No. 23-842

In the Supreme Court of the United States

PATRICIA POLANCO, *et al.*,
Cross-Petitioners,

v.

RALPH DIAZ, *et al.*,
Cross-Respondents.

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

REPLY BRIEF FOR CROSS-PETITIONERS

MICHAEL J. HADDAD
JULIA SHERWIN
TERESA ALLEN
Haddad & Sherwin LLP
505 17th Street
Oakland, CA 94612

Counsel for Patricia Polanco, Vincent Polanco, Selena Polanco, Gilbert Polanco, Michael Hampton, Jacqueline Hampton, Daniel Ruiz, Santos Ruiz, Fernando Vera, Vanessa Robinson, Daniel Ruiz, Jr., Angelina Chavez, Eric Warner, and Henry Warner

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
GRACE WALLACK
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Cross-Petitioners

Additional Counsel on Inside Cover

FULVIO FRANCISCO CAJINA
Law Office of Fulvio F. Cajina
528 Grand Avenue
Oakland, CA 94610

ANDREW NEILSON
Law Offices of Andrew Neilson
528 Grand Avenue
Oakland, CA 94610

Counsel for Karen Legg and Michelle Legg

NANCY L. HERSH
Hersh & Hersh LLP
Suite 2080
601 Van Ness Avenue
San Francisco, CA 94102

CHARLES C. KELLY, II
Hersh & Hersh
1388 Sutter Street
Suite 1210
San Francisco, CA 94109

MATTHEW CARLSON
Law Office Of Matthew D. Carlson
3959 N Buffalo Road
Suite 29
Orchard Park, NY 14127

BEN ROSENFELD
3163 Mission Street
San Francisco, CA 94110

Counsel for Reginald Thorpe

DAN STORMER
BRIAN OLNEY
DAVID CLAY WASHINGTON
Hadsell Stormer Renick & Dai, LLP
128 N Fair Oaks Ave.
Suite 204
Pasadena, CA 91103

SALOMON ZAVALA
Zavala Law Group
1930 Wilshire Blvd, #817
Los Angeles, CA 90057

DO KIM
Law Offices of Do Kim
Suite 2700
3435 Wilshire Blvd
Los Angeles, CA 90001

Counsel for Joaquin Diaz, Hilda Diaz, Yadira Menchu, and Blanca Diaz Houle

BRIAN A. FORD
Law Offices of Brian A. Ford
3330 Geary Boulevard
3rd Floor East
San Francisco, CA 94118

Counsel for Tyrone Love

STANLEY ROBERT APPS
4424 Bellingham Ave.
Studio City, CA 91604

Counsel for Donte Lee Harris, Kenneth Allan Cooper, and Matthew K. Quale, Jr.

TABLE OF CONTENTS

Table of Authorities..... ii
Reply Brief for Cross-Petitioners.....1
Conclusion 4

TABLE OF AUTHORITIES

Cases

Baxter v. *Bracey*,
140 S. Ct. 1862 (2020).....2

Helling v. *McKinney*,
509 U.S. 25 (1993).....1

Kingsley v. *Henderson*,
576 U.S. 389 (2015).....3

Malley v. *Briggs*,
475 U.S. 335 (1986).....4

Nazario v. *Thibeault*,
2023 WL 7147386 (2d Cir. 2023).....1

United States v. *Tinklenberg*,
563 U.S. 647 (2011).....3

In re Von Staich
56 Cal. App. 5th 53 (2020).....1

Zadeh v. *Robinson*,
928 F.3d 457 (5th Cir. 2019).....2

Other Authorities

Stephen M. Shapiro *et al.*, *Supreme Court Practice* 492 (10th ed. 2013).....3

REPLY BRIEF FOR CROSS-PETITIONERS

A. As we have explained, the California prison officials' petition in No. 23-722 presents no question warranting this Court's review: The court of appeals and multiple district courts properly applied clearly established law to the officials' "textbook * * * deliberate indifference." Pet. App. 15a. Indeed, as the California Office of the Inspector General found, these officials "ignor[ed] concerns from health care staff" and "risked the health and lives" of "thousands" in order to meet a "self-imposed deadline," thereby causing "the worst epidemiological disaster in California correctional history." Supp. App. 4a, 21a (quoting *In re Von Staich* 56 Cal. App. 5th 53, 57 (2020)), 41a. That conduct was not reasonable under any standard, and qualified immunity does not protect it.

In short, "[a]lthough COVID-19 may have been unprecedented, . . . the legal theory that [cross-petitioners] assert[] is not" (Pet. App. 103a (quotation marks omitted)), and the California officials' protestations about COVID's novelty raise essentially factual disputes rather than cognizable legal questions about clearly established law. See, *e.g.*, *Helling* v. *McKinney*, 509 U.S. 25, 33 (1993) (explaining that "deliberate[] indifferen[ce] to the exposure of inmates to a serious, communicable disease" would violate the Eighth Amendment); *Nazario* v. *Thibeault*, 2023 WL 7147386, at *2 (2d Cir. 2023) (relying on *Helling* as clearly established law in the COIVD-19 context, and concluding that arguments about what "a reasonable official" would "have understood * * * in the pandemic's early stages" raised factual questions not resolvable on summary judgment). Further review at this preliminary stage is thus unwarranted.

Should the Court disagree, however, it should also take up the logically prior question of whether qualified immunity is justified in the first place. As we have explained at length, a growing number of Justices and judges are urging the Court to do just that, voicing unease both with immunity's historical and doctrinal foundations and with the outcomes it encourages. See, *e.g.*, *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1862-1864 (2020) (Thomas, J., dissenting from denial of cert.) ("Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition."); *Zadeh* v. *Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part) ("Even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence."); Cross-Pet. 11-13 (collecting cases). And there is good cause for this discomfort: Qualified immunity is wrong. See *id.* at 17-33. And, as we have described, allowing qualified immunity to continue foreclosing remedies for egregious constitutional violations, notwithstanding the outpouring of jurists who repeatedly describe the doctrine as legally flawed, damages public confidence in the judiciary. See *id*. at 14-15.

B. The prison officials offer little of substance in response. Notably, they do not even attempt to muster a defense of qualified immunity's legality on the merits.[1] The officials simply note that the Court has

---

[1] Indeed, the California Attorney General's unwillingness to articulate a merits defense of qualified immunity makes the officers' petition a uniquely poor vehicle for further review. While we have filed a conditional cross-petition to underscore the

previously denied petitions raising the same question. Opp. 2-4. But they provide no reason why the Court should grant *their* petition—which essentially raises only a case-specific request for error correction—while failing to address the predicate issue of acknowledged systemic importance presented in the cross-petition: whether qualified immunity is justified in the first place.

The officials also highlight that their conduct does not involve the kind of split-second decisions that often give rise to qualified-immunity cases. Opp. 5. But if anything, that is all the more reason why qualified immunity should not apply here at all: Unlike an officer on the street "forced to make [a] split-second judgment[]—in circumstances that are tense, uncertain, and rapidly evolving" (*Kingsley* v. *Henderson*, 576 U.S. 389, 399 (2015) (quotation marks omitted)), the officials here had every opportunity "to slow down a little and do it right," as one executive implored them to do (Supp. App. 45a). But they made "a conscious decision" not to do so, instead "ignoring concerns from health care staff and transferring [122] medically vulnerable inmates" from an infected prison

---

importance of first addressing the legality of qualified immunity, cross-petitioners would nonetheless seek affirmance of the decisions below based on the illegality of qualified immunity, should the Court grant the officers' petition alone. See *United States* v. *Tinklenberg*, 563 U.S. 647, 661 (2011) (the Court may always consider "alternative grounds for affirmance"); Stephen M. Shapiro *et al.*, *Supreme Court Practice* 492 (10th ed. 2013) ("[A] party satisfied with the action of a lower court should not have to appeal from it in order to defend a judgment in his or her favor on any ground."). Since California does not appear willing to join issue on that question, further review would be improper.

to an un-infected one "even though the vast majority had not been recently tested for COVID-19." *Id.* at 4a, 16a; see Opp., No. 23-722, at 29-30. Predictably tragic results followed.

Again, our principal contention is that this egregious conduct is the kind of "plainly incompetent" behavior that does not warrant qualified immunity (*Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)), and that the officials' naked request for error correction should therefore be denied. But if the Court grants review, it is imperative that it review the entire set of issues presented here—including whether qualified immunity is justified to begin with.

CONCLUSION

The Court should deny the petition in No. 23-722. But if the Court grants review in No. 23-722, it should grant the conditional cross-petition as well.

Respectfully submitted.

MICHAEL J. HADDAD
JULIA SHERWIN
TERESA ALLEN
Haddad & Sherwin LLP
505 17th Street
Oakland, CA 94612

Counsel for Patricia Polanco, Vincent Polanco, Selena Polanco, Gilbert Polanco, Michael Hampton, Jacqueline Hampton, Daniel Ruiz, Santos Ruiz, Fernando Vera, Vanessa Robinson, Daniel Ruiz, Jr., Angelina Chavez, Eric Warner, and Henry Warner

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
GRACE WALLACK
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Cross-Petitioners

FULVIO FRANCISCO CAJINA
Law Office of Fulvio F. Cajina
528 Grand Avenue
Oakland, CA 94610

ANDREW NEILSON
Law Offices of Andrew Neilson
528 Grand Avenue
Oakland, CA 94610

Counsel for Karen Legg and Michelle Legg

NANCY L. HERSH
Hersh & Hersh LLP
Suite 2080
601 Van Ness Avenue
San Francisco, CA 94102

CHARLES C. KELLY, II
Hersh & Hersh
1388 Sutter Street
Suite 1210
San Francisco, CA 94109

MATTHEW CARLSON
Law Office Of Matthew D. Carlson
3959 N Buffalo Road
Suite 29
Orchard Park, NY 14127

BEN ROSENFELD
3163 Mission Street
San Francisco, CA 94110

Counsel for Reginald Thorpe

DAN STORMER
BRIAN OLNEY
DAVID CLAY WASHINGTON
Hadsell Stormer Renick & Dai, LLP
128 N Fair Oaks Ave.
Suite 204
Pasadena, CA 91103

DO KIM
Law Offices of Do Kim
Suite 2700
3435 Wilshire Blvd
Los Angeles, CA 90001

SALOMON ZAVALA
Zavala Law Group
1930 Wilshire Blvd, #817
Los Angeles, CA 90057

Counsel for Joaquin Diaz, Hilda Diaz, Yadira Menchu, and Blanca Diaz Houle

BRIAN A. FORD
Law Offices of Brian A. Ford
3330 Geary Boulevard
3rd Floor East
San Francisco, CA 94118

Counsel for Tyrone Love

STANLEY ROBERT APPS
4424 Bellingham Ave.
Studio City, CA 91604

Counsel for Donte Lee Harris, Kenneth Allan Cooper, and Matthew K. Quale, Jr.

April 22, 2024