

In the Supreme Court of the United States

PATRICIA POLANCO, *et al.*,

Cross-Petitioners,

v.

RALPH DIAZ, *et al.*,

Cross-Respondents.

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

BRIEF FOR CROSS-RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should reverse or recalibrate the doctrine of qualified immunity.

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STATEMENT

The petition for a writ of certiorari in No. 23-722 describes the background of these four related cases, in which the Ninth Circuit affirmed the denial of qualified immunity to state officials in suits arising out of an outbreak of COVID-19 at a state prison. *See Pet.* 4-10.¹ The conditional cross-petition for a writ of certiorari in No. 23-842 presents broad arguments for reversing or “reexam[in]ing in whole” the doctrine of qualified immunity, Cross-Pet. 2, which do not turn on the facts or procedural histories of these cases, *see id.* at 10-33. In reciting the background facts, the cross-petition paraphrases (*see id.* at 3-9) the factual allegations in some of the underlying complaints. But it is the actual wording of the complaint allegations (not cross-petitioners’ subsequent gloss on them) that is relevant in reviewing the denial of cross-respondents’ motions to dismiss those complaints on qualified immunity grounds. *See* Sup. Ct. R. 15.2; *see generally* *Ashcroft v. Iqbal*, 556 U.S. 662, 677-679 (2009).

ARGUMENT

Cross-respondents filed the petition for a writ of certiorari in No. 23-722, which presents the question “[w]hether 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.” Pet. i. As explained in that petition, this Court should either grant plenary review on that question or summarily reverse

¹ This brief uses “Pet.” to refer to the petition for a writ of certiorari in No. 23-722 and “Cross-Pet.” to refer to the conditional cross-petition for a writ of certiorari in No. 23-842.

the judgments below. *See id.* at 10-22. The cross-petitioners here, who are the respondents in No. 23-722, ask this Court to “overturn[] or reexamine[] in whole” the doctrine of qualified immunity “in the event the Court grants certiorari in No. 23-722.” Cross-Pet. 1, 2. But cross-petitioners have failed to identify any persuasive reason why this Court should embark on a wholesale re-assessment of that long-settled doctrine in this case.

Under the doctrine of qualified immunity, “government officials performing discretionary functions generally are shielded from liability for civil damages” unless their conduct “violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known” at the time the conduct occurred. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To overcome qualified immunity, a plaintiff must show that precedent placed the illegality of the challenged conduct “beyond debate.” *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). Qualified immunity thus “gives government officials breathing room to make reasonable but mistaken judgments.” *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611 (2015); *see also Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (doctrine “shield[s] officials from harassment, distraction, and liability when they perform their duties reasonably”).

This Court has recognized and applied the doctrine of qualified immunity for decades. *See, e.g., Harlow*, 457 U.S. at 818-819. Given “the importance of qualified immunity ‘to society as a whole,’ the Court often corrects lower courts when they wrongly subject individual officers to liability.” *Sheehan*, 575 U.S. at 611 n.3 (internal citation omitted); *see also White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam). It has done so

very recently. *See, e.g., City of Tahlequah, Okla. v. Bond*, 595 U.S. 9, 14 (2021) (per curiam); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6-8 (2021) (per curiam).² And it has “repeatedly stressed” that lower courts must not define clearly established rights at a high level of generality, *e.g.*, *Wesby*, 583 U.S. at 63-64, as the Ninth Circuit did here, *see* Pet. 12-18.

This Court has also repeatedly denied petitions advancing the question presented by this conditional cross-petition—more than two dozen times between 2018 and 2023. *See Hulbert v. Pope*, cert. denied, No. 23-385 (Dec. 11, 2023); *Rogers v. Jarrett*, cert. denied, No. 23-93 (Oct. 2, 2023); *N.S. v. Kan. City Bd. of Police Comm’rs*, cert. denied, No. 22-556 (June 30, 2023); *Holloway v. City of Milwaukee, Wis.*, cert. denied, No. 22-589 (Apr. 3, 2023); *Lewis v. City of Edmond, Okla.*, cert. denied, No. 22-675 (Mar. 27, 2023); *Haworth v. City of Walla Walla, Wash.*, cert. denied, No. 22-632 (Mar. 6, 2023); *Novak v. City of Parma, Ohio*, cert. denied, No. 22-293 (Feb. 21, 2023); *Gordon v. Bierenga*, cert. denied, No. 21-1540 (Oct. 11, 2022); *Stallworth v. Hurst*, cert. denied, No. 21-1501 (Oct. 3, 2022); *Cope v. Cogdill*, cert. denied, No. 21-783 (June 30, 2022); *Clark v. Stone*, cert. denied, No. 21-709 (Jan. 10, 2022); *Cates v. Stroud*, cert. denied, No. 20-1438 (Oct. 12, 2021); *Advantageous Cmty. Servs., LLC v. King*, cert. denied, No. 20-1524 (Oct. 4, 2021); *Quinette v. Reed*, cert. denied, No. 20-1336 (June 1, 2021); *King v. Pridmore*, cert. denied, No. 20-877 (Apr. 19, 2021); *Liberti v. City of Scottsdale, Ariz.*, cert. denied, No. 20-876 (Feb. 22, 2021); *Reich v. City of Elizabethtown, Ky.*,

² *See also Thompson v. Clark*, 596 U.S. 36, 48-49 (2022) (rejecting concerns about “unwarranted” suits based on malicious prosecution because “officers are still protected . . . by qualified immunity”).

cert. denied, No. 20-43 (Oct. 5, 2020); *Fijalkowski v. Wheeler*, cert. denied, No. 19-1416 (Oct. 5, 2020); *Cooper v. Flraig*, cert. denied, No. 19-1001 (June 22, 2020); *Corbitt v. Vickers*, cert. denied, No. 19-679 (June 15, 2020); *Zadeh v. Robinson*, cert. denied, No. 19-676 (June 15, 2020); *Baxter v. Bracey*, cert. denied, No. 18-1287 (June 15, 2020); *Sensabaugh v. Halliburton*, cert. denied, No. 19-771 (Feb. 24, 2020); *I.B. v. Woodard*, cert. denied, No. 18-1173 (May 20, 2019); *Lowe v. Raemisch*, cert. denied, No. 17-1289 (Oct. 9, 2018); *Apodaca v. Raemisch*, cert. denied, No. 17-1284 (Oct. 9, 2018); *Spencer v. Abbott*, cert. denied, No. 17-1397 (Oct. 1, 2018).

Indeed, the Court recently denied several more petitions raising this issue—including two presenting an identically worded question and making similar arguments. *See Jackson v. Dutra*, cert. denied, No. 23-514 (Mar. 25, 2024) (“Whether the Court should reverse or recalibrate the doctrine of qualified immunity.”); *Martinez v. Jenneiahn*, cert. denied, No. 23-611 (Feb. 20, 2024) (same); *Felkner v. Nazarian*, cert. denied, No. 23-274 (Feb. 20, 2024) (similar); *Molina v. Book*, cert. denied, No. 23-227 (Feb. 20, 2024) (similar).

Cross-petitioners do not identify any persuasive reason why the Court should reach a different outcome with respect to their conditional cross-petition. They do not contend that this case would present a better vehicle for deciding the question than the many recent cases in which the Court has denied review. They merely assert that this case presents a “suitable vehicle” because the “question about what it means for the law to be clearly established for qualified immunity purposes” is one that “presupposes that qualified immunity is good law.” Cross-Pet. 33. Of course, that would be equally true of any decision applying the

qualified immunity doctrine—and was true in the dozens of recent cases in which this Court denied review of that question.

Nor does this case involve the kinds of factual circumstances that have sometimes prompted members of this Court to criticize aspects of the qualified immunity doctrine. For example, this is not a case in which the application of qualified immunity would encourage police officers to “shoot first and think later” in routine encounters with civilians. *E.g., N.S. v. Kan. City Bd. of Police Comm’rs*, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting from denial of cert.) (internal quotation marks omitted). On the contrary, this case is an especially compelling illustration of why qualified immunity matters: to protect individual officers’ ability to act in the face of novel circumstances not governed by clearly established law—here, managing a prison system during the early months of an unprecedented global pandemic. *See* Pet. 4-5, 10-18. Allowing these suits to proceed (along with dozens of others arising from the same facts, *see id.* at 21) would “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” during novel crises in the future. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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