

No. 19A-__

In the Supreme Court of the United States

JOSEPH A. ZADEH and JANE DOE,

Applicants,

v.

MARI ROBINSON, et al.,

Respondents.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO
FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE AND CIRCUIT JUSTICE
FOR THE FIFTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicants Dr. Joseph A. Zadeh and his patient, Jane Doe, respectfully request a 30-day extension of time, to and including October 30, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The Fifth Circuit denied a timely request for rehearing en banc on July 2, 2019. Unless extended, the time to file a petition for a writ of certiorari will expire on September 30, 2019. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

A copy of the Fifth Circuit's original opinion is attached as Exhibit A. A copy of the substitute opinion filed by the panel on applicants' petition for rehearing en banc is attached as Exhibit B.

1. This case arises from an incident that took place in Euless, Texas in 2013. Dr. Zadeh was the subject of an investigation by the Drug Enforcement Agency (DEA) for violations of the Texas Medical Board's regulations. Ex. B, at 2. Dr. Zadeh was also the subject of an administrative proceeding before the State Office of Administrative Hearings. *Ibid.*

Respondents Sharon Pease and Kara Kirby, investigators with the Board, attempted to serve an administrative subpoena at Dr. Zadeh's office on October 22, 2013, requiring the immediate production of Dr. Zadeh's patients' medical records. Ex. B, at 2-3. They were accompanied by two DEA agents. *Id.* at 3. Dr. Zadeh was not present when the investigators arrived, so they handed the subpoena to his assistant. *Ibid.* While the investigators sat in the waiting room, Dr. Zadeh's assistant spoke with Dr. Zadeh, his lawyer, and his brother. *Ibid.* No permission to proceed was given by the assistant, but following the phone calls, the investigators told her that they would suspend Dr. Zadeh's medical license if she did not produce the records they requested. *Ibid.* The assistant complied and delivered the records to the investigators. *Ibid.*

2. Dr. Zadeh, along with one his patients, sued respondents pursuant to 42 U.S.C. § 1983, asserting violations of the Fourth Amendment. Ex. B, at 2. The district court granted respondents' motion for summary judgment on qualified immunity grounds. *Ibid.*

3. The court of appeals affirmed. The panel held that respondents' conduct could not be justified as a valid warrantless administrative search, and thus that

“there was a violation of Dr. Zadeh’s constitutional rights.” Ex. A, at 12. However, the panel concluded, “the unlawfulness of [respondents’] conduct was not clearly established at the time of the search,” and respondents were therefore shielded by qualified immunity. *Id.* at 15.

Judge Willett initially concurred *dubitante*, “writ[ing] separately to register [his] disquiet over the kudzu-like creep of the modern immunity regime.” Ex. A, at 21. He agreed with the panel that Dr. Zadeh’s Fourth Amendment rights were violated, but decried the fact that “[o]wing to a legal *deus ex machina*—the ‘clearly established law’ prong of qualified immunity analysis—the violation eludes vindication.” *Ibid.* See also *id.* at 23 (“The current ‘yes harm, no foul’ imbalance leaves victims violated but not vindicated; wrongs are not righted, wrongdoers are not reproached, and those wronged are not redressed.”).

4. Applicants petitioned for rehearing en banc. On rehearing, the panel withdrew its prior opinion and issued a new one, adding further analysis but maintaining its conclusion that while “there was a violation of Dr. Zadeh’s constitutional rights,” “the unlawfulness of the defendants’ conduct was not clearly established at the time of the search.” Ex. B, at 1, 13, 18.

This time, Judge Willett dissented in relevant part: “[D]eeper study has convinced me that the officials’ constitutional misstep violated clearly established law, not a previously unknown right. And it has reaffirmed by broader conviction that the judge-made immunity regime ought not be immune from thoughtful reappraisal.” Ex. B, at 25-26.

5. The petition for certiorari will demonstrate that review is warranted on at least the following question: whether the doctrine of qualified immunity should be narrowed or revisited entirely.

Indeed, there is “growing concern” about the lawfulness of qualified immunity among judges, scholars, and Justices of the Court. *Ziglar v. Abbasi*, 137 S. Ct. 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part); see also, e.g., *id.* at 1872 (“Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.”); Ex. A, at 23-24 (Willett, J., concurring *dubitante*) (“I add my voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence and its real world implementation.”) (quotation marks omitted); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 46-49 (2018) (answering that question in the affirmative); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1799 (2018) (“If the Court did find an appropriate case to reconsider qualified immunity * * * the Court could not justify the continued existence of the doctrine in its current form.”).

6. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel of record was retained only recently and has not yet had an opportunity to familiarize himself with the full record and issues involved. Undersigned counsel also has several other matters with proximate due dates before this Court, including a reply in support of certiorari due on September

23, 2019, in *Nasrallah v. Barr*, No. 18-1432; a petition for a writ of certiorari due on October 3, 2019, in *Texas Brine Company v. Florida Gas Transmission Company, et al.*, No. 19A-106; oral argument on October 16, 2019, in *Kansas v. Garcia*, No. 17-834; and a merits reply brief due on November 20, 2019, in *Guerrero-Lasprilla v. Barr*, No. 18-776, and *Ovalles v. Barr*, No. 18-1015.

For the foregoing reasons, the application for a 30-day extension of time, to and including October 30, 2019, within which to file a petition for a writ of certiorari in this case should be granted.

September 16, 2019

Respectfully submitted.



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