

No. 26-180

IN THE
Supreme Court of the United States

EDWARD ALLYN HUDACKO,

Petitioner,

v.

REGENTS OF THE UNIVERSITY
OF CALIFORNIA, *et al.*,

Respondents.

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

**BRIEF OF *AMICUS CURIAE* DEFENSE OF
FREEDOM INSTITUTE FOR POLICY STUDIES
IN SUPPORT OF PETITIONER**

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October 19, 2026

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STATEMENT OF INTEREST¹

Amicus curiae the Defense of Freedom Institute for Policy Studies (“DFI”) is a nonprofit, nonpartisan 501(c)(3) organization dedicated to defending and advancing educational freedom and opportunity for every American family, student, teacher, entrepreneur, and worker, and to protecting the civil and constitutional rights of Americans at school.

As part of its mission, DFI focuses on protecting parental rights like those threatened in this case. For example, DFI submitted an *amicus* brief in *Mahmoud v. Taylor*, 606 U.S. 522 (2025), and gave testimony at the U.S. House Subcommittee on Early Childhood, Elementary and Secondary Education hearing on Defending Faith and Families Against Government Overreach on the implications of *Mahmoud*, see *Defending Faith and Families Against Government Overreach: Mahmoud v. Taylor*: Hearing Before the Subcomm. on Early Childhood, Elementary, & Secondary Educ. of the H. Comm. on Educ. & Workforce, 119th Cong. (Feb. 10, 2026).

SUMMARY OF ARGUMENT

“It’s easier to ask for forgiveness than for permission” is a saying made famous by pioneering computer scientist Admiral Grace Hopper, as she cut through bureaucratic

1. No party or its counsel authored any of this brief, and no person other than *amicus curiae*, its members, or its counsel contributed monetarily to this brief. Undersigned counsel provided counsel of record timely notice of the *amicus*’s intention to file a brief more than ten days prior to the due date. Sup. Ct. R. 37.2.

red tape working heroically to improve the United States Navy's information technology systems. Sternod, *The Unstoppable Career of Rear Adm. Grace Hopper*, Naval History and Heritage Command (June 25, 2026) (available at <https://www.history.navy.mil/news-and-events/news/2026/code-commission-character-grace-hopper.html>). While this approach served Admiral Hopper well, the constitutional rights of parents are more than just bothersome bureaucratic red tape, and Admiral Hopper's approach should not be a way for imperious government officials to run roughshod over parental rights.

The UCSF Individuals² blew past a specific parental right well-established under the Fourteenth Amendment and expressly carved out in an enforceable court order to perform life-altering, elective surgery on a minor, assuming qualified immunity would forgive them later.

The proper test for qualified immunity must turn in critical part on the perspective of a reasonable government actor with the same job responsibilities, discretion and scope of authority as the defendant claiming immunity. Instead, the Ninth Circuit focused exclusively on whether clearly established, controlling precedent had already held that a parental right existed in this same factual situation. Although the Ninth Circuit's analysis was quick and easy,

2. "UCSF Individuals" has the same meaning as used in the Ninth Circuit decision, *see Hudacko v. The Regents of The Univ. of Cal.*, No. 24-7360, 2025 U.S. App. LEXIS 27380, at *2 (9th Cir. Oct. 21, 2025), and this brief addresses the 42 U.S.C. § 1983 claims against the UCSF Individuals, as discussed in that decision, *see id.* at **5-7. Otherwise, the defined terms used herein have the same meanings as in Hudacko's Petition for a Writ of Certiorari.

it showed minimal regard for individual constitutional rights.

The face of the SAC makes clear that reasonable government medical and legal professionals like the UCSF Individuals would not have proceeded with surgery under these circumstances, knowing that they had no authority to override Hudacko's constitutional rights.

ARGUMENT

Contrary to the Ninth Circuit's conclusion, the absence of a case precisely on point finding unconstitutional conduct like that of the UCSF Individuals does not entitle them to qualified immunity. Rather, the UCSF Individuals were required to show that their actions, as set forth in the SAC, were objectively reasonable in light of the well-established limits on their authority under the Constitution to intrude upon parent-child relationships, and notwithstanding Hudacko's right reserved unambiguously in Section 7b.

The Ninth Circuit acknowledged that "the rights of parents in the 'care, custody, and control of their children'" are "well-established liberty interest[s] under the Fourteenth Amendment." *Hudacko*, 2025 U.S. App. LEXIS 27380, at *5 (9th Cir. Oct. 21, 2025) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). However, the Court concluded, Hudacko's "right cannot be defined that broadly because the custody order stripped him of almost all his parental rights." *Hudacko*, 2025 U.S. App. LEXIS 27380, at *5.

"[A]lmost all" is a critical caveat. Section 7b explicitly preserved the very right that the UCSF Individuals

ignored: authority over “any gender identity related surgery,’ which required Hudacko’s consent.” *Id.* at *6. That the custody order stripped him of other clearly established parental rights does not mean that a reasonable government actor would have run roughshod over the one it expressly preserved.

As alleged in the SAC, the UCSF Individuals were entirely aware of Section 7b. App. 115a, 117a-119a. Importantly, the provision also plainly limited their discretion; that is, they could not proceed with the surgery without Hudacko’s consent (or an appropriate court order). And in the same way that the custody order stripped Hudacko of various parental rights, the UCSF Individuals knew that it also stripped Underhill of the right to make decisions on gender-related surgery without Hudacko’s consent.

A reasonable government official would not have hurried past the constitutional right highlighted in Section 7b on the way to performing irreversible, life-altering surgery on a minor. This Court should not set the requirements for qualified immunity so low as to excuse such government conduct.

I. THE PROPER TEST FOR QUALIFIED IMMUNITY FOCUSES NOT ON THE EXISTENCE OF CONTROLLING CASELAW EXCLUSIVELY, BUT ALSO CONSIDERS A REASONABLE GOVERNMENT ACTOR IN THE SAME CIRCUMSTANCES.

The Ninth Circuit faulted Hudacko for failing to cite “clearly established law under similar facts,” and

“[i]nstead, . . . contend[ing] that the ‘explicit language’ of the custody order provision clearly establishes his right.” *Hudacko*, 2025 U.S. App. 27380, at *6. However, simply because no court has yet found a constitutional violation in similar circumstances does not put the UCSF Individuals in the clear.

In determining qualified immunity, a court must consider more than caselaw existing at the time of the conduct, and compare the challenged conduct to that of an objectively reasonable government actor facing the same situation. Furthermore, *Hudacko* never contended that the custody order was the source of the right violated by the UCSF Individuals, but that the order confirmed what was already well-established under the Fourteenth Amendment.

A proper test for qualified immunity must turn in large part on the perspective of an objectively reasonable government actor in the same position, with the same discretion and scope of authority, as the defendant. Under *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), a grant of qualified immunity rested on “the objective legal reasonableness of an official’s acts.” This requires acknowledging that the varying responsibilities among the myriad of government offices provide officials with varying opportunities to understand the limits of their power. *Harlow*’s “reasonable person,” and the legal rights about which they “would have known,” will vary depending on variations in the scope of discretion and responsibilities of office. *Harlow*, 457 U.S. at 818.

The Ninth Circuit instead focused on whether the governing caselaw so clearly established *Hudacko*’s right

that only the small class of officials not protected by qualified immunity – namely, “the plainly incompetent or those who knowingly violate the law,” *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citation omitted) – would proceed as the UCSF Individuals did. This sets the bar for qualified immunity too low, here allowing the state to defy a parent’s legally recognized wishes regarding elective surgery on his minor child.

In *Hope v. Pelzer*, this Court rejected the notion that law is “clearly established” only where the facts of previous cases are “materially similar;” rather, the standard merely requires that “in light of pre-existing law the unlawfulness [of the challenged conduct] must be apparent” to a reasonable official. *Hope*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (the “clearly established” test does “not require a case directly on point”). *Hope* analogized the “clearly established” standard to the “fair warning” that defendants are entitled to in criminal prosecutions for willfully depriving a person of their constitutional rights under the color of law. *Hope*, 536 U.S. at 739-40 (citing *United States v. Lanier*, 520 U.S. 259, 269 (1997) (in turn, equating the notice of unlawfulness necessary to substantiate a criminal violation to the standard for qualified immunity)). Fair warning considers the perspective of a reasonable government official in the same shoes as the defendant.

The Ninth Circuit relied on *Carroll v. Carman* for the proposition that “clearly-established law” requires that “existing precedent must have placed the statutory or constitutional question beyond debate.” *Hudacko*,

2025 U.S. App. LEXIS 27380, at *5 (quoting *Carroll v. Carman*, 574 U.S. 13, 16 (2014) (per curiam)). However, *Carroll* in turn was quoting from *al-Kidd*, which held at the same time that a “clearly established” right means “a reasonable official would [have understood] that what he is doing violates that right.” *Carroll*, 574 U.S. at 16 (quoting *Anderson*, 483 U.S. at 640). Consequently – and particularly in light of *al-Kidd*’s addition of the word “every” to the quote from *Anderson* – the words “beyond debate” must mean “beyond debate among reasonable officials” in the same position as the defendants. Again, this is consistent with *Hope*’s articulation that “clearly established” means reasonable officials have been given fair warning of the constitutional boundaries of their authority. 536 U.S. at 741; *see also* *District of Columbia v. Wesby*, 583 U.S. 48, 63-64 (2018) (relevant question is whether a reasonable official, confronted with the same facts, would know that the challenged actions violate the law).

Applying the objective reasonableness test for qualified immunity requires understanding “clearly established” not as an isolated, academic matter, but *relative to* the variations in responsibilities of a government actor in the defendant’s position, which responsibilities inform the reasonable official’s understanding of the limits of their power under the Constitution. Consequently, the “reasonable official” inquiry itself will vary with the responsibilities of office, requiring different measures for qualified immunity protection of officials like the UCSF Individuals as compared to, for example, law enforcement officers.

Many qualified immunity cases involving law enforcement officers turn on an important factor not present here. Very often, the decisions faced by law enforcement officers do not carry the luxury of time. *See, e.g., Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014). Split-second thinking from the UCSF Individuals, however, was not required. There were no exigent circumstances. The surgery at issue was elective, and could have waited until Minor reached the age of maturity, at which point Hudacko would have had no legal right to interfere.³

Not only are the circumstances commonly faced by law enforcement officers unique, but a proper qualified immunity analysis also cannot lump together disparate employees like the UCSF physicians (Rosenthal, Lee), psychologist (Ehrensaft), and attorney (Orr). The different kinds and levels of knowledge that can be reasonably expected for each position generally must be sorted out through an inquiry that goes beyond the face of the complaint.

A judge-created doctrine, qualified immunity seeks to balance the competing values of “the importance of

3. It is worth noting that the contention often put to parents for performing gender transition procedures on their minor-children – namely, that it is better to have a live son/daughter than a dead daughter/son – has proven to be a pernicious, false dichotomy. *See, e.g.,* Cass, “Independent review of gender identity services for children and young people: Final report,” at 186 (April 10, 2024) (“Some clinicians feel under pressure to support a medical pathway based on widespread reporting that gender-affirming treatment reduces suicide risk. This conclusion was not support by the [Cass] systematic review.”) (available at <https://cass.independent-review.uk/home/publications/final-report/>).

a damages remedy to protect the rights of citizens” and “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.” *Harlow*, 457 U.S. at 807 (citation omitted). Emphasizing the latter, *Harlow* announced an associated interest in relieving the societal costs of “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office,” while recognizing the danger that failure to dismiss “insubstantial lawsuits” without trial would cause officials to hesitate in performing their duties.⁴ *Harlow*, 457 U.S. at 814.

Consideration of factual circumstances, apart from whether controlling authority exists, need not interfere with the interest in not subjecting government officials to baseless litigation. The concerns expressed in *Harlow* can still be addressed with limited discovery at the early stage of a lawsuit on the issue of qualified immunity, *see Anderson*, 483 U.S. at 646 n.6, and the issue can then be decided on summary judgment. Staging discovery in this way avoids embroiling government officials in unnecessary, protracted litigation, while still allowing for meaningful judicial scrutiny of their conduct. However, in the decades since *Harlow*, the judicially-maintained doctrine has gotten out of balance, forgiving too much unconstitutional conduct by government actors.

4. Before *Harlow*, the qualified immunity analysis included consideration of a defendant’s subjective good faith *See, e.g., Wood v. Strickland*, 420 U.S. 308, 322 (1975). *Harlow* dropped the subjective component of the test largely because of the difficulty of determining the actor’s state of mind without going through trial. *Harlow*, 457 U.S. at 815-18.

A narrow focus on “clearly-established law” places the bar for obtaining qualified immunity too low. The standard should not be reduced to the point that the doctrine shields all government actors but “the plainly incompetent or those who knowingly violate the law.” *Hudacko v. Lee*, No. 23-cv-05316-SI, 2024 U.S. Dist. LEXIS 214579, at *29 (N.D. Cal. Nov. 25, 2024) (quoting *Saucier*, 533 U.S. at 202). Common sense should not have to wait for federal courts to recognize it in a reported case before government officials are required to exercise it.

II. REASONABLE GOVERNMENT MEDICAL AND LEGAL PROFESSIONALS WOULD HAVE RECOGNIZED THAT UNDER WELL-ESTABLISHED CONSTITUTIONAL LAW AND THE PLAIN LANGUAGE OF SECTION 7B, HUDACKO’S CONSENT WAS REQUIRED BEFORE THEY COULD PERFORM GENDER TRANSITION-RELATED SURGERY ON MINOR.

To recognize Hudacko’s right to deny permission to perform surgery on his son, the UCSF Individuals only needed to be aware of two things: the long-established Fourteenth Amendment rights of a parent and the plain language of Section 7b. The SAC alleges that they were aware of both. App. 115a, 117a-119a, 122a. That courts have not yet recognized in combination parental rights and a provision like Section 7b did not allow the UCSF Individuals to ignore them together as some matter of “first impression.” *Hope*, 536 U.S. at 741 (“a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though ‘the very action in question has [not] previously been held unlawful’”) (quoting *Anderson*,

483 U.S. at 640). A reasonable doctor or lawyer with knowledge that a parent retained the constitutional right under a court order to veto any gender identity-related surgical procedure would have held off performing it. *See Anderson*, 483 U.S. at 641 (determining objective legal reasonableness of government actor’s conduct “will often require examination of the information possessed” by actor at the time).

Qualified immunity should not mean that apart from conduct specifically prohibited by black letter law, a government official can behave however they see fit with impunity from Section 1983 liability. For a novel factual situation like here, fair warning of the unconstitutionality of a defendant’s conduct precludes a finding of qualified immunity. *See Hope*, 536 U.S. at 741. The UCSF Individuals had fair warning.

A. The Parental Right to Direct a Child’s Medical Care Is Well-Established Under the Fourteenth Amendment.

As the Ninth Circuit acknowledged, “the rights of parents in the ‘care, custody, and control of their children’” are “well-established liberty interest[s] under the Fourteenth Amendment.” *Hudacko*, 2025 U.S. App. LEXIS 27380, at *5 (quoting *Troxel*, 530 U.S. at 65). Parental interest “is perhaps the oldest of the fundamental liberty interests recognized by this Court,” and is more than just the personal right of an individual; rather, being a parent carries important caregiving responsibilities which are a “high duty.” *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (referring to parent’s obligation to obtain appropriate medical care for children); *see also Meyer*

v. Nebraska, 262 U.S. 390, 400 (1923) (“it is the natural duty of the parent to give his children education suitable to their station in life”).

There is no dispute that this parental interest “includes the right not to be shut out of participation in decisions” regarding their children’s health. *Mirabelli v. Bonta*, 607 U.S. 492, 497 (2026) (citing *Parham*, 442 U.S. at 602); *see also* *Mirabelli*, 507 U.S. at 499 (Barrett, J., concurring) (“the doctrine of substantive due process has long embraced a parent’s right to raise her child, which includes the right to participate in significant decisions about her child’s mental health”) (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer*, 262 U.S. 390; *Parham*, 442 U.S. 584). *Mirabelli*’s reliance on a host of older cases like *Meyer*, *Pierce* and *Parham* demonstrates that the parental right to participate in medical decisions was established long before that case was decided.

The Ninth Circuit relied on irrelevant facts to distinguish the instant case from precedent, stating, “Hudacko cites no clearly established law creating a parental liberty interest in precluding the procedure at issue here when the other parent and minor child consent to it.” *Hudacko*, 2025 U.S. App. LEXIS 27380, at *6. However, as discussed *infra*, Section 7b required Hudacko’s consent to the procedure, and made Underhill’s alone legally insufficient. Minor’s consent to experimental, life-altering surgery was also legally insufficient. *See, e.g.*, “Consent Requirements for Medical Treatment of Minors” (<https://edrive.ucsf.edu/minor-consent>) (last visited Oct. 15, 2026).

Moreover, *Meyer, Pierce, Parham, Troxel*, et al., constitute a “robust ‘consensus of cases of persuasive authority’” that would preclude a reasonable official in the UCSF Individuals’ position from believing that performing gender-identity related surgery without Hudacko’s consent was lawful. *See al-Kidd*, 563 U.S. at 742. It is hardly a stretch from this well-established precedent to the right Hudacko seeks to vindicate here, and qualified immunity should not give government actors the incentive to remain obtuse.

The instant situation demonstrates the flaws in focusing exclusively on “clearly established law.” Gender transition treatments are a recent development in medicine, particularly when performed on minors. App. 97a, 99a-100a, 120a. Thus, it is not surprising that *Meyer-Pierce* and their progeny did not anticipate the scenario presented here, and specific precedent on point does not yet exist. However, the lag in constitutional law catching up with cutting-edge, experimental medicine should not protect conduct that is plainly unconstitutional.⁵

5. Since *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), courts have often determined qualified immunity based solely on whether the law is clearly established that certain conduct violates a constitutional right, without expanding on whether specific conduct in the cases before them is actually unconstitutional. This has been criticized for leading to “constitutional stagnation” that does not clarify what conduct is violative, or clearly established as such. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 4 (2015).

B. A Review of the SAC's Factual Allegations Demonstrates That a Reasonable Official Would Have Known That the UCSF Individuals' Conduct Violated Hudacko's Parental Right.

A review of the SAC demonstrates the significance of the factual circumstances presented in a specific case, beyond what “clearly-established law” may exist.

Section 7b provides,

[Minor] will not be permitted to undergo any gender identity related surgery until they are 18 years of age, absent a written agreement by both parties, Christine [Underhill] and Edward Hudacko, or an order of the court.

App. 106a-107a, 115a. As interpreted by the Ninth Circuit, “[u]nder the custody order, Underhill had sole medical decision-making authority over Minor with the exception of ‘any gender identity related surgery,’ which required Hudacko’s consent.” *Hudacko*, 2025 U.S. App. LEXIS 27380, at *5-6.

Section 7b made clear that notwithstanding the loss under the custody order of other parental rights established by Fourteenth Amendment precedent, Hudacko retained authority over any gender identity-related surgery on Minor. In the same way, the order made clear that Underhill did not have sole authority over this form of medical treatment. If anything, that gender identity-related surgery was explicitly carved out by Section 7b as requiring Hudacko’s consent should

have alerted the UCSF Individuals to the heightened importance of this specific authority.

This unambiguous order notwithstanding, no “agreement” of any kind between Underhill and Hudacko authorized the surgery on Minor, nor is there any reason to believe that the UCSF Individuals ever bothered to try to get a court order that would have authorized them to perform the surgery.

The Ninth Circuit claimed that “it was not clear the implant procedure fell within Provision 7b’s ‘surgery’ exception in the custody order.” *Hudacko*, 2025 U.S. App. LEXIS 27380, at *6. However, the UCSF Individuals included medical professionals (with access to counsel) and lawyers, and “surgery” could not be reasonably susceptible to any meaning to them other than the one put forth by Hudacko (and used by UCSF itself). App. 117a, 120a, 123a. Performing experimental, life-altering surgery on a minor without proper informed consent cannot be dismissed as a “reasonable but mistaken judgment[] about open legal questions” for which the UCSF Individuals should be given “breathing room.” *Al-Kidd*, 563 U.S. at 743.

The nature of the medical procedure is also relevant to the qualified immunity analysis. That is, the analysis presumably would be easier if the UCSF Individuals had performed some more pedestrian treatment, like an annual physical examination. However, again, the SAC alleges the procedure was experimental and life-altering, and the UCSF Individuals knew that it would render Minor permanently sterile. App. 97a, 99a, 111a, 120a-121a, 247a, 251a-253a. Common sense would dictate that the more serious the medical procedure, the greater the

need for parental consent. The circumstances demanded caution, not rushing ahead as the UCSF Individuals chose to do. *Harlow*, 475 U.S. at 819 (“Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate[.]”).

As another example of the importance of reviewing the specific facts alleged, the SAC makes clear that the UCSF Individuals were aware not only aware of Section 7b, but also of Hudacko’s vigorous opposition to any gender transition-related surgery on his child. App. 117a-119a, 245a-253a. Nevertheless, they went ahead and performed that surgery. App. 118a-123a. Although they had ample time and access to consul, and could have sought a court order as referenced in Section 7b, they proceeded without doing so. This further shows the inappropriateness of qualified immunity on the current record.

At the least, it is plausible from the face of the SAC that the UCSF Individuals simply chose to defy both Hudacko’s directive and the custody order, and there is no basis to think that the performance of surgery on a minor without proper informed consent was just some forgivable bureaucratic mistake. Qualified immunity cannot excuse government officials who are oblivious to or willing to defy rights established under the Constitution and confirmed by enforceable court orders.

CONCLUSION

For the foregoing reasons, as well as those set forth in Hudacko's Petition For a Writ of Certiorari, this Court should grant his petition.

Respectfully submitted,

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