.

Again, respondents define the rule at far too high a level of generality. The "clearly established" inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition.*"* *Mullenix*, 577 U.S. at 12 (internal quotation marks omitted). In Fourth Amendment cases, for instance, the relevant legal rule may not be defined as the "'right to be free of excessive force.'" *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam). In the First Amendment context, the rule may not be defined as "the general right to be free from retaliation for one's speech." *Reichle v. Howards*, 566 U.S. 658, 665 (2012). Respondents' characterization of the relevant Eighth Amendment principle is not meaningfully more specific than those other broad characterizations that this Court has rejected.

And even if respondents' characterization could theoretically constitute "clearly established" law, no precedent actually establishes it. Respondents assert that *Helling v. McKinney*, 509 U.S. 25, 33 (1993),

placed the Eighth Amendment question in this case "beyond debate." Opp. 18 (internal quotation marks omitted). But they acknowledge that *Helling*'s "specific holding" had nothing to do with communicable diseases, let alone novel viruses like COVID-19. *See id.* That holding instead concerned the known danger of sustained exposure to secondhand smoke from a cellmate who smoked five packs of cigarettes a day. *Helling*, 509 U.S. at 35. The Court's brief dicta about a "serious, communicable disease" merely illustrated the point that the Eighth Amendment can "protect[ ] against future harm to inmates" and is not limited to circumstances where "the complaining inmate shows . . . current symptoms." *Id.* at 33; *see* Pet. 16-17.

Respondents do not identify any Ninth Circuit precedent extending *Helling* to hold that conduct similar to that alleged here violates the Eighth Amendment.[2] Nor do they discuss any of the four inapposite Ninth Circuit cases invoked by the panel below, *see* Pet. 17, or defend the panel's assertion that those cases support its analysis of "clearly established" law, *see* Pet. App. 103a. The only prior Ninth Circuit case that respondents discuss (Opp. 20) is a decision *upholding* qualified immunity in the face of an asserted "right to be free from heightened exposure to" fungal spores that caused a disease. *Hines v. Youseff*, 914 F.3d 1218, 1229 (9th Cir. 2019). Neither that decision,

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[2] Respondents do discuss out-of-circuit precedent (Opp. 18-19 & n.7), which could not have given petitioners fair notice that their conduct violated the Constitution. The only case presenting remotely similar facts is an unpublished Second Circuit decision that post-dates the decision below and relies not just on *Helling* but also on Second Circuit precedent. *See Nazario v. Thibeault*, 2023 WL 7147386, at *2 (2d Cir. Oct. 31, 2023).

nor any Supreme Court or Ninth Circuit precedent, established beyond debate that the conduct alleged here violated the Eighth Amendment.

3. By defining "clearly established" law at a high level of generality, the Ninth Circuit contravened this Court's precedent and defeated the purpose of qualified immunity. "Qualified immunity is no immunity at all if 'clearly established' law can . . . be defined" in terms so broad or generic that reasonable officials lack clear guidance about what particular conduct violates the Constitution. *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015). Of course, that result would not trouble respondents—they believe that "qualified immunity is fundamentally unjustified" and have asked this Court to "overturn" it. Opp. 28. But the Court has consistently denied similar requests. *See* Opp. to Cross-Pet. 3-4. And it has repeatedly intervened when federal circuits—"and the Ninth Circuit in particular"—failed to define clearly established law at the proper level of generality. *E.g.*, *Kisela*, 138 S. Ct. at 1152. The same result is warranted here.

II. THIS COURT SHOULD GRANT PLENARY REVIEW OR SUMMARILY REVERSE

Indeed, further review by this Court is especially appropriate here. The Ninth Circuit's flawed analysis will directly affect at least nine appeals and scores of pending lawsuits stemming from the same events, exposing state officials to burdensome litigation and discovery. Pet. 6-10, 20-21. And the harm to "future precedent" in other contexts may be even "more dangerous" given the Ninth Circuit's "disregard[]" for "the clearly established inquiry." Pet. App. 32a (Nelson, J., dissenting). Respondents nonetheless assert that "this Court's review is unwarranted." Opp. 4.

1. Respondents contend that "[f]actual disputes preclude review." Opp. 13. That misunderstands the posture of these cases. Petitioners appealed from the denial of their motions to dismiss. *See* Pet. 6-9. The lower courts thus assumed the truth of the allegations in the complaints. *See, e.g.*, Pet. App. 3a n.1, 80a. The petition therefore presents "a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Resolving that question requires considering "the factual allegations" in the complaints and comparing them to precedent, but it does not require deciding "the correctness" of the facts alleged. *Id.*

Respondents assert that "this Court does not and cannot review qualified immunity rulings where disputes of fact exist," observing that, "at this motion-to-dismiss stage, disputed facts abound." Opp. 4, 16. If respondents mean that this Court cannot review qualified immunity rulings at the pleading stage, they are mistaken: the Court has repeatedly reversed denials of qualified immunity in this posture. *See, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 155 (2017); *Wood v. Moss*, 572 U.S. 744, 754-755, 764 (2014); *Ashcroft v. al-Kidd*, 563 U.S. 731, 734, 744 (2011). Indeed, it has "stressed the importance of resolving immunity questions at the earliest possible stage in litigation," *Pearson*, 555 U.S. at 232 (internal quotation marks omitted), and emphasized that qualified immunity is "important enough to support an immediate appeal" at the motion-to-dismiss stage. *Behrens v. Pelletier,* 516 U.S. 299, 308 (1996).

To support their position that it would be inappropriate for this Court to "revisit[]"qualified immunity at this stage, respondents invoke *Johnson v. Jones*,

515 U.S. 304 (1995), and *Ortiz v. Jordan*, 562 U.S. 180 (2011). *See* Opp. 15-16. But respondents misunderstand the significance of those decisions. In *Johnson*, this Court held that a district court's ruling on clearly established law may be reviewed through an interlocutory appeal from the denial of summary judgment, but that interlocutory review of the *separate* question of whether there is "a genuine issue of fact for trial" is impermissible. *Johnson*, 515 U.S. at 307, 317. In *Ortiz*, the Court held that a qualified immunity argument "going to the sufficiency of the evidence" must be raised in a post-verdict motion to be preserved for an appeal following final judgment. 562 U.S. at 190; *see id.* at 190-192. This petition does not raise the issues described in *Johnson* or *Ortiz*.

And respondents fail to appreciate *why* this Court favors early resolution of qualified immunity defenses. A primary purpose of "the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009). Litigation "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Id.* Even the threat of protracted litigation risks chilling the efforts of government officials to protect vulnerable people in emergent and novel crises. *See*, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Those concerns are at their apex when cases like these are allowed "to move beyond the motion-to-dismiss stage." Opp. 31-32.

2. Respondents next argue that "California officials faced no exigent circumstances" here, and that these cases are unlike "quintessential" qualified immunity cases involving car chases or armed suspects.

Opp. 29. But qualified immunity is not limited to cases involving "split-second decision[s]." *Id.* The doctrine can apply in any action seeking damages from public officials for an alleged statutory or constitutional violation. *See, e.g.*, *Ziglar*, 582 U.S. at 155 (challenge to post-9/11 detention policies); *Taylor v. Barkes*, 575 U.S. 822, 827 (2015) (per curiam) (challenge to prison's "suicide screening and prevention measures").

In any event, respondents ignore that the actions challenged here were "an attempt to prevent further harm" to "inmates with high-risk medical conditions" who were housed at a Southern California facility that was suffering a "severe outbreak." Pet. App. 4a; *see also, e.g.*, *Polanco* D. Ct. Dkt. 1 at 13. As explained in the inspector general report attached to the opposition, those inmates were "vulnerable to severe morbidity and mortality were they to contract COVID-19," and that facility had "limited capacity" to protect them. Opp. App. 14a. Petitioners transferred those inmates to guard against an exigent threat to their health—during an evolving pandemic marked by "uncertain, developing, and consistently changing" public health guidance. Pet. App. 29a-30a (Nelson, J., dissenting).[3]

3. Respondents also contend that the decisions below will not affect how qualified immunity is applied in the Ninth Circuit going forward. Opp. 30-31. That

[3] Respondents claim that these facts are "exceptional" and point to other decisions rejecting Eighth Amendment claims in the COVID-19 prison context. Opp. 30-31. But none of those cases concerned qualified immunity. All three decisions related to preliminary injunctions that mandated the transfer or release of inmates or required certain public health measures. *See Swain v. Junior*, 961 F.3d 1276, 1280 (11th Cir. 2020); *Wilson v. Williams*, 961 F.3d 829, 833 (6th Cir. 2020); *Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020).

cannot be squared with actual case-related developments. Within months of the *Polanco* decision, the Ninth Circuit relied on that decision to deny qualified immunity in *Hampton*. Pet. App. 96a-97a. Then it applied *Hampton* to deny qualified immunity in nine additional prisoner lawsuits. *Id.* at 184a-185a. The *Polanco* and *Hampton* decisions are likely to control the qualified immunity analysis in dozens of other pending cases as well. *See* Pet. 9-10. And these flawed decisions are controlling not just in California but in the other 10 jurisdictions within the Ninth Circuit. *Cf. Elliott v. Nevada*, 2023 WL 8604509, at *7 (D. Nev. Dec. 12, 2023) (citing *Hampton* in holding that prisoner arguably raised colorable Eighth Amendment claim regarding COVID-19 conditions).

Finally, respondents have no answer to the broader concern raised by the dissent below: that courts addressing qualified immunity outside the COVID-19 context will rely on *Polanco* and *Hampton* to define clearly established law at a high level of generality—including by "cherry-pick[ing]" aspects of multiple prior opinions to manufacture "clearly established" precedent. *al-Kidd*, 563 U.S. at 743; *see* Pet. App. 32a (Nelson, J., dissenting). Leaving these published decisions in place would exacerbate the troubling trend of lower courts "employing the high level of generality that the Supreme Court has chastised [the Ninth Circuit] for." Pet. App. 27a (Nelson, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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