IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81513

SONJIA MACK,
Appellant

v.

BRIAN WILLIAMS; JAMES DZURENDA; ARTHUR EMLING, JR.; and MYRA LAURIAN,
Respondents.

On Response to Order Accepting Certified Question from
the U.S. District Court for the District of Nevada
Case No. 2:18-cv-00799-APG-VCF
Honorable Judge Andrew P. Gordon, U.S. District Court Judge

BRIEF OF *AMICUS CURIAE* RODERICK & SOLANGE MACARTHUR JUSTICE CENTER

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The *amicus curiae* the Roderick and Solange MacArthur Justice Center is a nonprofit organization and has no parent corporation or stock.

2. No law firm or lawyer appeared for the *amicus* in earlier proceedings; the law firms and lawyers now appearing for *amicus* are:

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC attorneys have led civil rights battles in areas including police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, the treatment of incarcerated people, and qualified immunity. RSMJC has an interest in ensuring accountability for civil rights violations by preventing the unwarranted expansion of qualified immunity.

The authority of the *amicus curiae* to file this Brief is pursuant to leave of the Court by a motion under Nevada Rules of Appellate Procedure 29(a) and (f).

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amicus, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. The amicus, their members, and their counsel have not represented any of the parties to the present appeal in another proceeding involving similar issues, nor have they been parties in a proceeding or legal transaction that is at issue in the present appeal.

INTRODUCTION

Under federal law, the judge-made doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The defense calls on courts to decide two questions: (1) whether there is a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Since 2009, federal courts have been authorized to skip the first question—whether conduct is constitutional—altogether if they answer the second question in the negative. *Id.* at 236.

Nevada should refuse to import this flawed innovation into its jurisprudence. As experience in the federal courts has shown, qualified immunity is unworkable and unjust. The doctrine also lacks historical and textual support that might counterbalance its practical and equitable problems. It is thus unsurprising that the defense is increasingly criticized—in increasingly strident terms—by jurists, scholars, elected officials, and everyday citizens spanning the ideological spectrum; disdain for qualified immunity is that rare issue on which the American left, center, and right are largely in agreement.

Recognizing the doctrine's intractable problems, several state high courts have recently declined similar invitations to adopt qualified immunity—this Court

should follow suit. But if this Court nonetheless adopts qualified immunity as a defense to state constitutional challenges, it should do so without importing the flaws that plague the federal doctrine. It can do so in two ways. First, by making clear that "clearly established" means more than appellate precedent from cases presenting virtually identical facts. Second, by rejecting the recent innovation of *Pearson v. Callahan*, which permits courts to dispose of a case on the "clearly established" prong without first—or ever—deciding whether the challenged conduct is unlawful.[2]

ARGUMENT

I. This Court Should Not Adopt The Doctrine Of Qualified Immunity: It Is Unworkable, Unjust, And Untethered To Any Statutory Or Historical Justification.

If this Court finds a private right of action exists under the Nevada Constitution, Article I, §§ 8, 18, defendants who are found to violate those constitutional provisions should not be entitled to present the defense of qualified

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[2] RSMJC's amicus brief pertains only to the third certified question concerning immunities and focuses entirely on the availability and construction of qualified immunity as a defense for state actor defendants. While RSMJC does not write extensively on the other certified questions, its position on them is as follows. The first and second certified questions should be answered affirmatively: this Court should find the existence of a private right of action under the Nevada Constitution, Article 1, §§ 8, 18. As to the fourth certified question concerning remedies, it is RSMJC's position that all civil remedies, including injunctive relief, declaratory relief, compensatory damages, punitive damages, and nominal damages, should be available.

immunity. It is no secret that the adoption and application of qualified immunity in federal law has been the subject of withering criticism from an ever-growing number of jurists, scholars, elected officials, and practitioners. This Court should heed this wide-ranging criticism of qualified immunity and decline to enshrine the problematic doctrine in Nevada law.

The consensus against qualified immunity is remarkable because it is "cross-ideological"—no small feat in "this hyperpartisan age." *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). For instance, U.S. Supreme Court Justices on different sides of the ideological spectrum have expressed serious doubts about the doctrine. *See, e.g.*, *Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (The current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers," telling them that "they can shoot first and think later.").[3] The same is true of scholars and elected officials. *See, e.g.*,

[3] In addition to Justices Thomas and Sotomayor, judges across the country have strongly criticized qualified immunity. *See, e.g.*, *Cole v. Carson*, 935 F.3d 444, 470-71 (5th Cir. 2019) (Willett, J., dissenting) ("The real-world functioning of modern immunity practice—essentially 'heads government wins, tails plaintiff loses'—leaves many victims violated but not vindicated."); *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part) (noting

William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018); Emma Tucker, *States Tackling "Qualified Immunity" for Police as Congress Squabbles Over the Issue*, CNN (April 23, 2021).[4] Even a majority of the general public supports ending qualified immunity for some state actors. *See* Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, Cato Institute (July 16, 2020).[5] Although much has been written about the multitude of ways in which qualified immunity has been an abject failure, several of its failings warrant emphasis.

"struggle" to apply the "ill-conceived" and "judge-made doctrine of qualified immunity, which is found nowhere in the text of § 1983"); *Horvath v. City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("[T]here is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases."); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *6-7 (E.D.N.Y. June 26, 2018) (Weinstein, J.) ("The Court's expansion of immunity . . . is particularly troubling. . . . The law, it is suggested, must return to a state where some effective remedy is available for serious infringement of constitutional rights."); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete reexamination of [qualified immunity] which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment."), *aff'd in part and rev'd in part*, 951 F.3d 1161 (10th Cir. 2020).

[4] https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html

[5] https://www.cato.org/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police

First, qualified immunity is unworkable. As one court recently lamented, "determining whether an officer violated 'clearly established' law has proved to be a mare's nest." *Vega v. Semple*, 963 F.3d 259, 275 (2d Cir. 2020) (quoting John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010)). It is a frequent source of "challenges," and defining the right at issue presents a "chronic difficulty" for courts. *Id.* For example, Judge Charles Wilson of the Eleventh Circuit described "[w]ading through the doctrine of qualified immunity" as "one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. Ann. Surv. Am. L. 445, 447 (2000). Similarly, Judge Don Willett of the Fifth Circuit summed up the state of things by observing that "[i]n day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part). One exasperated federal district judge put it more bluntly:

> Factually identical or highly similar factual cases are not, however, the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way. The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions. . . . It strains credulity to believe that a

> reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: "Are the facts here anything like the facts in *York v. City of Las Cruces*?"

Manzanares v. Roosevelt Cnty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) (cleaned up).

As it turns out, that skepticism is dead-on. Recent studies have shown that "officers are not actually educated about the facts and holdings of court decisions that"—theoretically—"clearly establish the law." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 683 (2021). This is unsurprising. After all, "[t]here could never be sufficient time to train officers about the hundreds—if not thousands—of court cases that could clearly establish the law for qualified immunity purposes." *Id.* at 611. Why, then, are courts and litigators alike forced to throw themselves into the mare's nest that is the clearly established inquiry, "plumb[ing] the depths of Westlaw for factually similar lower court decisions"? *Id.* at 612. No good answer exists.

Second, qualified immunity is unjust. As Justice Sotomayor explained, qualified immunity jurisprudence "sends an alarming signal . . . that palpably unreasonable conduct will go unpunished." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting). The doctrine serves to "insulat[e] incaution," and "formalizes a rights-remedies gap through which untold constitutional violations slip unchecked." *Cole v. Carson*, 935 F.3d 444, 470-71 (5th Cir. 2019) (Willett, J., dissenting). State

court judges applying the doctrine to federal claims have likewise critiqued "the collateral damage done by a qualified immunity doctrine." *Lacy v. Coughlin*, 100 Mass. App. Ct. 321, 2021 WL 4572105, at *12 (2021) (Sullivan, J., dissenting). Justice Appel of the Supreme Court of Iowa, for instance, explained how the "federal approach to statutory qualified immunity embraces a dynamic that has progressively chewed and choked potential remedies for constitutional violations." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 290 (Iowa 2018) (Appel, J., dissenting). Justice Workman of the Supreme Court of Appeals of West Virginia echoed this point, noting how the doctrine awards government actors "near absolute immunity." *W. Virginia Div. of Corr. v. P.R.*, No. 18-0705, 2019 WL 6247748, at *11 (W. Va. Nov. 22, 2019) (cleaned up) (Workman, J. dissenting).

In particular, the vicious cycle created by *Pearson v. Callahan*, 555 U.S. 223 (2009)—allowing courts to decide the clearly established inquiry at prong two of the qualified immunity analysis without first deciding whether there was a constitutional violation—means that government officials can flagrantly violate the law in similar ways, over and over again, until and unless a court finally decides to intervene and decide whether the underlying conduct is unlawful. The growing frequency of this "Escherian Stairwell," *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part and dissenting in part), is supported by empirical research. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity,* 89 S. Cal. L. Rev. 1, 6-7 (2015)

(quantifying post-*Pearson* reduction in courts establishing constitutional violations at prong one).

In short, there is "growing concern" that "qualified immunity smacks of unqualified impunity." *Fogle v. Sokol*, 957 F.3d 148, 158 n.11 (3d Cir. 2020) (citing *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part)). The Framers meant for rights to have remedies, but qualified immunity threatens this fundamental precept by continually encroaching upon the theoretical availability of redress for violations of constitutional and statutory rights. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

Finally, federal qualified immunity has no basis in the statutory text or common law. Justice Thomas has said as much several times in recent years. *See, e.g.*, *Baxter*, 140 S. Ct. at 1862, 1864 (Thomas, J., dissenting from the denial of certiorari) ("[O]ur § 1983 qualified immunity doctrine appears to stray from the statutory text," and "[i]n several different respects, it appears that our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act." (internal quotation marks omitted)); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) ("[W]e have diverged from the historical

inquiry mandate by the statute . . . [and] completely reformulated qualified immunity along principles not at all embodied in the common law." (internal quotation marks omitted)). And the doctrine's departure from its historical roots has not escaped the attention of other federal judges or state court judges. *See, e.g.*, *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting); *Fogle*, 957 F.3d at 158 n.11; *Zadeh*, 928 F.3d at 479 (Willet, J., concurring in part and dissenting in part); *Baldwin*, 915 N.W.2d at 289 (Appel, J., dissenting) ("Robust qualified immunity for individuals committing constitutional wrongs is completely inconsistent with the wording, the legislative history, and the challenging historical purpose of the statute.").

Scholars agree. *See, e.g.*, *Baude*, *supra*, at 50-60 (explaining that neither the statutory text nor historical common law immunities provide support for qualified immunity); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863, 1928-29 (2010) (matters of indemnity and immunity were left to Congress, not the judiciary, in the founding era); Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 Yale L.J. 1425, 1506-07 (1987) (the lone historical defense against constitutional torts was legality). The doctrine's untethering from the statutory text and historical practice thus makes the "heads government wins, tails plaintiff loses" reality of modern qualified immunity particularly hard to

swallow. *See Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting).

It makes little sense to import this unworkable, unjust, and ahistorical doctrine into state constitutional law. As one state supreme court justice put it, there is "no persuasive reason why federal statutory interpretation should be hurriedly, or deliberately, ripped out of the federal caselaw and frantically, or carefully, pasted into . . . state constitutional law." *Baldwin*, 915 N.W.2d at 288 (Appel, J., dissenting). Indeed, several states have already declined to import the doctrine into state constitutional law. For instance, the Maryland high court explained that "[t]o accord immunity to the responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional provisions." *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662, 684-85 (1988), *superseded by statute on other grounds, as recognized in D'Aoust v. Diamond,* 36 A.3d 941, 962 (2012). It thus held that qualified immunity was unavailable as a defense for state constitutional violations. *Id.* at 680. The Montana Supreme Court similarly decided that "qualified immunity, as established by federal law . . . is not applicable to those claims filed by the Plaintiffs for violation of those rights guaranteed by the Montana State Constitution." *Dorwart v. Caraway*, 312 Mont. 1, 21 (2002). Given the significant

flaws of the doctrine, this Court should likewise decline to import qualified immunity into its constitutional caselaw.

II. If This Court Adopts Qualified Immunity As A Defense To Nevada Constitutional Claims, Then It Should Not Adopt A Senseless Version Of The Doctrine.

Should this Court decide that state actors may invoke qualified immunity as a defense to civil actions under Nevada's Constitution, it should steer clear of two particularly intractable problems with current federal qualified immunity jurisprudence. First, this Court should make clear that notice for the purposes of the "clearly established" inquiry comprises sources beyond prior appellate decisions presenting nearly identical facts. Indeed, not only can conduct be obviously unlawful such that factually analogous precedent is unnecessary, but non-binding judicial sources, and even non-judicial sources, can put state actors on notice that their actions are unlawful. Second, it should reject *Pearson v. Callahan*, which allows courts to pass on the question of whether the conduct at issue was unlawful and skip straight to whether the right was clearly established, a shortcut that deprives government officials, courts, and the general public alike of the notice necessary to comply with and apply the law.

a. Qualified Immunity's Clearly Established Inquiry Is Fundamentally Concerned With Notice, Which Is Provided By Sources Other Than Prior Appellate Decisions Considering Identical Facts.

In federal courts, it is often argued—and sometimes erroneously held—that the notice necessary to defeat qualified immunity is found only in opinions of the Supreme Court and the federal courts of appeals, and only in cases presenting nearly identical circumstances. But, where conduct is obviously unlawful, factually similar precedent is not necessary to defeat qualified immunity. Moreover, extrajudicial sources, including administrative rules and regulations, can put state actors on notice that their conduct is unlawful.

As an initial matter, an artificially cramped view of the qualified immunity inquiry cannot be squared with the Supreme Court's repeated admonitions that obviousness alone can provide fair warning to officials that their acts are unlawful. *See e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020); *Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002). After all, the clearly established inquiry boils down to notice, not whether a court has held that "the very action in question has previously been held unlawful." *Hope*, 536 U.S. at 739.

In some instances, such as Fourth Amendment cases requiring split-second decision making, the Supreme Court has generally demanded a "high 'degree of specificity'" to provide the requisite notice. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *Mullenix v. Luna*, 577 U.S. 7, 13 (2015). But in other cases—

like the one here where Defendants had ample time to reflect upon the unlawfulness of their conduct—no such situational similarity is (nor should be) required to make it over the clearly established hurdle. Instead, a "general statement[] of the law" in prior cases can provide fair warning, as long as it applies with "obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741, 745-76. This obviousness exception is "vital" since "any willing judge or jurist may distinguish precedent as not 'clearly established' because of slightly differing facts." *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *12 (E.D.N.Y. June 26, 2018) (Weinstein, J.).

In just the last year, the Supreme Court has twice underscored that obviousness is crucial to the clearly established inquiry. First, in *Taylor*, the Court summarily reversed the Fifth Circuit for its unduly narrow view of the clearly established inquiry in a prison conditions case. 141 S. Ct. at 53-54. The Supreme Court was untroubled by the absence of a prior case establishing that the specific conditions at issue in *Taylor* were unconstitutional. *Id.* Instead, the "obviousness of [the plaintiff's] right" was apparent from the "general constitutional rule" barring deliberate indifference under the Eighth Amendment. *Id.* at 53-54 & n.2 (quoting *Hope*, 536 U.S. at 741). Then, several months later, the Supreme Court granted, vacated, and remanded in another qualified immunity case. *McCoy v. Alamu*, 141 S. Ct. 1364 (2021). *McCoy* instructed the Fifth Circuit to reconsider, in light of *Taylor*, the grant of qualified immunity to a correctional officer who pepper-sprayed a

prisoner "for no reason." *Id.* Over a dissent, the Fifth Circuit had rejected the plaintiff's argument that the assault was an "obvious" violation of the general rule that prison officials cannot act "maliciously and sadistically to cause harm." *See McCoy v. Alamu*, 950 F.3d 226, 234 (5th Cir. 2020). And the petition for certiorari requested summary reversal on the basis that a concededly unjustified assault was an obvious violation of the Eighth Amendment. Pet. for Writ of Cert. at 16-18, *McCoy*, 141 S. Ct. 1364 (No. 20-31); Rep. in Supp. of Cert. at 10-12, *McCoy*, 141 S. Ct. 11364 (No. 20-31). In asking the Fifth Circuit to reconsider its grant of qualified immunity, the Supreme Court sent a clear signal that the obviousness inquiry discussed in *Taylor* governed the case.

Thus, if this Court adopts qualified immunity, it should make clear that Nevada courts should not hesitate to rely on the obviousness doctrine in determining a right is clearly established. As then-Judge Gorsuch astutely pointed out, "the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015). Without the obviousness doctrine, the more "flagrantly unlawful" the action, the more likely an official is to escape liability. *See id.* Conduct so unnecessarily cruel and shocking that it is unlikely to ever be repeated by more than one defendant—like subjecting Ms. Mack to an unconsented, invasive, and entirely unnecessary strip search—would enjoy immunity, while more mundane violations would be punished.

See Appellant's Opening Br., Compl. at EOR 0003-0005. That would be nothing short of perverse.

Even beyond obvious violations, court decisions presenting nearly identical circumstances are not the only sources that clearly establish a right. Proper application of the inquiry calls for an examination of a variety of extrajudicial sources, including administrative rules and regulations, to determine whether the unlawfulness of the defendants' conduct was clearly established.

In *Hope*, for example, the Supreme Court did not rely solely on the obviousness of the Eighth Amendment violation—it also relied on an Alabama Department of Corrections regulation to find the unlawfulness of defendants' use of a hitching post was clearly established. 536 U.S. at 743-44. While the regulation did not prohibit the use of the hitching post, it did impose certain requirements on the practice, including a requirement to periodically offer water and bathroom breaks. *Id.* The Court held that the defendants' disregard for the regulation's limitations on hitching post use provided "strong support for the conclusion that they were fully aware of the wrongful character of their conduct." *Id.* at 744. Likewise, a DOJ report "specifically advised [prison officials] of the unconstitutionality of its practices before the incidents in [the] case took place," a fact that "buttressed" the Supreme Court's conclusion that prison officials were on notice that the use of a hitching post violated the Eighth Amendment. *Id.* at 744-45.

The majority of federal courts of appeals also consider such non-judicial sources when determining whether rights are clearly established. *See, e.g.*, *Irish v. Maine*, 849 F.3d 521, 523-24, 527-28 (1st Cir. 2017) (explaining that policies, training, and standard police practices are relevant to the qualified immunity inquiry and ordering discovery as to "whether there was any departure from established police protocol or training"); *Okin v. Vill. of Cornwall-On-Hudson Police Dep't.*, 577 F.3d 415, 433-34 (2d Cir. 2009) (explaining that the court "may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights"); *Williams v. Sec'y Dep't Corr.*, 848 F.3d 549, 570-71 (3d Cir. 2017) (explaining that a Pennsylvania statute had bearing "on whether Plaintiff's due process rights were clearly established"); *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 546 (4th Cir. 2017) (explaining that clearly established finding was "'buttressed by' the South Carolina Department of Correction's internal policies" (quoting *Hope*, 536 U.S. at 744)); *Maye v. Klee*, 915 F.3d 1076, 1087 (6th Cir. 2019) (holding that the right of Muslim inmates to participate in Eid was "clearly established in every meaningful sense" by a district court order and an internal policy that "served to place [] officials on notice"); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 531, 533-34 (8th Cir. 2009) (en banc) (observing that "[p]rison regulations governing the conduct of correctional

officers are [] relevant in determining whether an inmate's right was clearly established," and relying on Arkansas Department of Corrections administrative regulations to deny qualified immunity (quoting *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002))); *Vazquez v. Cnty. of Kern*, 949 F.3d 1153, 1164-65 (9th Cir. 2020) (finding that statutory standards under the Prison Rape Elimination Act were "relevant . . . to determining whether reasonable officers would have been on notice that their conduct was unreasonable").

Here, Defendants are alleged to have acted in direct contravention of established Nevada Department of Corrections (NDOC) policies when they subjected Ms. Mack—who was merely visiting the facility—to an unconsented, invasive, and dehumanizing strip search without giving her a choice to leave the facility. *See* NDOC Admin. Reg. 719; NDOC Operational Procedure 712; Compl. at EOR 0003-0007. Those established policies offer "strong support" that Defendants had adequate notice that their conduct was wrongful. Should this Court determine that state actors may claim entitlement to qualified immunity, it should hold that such notice is sufficient to defeat the defense. It should likewise make clear that clearly established law exists in the absence of factually analogous precedent—obviously unlawful conduct, regulations, and other sources offer all the notice that is necessary to shield government actors from surprise.

b. The *Pearson v. Callahan* Shortcut Enables State Actors To Flagrantly Violate The Law In Similar Ways In Perpetuity.

In *Pearson v. Callahan*, the Supreme Court upended the modern qualified immunity landscape by making optional the prevailing (and sensible) rights-first immunity-second order of operations for reviewing the defense. Prior to *Pearson*, resolving assertions of qualified immunity entailed a two-step sequence. *Saucier v. Katz*, 533 U.S. 194 (2001). The test required courts to consider whether a government official's conduct violated a constitutional right before deciding whether that right was clearly established at the time of the alleged conduct. *Id.* The Court noted that the first prong permits "the law's elaboration from case to case" and is the mechanism by which courts describe and protect constitutional rights. *Id.* It further observed that "[t]he law might be deprived of this explanation were a court to simply skip ahead to the question [of] whether the law clearly established that the officer's conduct was unlawful." *Id.*

In 2009, the Court abandoned this framework in favor of potential incremental efficiency gains and announced that lower courts were free to start and end with the "clearly established" prong of the qualified immunity analysis. *Pearson*, 555 U.S. at 234-36. As it turns out, *Pearson* may not have ushered in a golden age of efficiency. Authorized to "leave [constitutional] issue[s] for another day," courts may dodge the same questions again and again. *Camreta v. Greene*, 563 U.S. 692, 706 (2011); *see also, e.g., Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (noting

that it was the "fourth time in three years that an appeal has presented the [same] question" only to "resolve the question at the clearly established step").

While *Pearson's* efficiency is thus debatable, its distortion of the qualified immunity regime is not. First, *Pearson* has unquestionably stymied the development of constitutional guidance by "leav[ing] standards of official conduct permanently in limbo." *Camreta*, 563 U.S. at 706. This turn of events has prompted significant—and justified—handwringing. State and federal judges from all corners of the country have decried "the inexorable result" of *Pearson*: namely, the "constitutional stagnation" resulting from "fewer courts establishing law at all, much less clearly doing so." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part); *see also, e.g.*, *Lacy*, 2021 WL 4572105 at *11 (Sullivan, J. dissenting) (criticizing *Pearson* for its tendency to cause "the law [to] stagnate"); *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (en banc) (Grasz, J., dissenting) (observing that *Pearson* "stunt[s] the development of constitutional law" by encouraging "default[] to the 'not clearly established' mantra").

Likewise, judges have cogently explained how skipping the constitutional question all but gives the government "carte blanche to violate constitutionally protected privacy rights" by functioning as "a perpetual shield against the consequences of constitutional violations." *United States v. Warshak*, 631 F.3d 266, 282 n.13 (6th Cir. 2011). Or as one federal court of appeals judge memorably

described the problem with *Pearson*, "[n]o precedent = no clearly established law = no liability." *Zadeh*, 928 F.3d at 479 (Willet, J. concurring in part and dissenting in part).

Finally, jumping ahead to the "clearly established" prong, without first adjudicating the constitutionality of a challenged practice, "deprive[s] conscientious officers of the guidance necessary to ensure that they execute their responsibilities in a manner compatible with the Constitution." *United States v. Garcia-Hernandez*, 659 F.3d 108, 116 (1st Cir. 2011) (Ripple, J., concurring); *see also Baldwin*, 915 N.W.2d at 291 (Appel, J. dissenting) (similar). Put another way, *Pearson* permits courts to abdicate their "essential function of explaining and securing the protections of the Constitution by failing to inform law officers, among others, which practices are constitutional and which are not." Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 Mich. L. Rev. 1219, 1249 (2015).

If this Court permits qualified immunity as a defense to claims brought under the Nevada Constitution, it should soundly reject the *Pearson* experiment. As one Massachusetts court of appeals judge lamented recently, *Pearson* delivered the "coup de grace" to those seeking vindication of their constitutional rights. *Lacy*, 2021 WL 4572105 at *11 (Sullivan, J. dissenting). After all, *Pearson* permits and encourages a regime where courts "fail to clarify uncertain questions, fail to address novel claims, [and] fail to give guidance to officials about how to comply with legal

requirements," thereby "frustrat[ing] . . . the promotion of law-abiding behavior." *Camreta*, 563 U.S. at 706 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should decline to adopt the unworkable and unjust innovation of qualified immunity. However, if this Court adopts the defense, it should do so without importing its greatest flaws.

DATED this 29th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2020 in 14-point font, Times New Roman style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5,229 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 29th day of October 2021, I served a true and correct copy of the foregoing BRIEF OF *AMICUS CURIAE* RODERICK & SOLANGE MACARTHUR JUSTICE CENTER as filed, byway of the Supreme Court's electronic filing system to the following:

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