

No. 81513

IN THE SUPREME COURT OF THE STATE OF NEVADA

SONJIA MACK,

Appellant,

v.

BRIAN WILLIAMS et al.,

Respondents.

Certified Questions from the U.S. District Court for the District of Nevada,
Case No. 2:18-cv-00799-APG-VCF

RESPONDENTS' ANSWERING BRIEF

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ISSUES PRESENTED FOR REVIEW

The certified questions submitted by the federal district court and accepted by this Court are:

1. Is there a private right of action under the Nevada Constitution, Article 1, § 8?
2. Is there a private right of action under the Nevada Constitution, Article 1, § 18?
3. If there is a private right of action, what immunities, if any, can a state actor defendant raise as a defense?
4. If there is a private right of action, what remedies are available to a plaintiff for these claims?

EOR 39.¹

INTRODUCTION

The Nevada Constitution grants the Legislature authority to define judicial causes of action and remedies. This makes sense, as the Legislature is the branch best equipped to balance the difficult financial, administrative, and social issues inherent in expanding or contracting actions and remedies. While the Legislature

¹ Mack prepared an “evidence of record” (EOR) instead of the Nevada Rule of Appellate Procedure 30 appendix. Where possible, this brief cites the EOR. Documents that were not included in the EOR will be cited by referring to Respondents’ Appendix.

has used this authority to create many statutory vehicles for enforcement of the Nevada Constitution, it has never authorized what Mack seeks here: a constitutional cause of action for damages.

This Court should respect the Legislature’s choice of remedies and answer the first two certified questions in the negative: the Due Process and Seizure and Search Clauses of the Nevada Constitution do not create a private right of action for damages. The remaining certified questions regarding remedies and immunities should be dismissed as moot.

STATEMENT OF THE CASE

Mack filed her complaint in the federal district court asserting claims under the U.S. and Nevada Constitutions. EOR 6-9. The claims arose from Mack’s aborted visit to High Desert State Prison. *Id.* at 3-6. Defendants Brian E. Williams; James Dzurenda; Arthur Emling, Jr.; and Myra Laurian are employees and officers of the Nevada Department of Corrections (“NDOC”). *Id.* at 3-4. They are named in their individual – not official – capacities. *Id.*

Defendants moved for summary judgment on all of Mack’s claims. EOR 11. The district court granted partial summary judgment. *Id.* at 11-12. On reconsideration, it certified four questions to this Court, which this Court accepted. *Id.* at 30-32, 39-40.

STATEMENT OF FACTS

I. Factual Background

Mack arrived at High Desert with Tina Cates. EOR 12. The women were there to visit their respective boyfriends, Karl Joshua and Daniel Gonzalez, who were High Desert inmates. *Id.* Mack signed a form consenting to the search of her person. *Id.*; RA 19.

A Las Vegas Justice Court justice of the peace had issued a search warrant, based on probable cause, for NDOC to search Cates's person. EOR 12; RA 51. In the High Desert waiting area Emling and Laurian separated Mack and Cates so that they could execute the Cates search warrant. EOR 12.

Emling then separately questioned Mack. EOR 12; RA 25. Mack admitted that she had arrived together with Cates. RA 25. She agreed with Emling that her boyfriend Joshua was "engaging in a lot of criminal activity." *Id.* And she confessed that she had paid \$300 to an unknown man at Joshua's direction. *Id.*; EOR 12. Laurian – a female officer – conducted a strip search of Mack. EOR 12; RA 42-43.

Mack acknowledged, in a later recorded phone call with Joshua, that she recognized her ability to leave at the time of the search, stating to him that she had told Defendants "I'm going to go" and then left. EOR 13-14. Mack's claim on appeal that she did not have the option to leave, EOR 13, is contradicted by this recorded statement made before she filed this lawsuit.

II. Procedural History

A. Mack files this lawsuit asserting federal and state constitutional claims.

As relevant here, Mack's complaint contended that the strip search deprived her of her procedural due process rights, in violation of the Fourteenth Amendment to the U.S. Constitution and article 1, section 8 of the Nevada Constitution. EOR 6-7. It also contended that the strip search was an unreasonable search and seizure, in violation of the Fourth Amendment to the U.S. Constitution and article 1, section 18 of the Nevada Constitution. *Id.* at 7-8.

B. The federal district court mostly grants summary judgment in favor of Defendants, but allows two claims for damages to proceed.

The federal district court granted summary judgment in favor of Defendants on the federal component of the procedural due process claim. EOR 16-17. The court concluded that Mack could not overcome qualified immunity on that claim. *Id.* at 17. But the court assumed that qualified immunity did not apply to the Nevada-law component of the claim and allowed it to proceed to trial. *Id.*

The district court denied summary judgment on both the federal- and Nevada-law components of the search and seizure claim. EOR 11. It determined that there were genuine issues of material fact as to whether Defendants had reasonable suspicion to search Mack, whether Mack consented to the search and whether Mack

was free to leave. *Id.* at 20-24. The court also concluded that Mack had overcome Defendants’ qualified immunity. *Id.* at 22-23.

The federal district court granted summary judgment in favor of Defendants on the remaining claims, which are not at issue here. EOR 12. The surviving claims – procedural due process and unreasonable search and seizure – seek only money damages. *See id.* at 9-10.²

C. This Court accepts the certified questions on the Nevada Constitution claims while the Ninth Circuit affirms the federal district court’s determination on the remaining federal-law claim.

Both sides moved for reconsideration of the summary judgment order. EOR 31. The federal district court denied Mack’s motion for reconsideration and granted Defendants’. *Id.* The court certified four questions to this Court that are outcome determinative for Mack’s Nevada Constitution claims: whether there is a private right of action under the Nevada Due Process and Seizure and Search Clauses, and if so, what defenses and remedies are available. *Id.* at 30.

Defendants also appealed the summary judgment order to the Ninth Circuit. *See Mack v. Williams*, 859 F. App’x 805, 806 (2021). They challenged the denial of

² In addition to the due process and search and seizure claims, the complaint asserted constitutional claims seeking injunctive and declaratory relief based on Mack’s allegedly losing her NDOC “visiting privileges.” EOR 9. Because the federal district court granted summary judgment on all her claims related to her visiting privileges, *id.* at 12, that relief is no longer available.

qualified immunity on the federal-law component of Mack’s search and seizure claim. *Id.* The Ninth Circuit affirmed the federal district court’s order. *Id.* The federal claim will proceed no matter how this Court rules on the Nevada-law issues presented by the certified questions.³

SUMMARY OF ARGUMENT

This case seeks an answer from this Court on a narrow question of Nevada law: is there an implied private right of action for damages under the Nevada Constitution’s Due Process and Seizure and Search Clauses? As detailed below, the answer is no.

Nevada’s constitutional text and structure, as well as its public policy, preclude adopting Mack’s argument and creating a new private right of action for damages. The Legislature has chosen to establish a comprehensive statutory scheme for enforcing the Nevada Constitution that does not include damages actions. This Court should defer to the Legislature’s choice. It is the Legislature’s duty – not the courts’ – to balance the competing concerns inherent in creating new causes of action. And the Legislature has strong public policy reasons to prefer claims for prospective relief over claims for retrospective relief.

³ Mack’s opening brief does not comply with Nevada Rule of Appellate Procedure 28(e)(1). Her statement of facts contains six pages of factual statements but provides only three record citations. OB 2-8. This Court may therefore disregard her statement of facts. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996-97 (1993).

The text of the relevant constitutional clauses does not create a damages remedy, as Mack herself acknowledges. Mack also acknowledges that the Nevada Legislature has never authorized damages actions for alleged violations of the Nevada Constitution. All of the statutory vehicles the Legislature has created to enforce the Nevada Constitution provide *prospective* relief (injunctive, declaratory and writ relief), not damages. This Court has accordingly never recognized a private right of action for damages.

In an effort to counter this established Nevada law and practice, Mack relies almost exclusively on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But *Bivens* cannot support her case. This Court should not import *Bivens* because it is plainly contrary to Nevada law. Even if it could be effectively imported into Nevada law, it is inapplicable to this case. Alternative remedies for Mack's alleged injuries already exist. And the unique considerations present in the prison-visitation context counsels against creating new damages liability here.

If this Court does decide to import *Bivens* into Nevada law, the parties largely agree what defenses should be available to Defendants: absolute immunity and discretionary-act immunity. Defendants also ask that this Court clarify Defendants' right to invoke qualified immunity. Qualified immunity is central to the balance

struck by *Bivens* and its progeny and can be applied by this Court without difficulty as part of a *Bivens* analysis.

ARGUMENT

I. This Court Must Decide Only One Issue, the Sole Dispute Between the Parties: Whether the Due Process and Seizure and Search Clauses of the Nevada Constitution Establish a Private Right of Action for *Damages*.

Defendants agree that the Legislature has created numerous causes of action for prospective relief that are regularly used to enforce the Nevada Constitution. *See infra* Argument Part II.A.2. This Court need not opine on whether there is a private right of action for prospective relief.

In addition, none of Mack’s claims for prospective relief survived summary judgment. *Compare supra* note 2. The only claims remaining seek damages for a single past event – the strip search. *See* EOR at 11-12, 16, 19. Because no claims for prospective relief are “currently pending in the certifying court,” this Court lacks jurisdiction to directly address whether there is a private right of action for prospective relief. *Echeverria v. State*, 137 Nev. Adv. Op. 49, 495 P.3d 471, 474-75 (2021) (quotation marks omitted).

II. There Is No Private Right of Action for Damages Under the Nevada Constitution’s Due Process and Seizure and Search Clauses.

Mack bears the burden to show that a private right of action authorizing her claim exists. *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992); *see Baldonado v. Wynn*

Las Vegas, LLC, 124 Nev. 951, 964 (2008). Mack cannot carry her burden. Nevada law forecloses the implied private right of action she seeks, and there is no basis for importing *Bivens* here.

A. Nevada law does not authorize a private right of action for damages for alleged constitutional violations.

1. The Due Process and Seizure and Search Clauses themselves do not create a private right of action for damages.

a. The provisions’ text does not authorize damages actions.

Constitutional interpretation turns on the “public understanding” of the provision’s text in the period leading up to and including its adoption. *Pohlabel v. State*, 128 Nev. 1, 9 (2012). When the language is unambiguous, “its text controls.” *Id.*

There is no ambiguity in the Due Process and Seizure and Search Clauses’ text. They don’t authorize damages. Nev. Const. art. 1, §§ 8(2), 18. They simply prohibit certain government actions, without mentioning remedies. *Id.* Drafters know how to authorize damages within a constitutional provision. Article 15, section 16 of the Nevada Constitution provides that a plaintiff “may bring an action against his or her employer in the courts” seeking “damages.” The provisions at issue here contain no such language. Nev. Const. art. 15, § 16(B).⁴

⁴ This Court should reject the argument of Amici Stephen Lara and Institute

b. The historical context and the constitutional debates confirm that voters did not understand the provisions to authorize damages actions.

Mack points to nothing outside the provisions' text that shows that the voters who approved the Nevada Constitution would have understood it to authorize damages actions. She cites the U.S. Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the proposition that "historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." OB 23. But that "history" had not been written in the time leading up to and including the approval of the Nevada Constitution.

It was not until Congress passed what is now 42 U.S.C. § 1983 – nearly seven years *after* the Nevada Constitution was approved – that damages became a recognized remedy for constitutional violations. *See Monroe v. Pape*, 365 U.S. 167, 171-72, 179-80 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). The cases the *Bivens* Court cited for the purported historical pedigree of damages actions all postdated § 1983. 403 U.S. at 395-96.

for Justice that article 4, section 22 of the Nevada Constitution establishes a private right of action for violations of other constitutional provisions. IJ Br. 5. That provision permits the *Legislature* to create causes of action "against the State as to all liabilities originating after the adoption of this Constitution." Nev. Const. art. 4, § 22. By its own terms, then, it does not ipso facto create a cause of action – it requires legislation. *Id.*

The Nevada Constitution debates squarely addressed the fact that constitutional rights required legislation to become actionable. As one framer explained, in discussing the provision that includes the Due Process Clause, “[t]he Constitution is inoperative of itself, until there is legislation.” Andrew J. Marsh, *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada* 62 (1866) [hereinafter “*Constitutional Convention Report*”].

2. The Legislature has created numerous statutory vehicles for constitutional violations, but it has never authorized damages actions.

The Due Process and Seizure and Search Clauses “look[] to legislation” to become enforceable by private citizens. *Constitutional Convention Report, supra*, at 62. As the framers of the Nevada Constitution intended, the Legislature has established a comprehensive statutory scheme for the enforcement of the Nevada Constitution. NRS 30.040 enables a plaintiff to obtain a declaration on a statute’s constitutionality. *See Tam v. Colton*, 94 Nev. 453, 456 (1978). The Nevada Administrative Procedure Act, NRS chapter 233B, permits affected persons to challenge the constitutionality of regulations and agency adjudications. NRS 233B.110(1), 233B.135(3)(a). NRS 33.010 creates a right to enjoin unconstitutional government acts. *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357 (2013).

Constitutional rights can also be enforced through legislatively created writ proceedings. *See, e.g.*, NRS 34.724(1) (post-conviction writ of habeas corpus); *State ex rel. Brennan v. Bowman*, 88 Nev. 582, 584-85 (1972) (writ of mandamus). In fact, the Legislature has created a writ proceeding specifically for one type of constitutional claims – prior restraints of speech. NRS 34.185(1).

The Legislature has omitted a private right of action for *damages* from its comprehensive statutory scheme. *See* OB 16. Mack resorts to asking this Court to imply a private right of action for damages to make up for the Legislature’s omission, an invitation this Court must reject. *See id.* It is not this Courts’ role to “fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.” *Echeverria v. State*, 137 Nev. Adv. Op. 49, 495 P.3d 471, 476 (2021).

This Court implies a private right of action not explicit in the statutory text only if the plaintiff can show that the Legislature intended to confer that right. *Baldonado*, 124 Nev. at 958. If she cannot make that showing, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter.” *Id.* at 959. Mack points to nothing in the statutory scheme that shows an intent to confer a private right of action for damages. Rather, she argues that the absence of an express private right of action for damages is proof that one exists. OB 13. But her argument gets the issue precisely backwards: the absence of

an express provision establishing a right of action creates a presumption that there is no such right. *Baldonado*, 124 Nev. at 959 & n.11, 964.

3. This Court has never recognized an implied private right of action for damages.

Mack concedes that this Court has never held that there is an implied right of action for damages under the Nevada Constitution. OB 19-20. Only Amici Stephen Lara and Institute for Justice (collectively, “IJ”) disagree. The cases IJ cites, however, show only that plaintiffs can enforce the Nevada Constitution through claims for prospective relief. *See, e.g., S. Pac. Co. v. Dickerson*, 80 Nev. 572, 576 (1964) (action for declaratory relief); *State ex rel. Fook Ling v. Preble*, 18 Nev. 251, 2 P. 754, 754 (1884) (writ proceeding). Defendants agree that the Legislature has created vehicles for prospective relief. But this fact highlights the *lack* of an equivalent right of action for damages.

This Court’s precedent undermines IJ’s argument. *Saunders v. State ex rel. Department of Highways*, 70 Nev. 480 (1954), originated as an eminent domain action filed by the State, through which the defendant obtained just compensation. *Id.* at 481. Eminent domain actions are a legislatively created procedure. *See* NRS 37.070. Again, Defendants acknowledge that Nevadans have many ways to litigate their rights under the Nevada Constitution – just not an implied private right of action for damages.

The remaining two cases relied on by IJ do nothing to answer the questions presented here. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984). In those two cases, this Court *rejected* various plaintiffs’ damages claims. *City of Fernley v. State*, 132 Nev. 32, 44 (2016); *Ransdell v. Clark County*, 124 Nev. 847, 861 (2008). Those cases did not even discuss – let alone hold – that there is a private right of action for damages under the Nevada Constitution.

4. Nevada’s constitutional structure requires this Court to defer to the Legislature’s choice of remedies for alleged Nevada Constitution violations.

In Nevada’s system, “issues relating to serious financial, administrative and policy concerns should be resolved by the legislature” – not the courts. *Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 636 (1987); *see also State v. Second Judicial Dist. Court (Hearn)*, 134 Nev. 783, 786 (2018) (citing Nev. Const. art. 3, § 1 and recognizing that Nevada’s government divides its power between three branches – legislative, executive and judicial). When, as here, “an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quotation marks omitted).

The questions presented in this case require balancing serious financial, administrative and policy concerns. Opening Nevada up to damages liability requires balancing the financial cost to the State, the burden on public officials

imposed by discovery and litigation and the social value in redressing past constitutional injuries. Allowing certain defenses (or limiting the maximum monetary liability, as the Legislature has done for tort actions) can shift that balance one way or the other. Those are all essential policy questions constitutionally committed to the Legislature. *See Blanton*, 103 Nev. at 636.

5. Public policy supports the Legislature’s choice to allow prospective relief but not authorize damages actions.

The Legislature struck a balance between competing considerations by creating vehicles for prospective relief – like writs and injunctions – while declining to create a damages cause of action. *See supra* Argument Part II.A.2. There are good reasons for the Legislature’s choice.

Claims for prospective relief allow Nevada courts to interpret and apply Nevada Constitution provisions without threatening the State treasury. Courts may be more inclined to extend constitutional protections where the costs are lower. John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 90, 98-99 (1999).

And the costs mitigated by allowing only prospective relief are not solely financial. Damages liability can cause “overdeterrence,” where the potential for liability causes a public official to refrain from discharging some part of his job. Jeffries, *supra*, at 90. Because claims for prospective relief require determining only

the present state of things, and not historical facts, they require less-onerous discovery to resolve. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685-86 (2009) (discussing the detrimental public policy effects of subjecting government officials to “disruptive discovery”). And preventing ongoing or imminent constitutional violations is more pressing priority than adjudicating the validity of past actions.

B. This Court should decline to import *Bivens* into Nevada law.

Mack makes no effort to argue that existing Nevada law supports judicially creating a private right of action for damages for Nevada Constitution violations. *See* OB 12-20. Instead, she almost exclusively relies on the U.S. Supreme Court’s 1971 *Bivens* decision, *id.* at 14-17, in which the Court implied a cause of action for damages for a search of the plaintiff’s home that violated the U.S. Constitution, *Bivens*, 403 U.S. at 389, 397.

This Court has never adopted *Bivens*, and it should not do so now. *Bivens* is incompatible with Nevada law. And even if it weren’t, by its own terms it doesn’t apply to Mack’s case.

1. *Bivens* is incompatible with Nevada law.

As explained above, this Court has held that the judiciary does not supply a remedy unless the Legislature intended to create that remedy. *Baldonado*, 124 Nev. at 958. And if the statutory text lacks an express right of action, a right of action presumptively does not exist. *See id.* at 959.

Bivens's analysis violates that precedent. In the *Bivens* era the U.S. Supreme Court "assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose." *Ziglar*, 137 S. Ct. at 1855. It would accordingly imply statutory private rights of action "not explicit in the statutory text itself." *Id.* The *Bivens* opinion relied on those statutory cases to likewise imply a private right of action for damages to enforce the federal constitution. *Id.*

Mack's attempts to distinguish this Court's *Baldonado* decision fall short. *See* OB 17. *Bivens* transposes principles of statutory construction to constitutional construction. *Ziglar*, 137 S. Ct. at 1855. *Baldonado* shows that the underlying principles of statutory construction relied upon in *Bivens* are incompatible with Nevada law.

2. *Bivens* is inapplicable because Mack has alternative remedies for the alleged violation.

"[W]hen alternative methods of relief are available, a *Bivens* remedy usually is not." *Ziglar*, 137 S. Ct. at 1863. "Numerous state courts" have likewise refused to create a *Bivens*-type remedy due to "the existence of alternative remedies." *Fields v. Mellinger*, 851 S.E.2d 789, 797 (W.V. 2020) (collecting cases). That is an independent reason to decline to import *Bivens* here.

Both federal and Nevada law provide alternative remedies for the claims that Mack asserts. Myriad state courts have held that a federal § 1983 claim provides alternative remedies that preclude creating a state-law *Bivens*-type claim. *Fields*,

851 S.E.2d at 798-99 (collecting cases). Mack is asserting § 1983 claims in this case, an alternative avenue to the damages award that she seeks. *See* EOR 11-12. Her surviving § 1983 claim will be adjudicated by the federal district court no matter how this Court answers the certified questions.

Nevada-law tort claims are also often available to redress this kind of alleged injury. For example, this Court has explained that an invasion of Fourth Amendment rights “has fundamental elements in common” with Nevada-law torts like conspiracy, battery and false imprisonment. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 370 (2009). Other state courts have held that the availability of a state-law tort action forecloses a *Bivens*-type claim. *See, e.g., St. Luke Hosp., Inc. v. Straub*, 354 S.W.3d 529, 538 & n.40 (Ky. 2011); *Giraldo v. Dep’t of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 390 (Ct. App. 2008).

More broadly, legislatively created vehicles for prospective relief like declaratory-judgment actions and writ proceedings already protect Nevadans’ constitutional rights. Threaded throughout this brief are numerous decisions of this Court defining the scope and effect of many Nevada Constitution provisions.⁵ Mack’s argument that without a new constitutional cause of action for damages “Nevada civil rights and constitutional protections” would be rendered “moot and

⁵ *See, e.g., Hearn*, 134 Nev. at 785-86; *City of Sparks*, 129 Nev. at 357; *Blanton*, 103 Nev. at 626-27; *Pohlbel*, 128 Nev. at 2; *Daines*, 108 Nev. at 17, 20-21; *Brennan*, 88 Nev. at 584, 586.

meaningless,” OB 13, has no basis in the reality of Nevada law. Alternative remedies exist.

3. On its own terms *Bivens* does not apply to Mack’s claims.

Even if this Court agrees with *Bivens*’s general principles, it should decline to apply it to this set of facts. Extending *Bivens* to new factual contexts is a “disfavored judicial activity.” *Ziglar*, 137 S. Ct. at 1857 (quotation marks omitted). It is permissible only where there are no “special factors counselling hesitation.” *Id.* Under that test, the U.S. Supreme Court has rejected every request to extend *Bivens* for the last 40 years. *Id.*

Searches of correctional-facility visitors is a new context that presents special factors counseling hesitation. A detention facility is “a unique place fraught with serious security dangers.” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Corrections officials must balance the “residual privacy interests of [prison] visitors,” *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995), with the threat of smuggling inherent in visitation, *see Bell*, 441 U.S. at 559. That kind of “intrusion into an area of prison management that demands quick response and flexibility” is not appropriate for a *Bivens*-type remedy. *See Earle v. Shreves*, 990 F.3d 774, 781 (4th Cir. 2021).

III. If This Court Imports *Bivens*, It Should Likewise Import the Defenses to *Bivens* Claims Recognized by Federal Law.

A. The parties agree that absolute immunity and discretionary-act immunity are available to Defendants.

Mack concedes that absolute immunity and discretionary-act immunity would apply if this Court created a private right of action for damages for violations of the Nevada Constitution. OB 21. Defendants agree.

Absolute immunity shields government officials from being subject to liability for exercising certain functions. Martin A. Schwartz, *Section 1983 Litigation Claims & Defenses* § 9.02 (4th ed. 2021). Government officials are absolutely immune from liability for legislative functions and court-related functions. *Legislature of State v. Settlemeyer*, 137 Nev. Adv. Op. 21, 486 P.3d 1276, 1283 (2021); *State v. Second Judicial Dist. Court (Ducharm)*, 118 Nev. 609, 615-16 (2002). This Court applies absolute immunity to Nevada-law claims. *See, e.g., Settlemeyer*, 486 P.3d at 1283-84.

The Legislature established discretionary-act immunity to shield Nevada officials from claims arising from their public duties. NRS 41.032(2). Discretionary-act immunity precludes liability “[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty” by a Nevada employee. *Id.*

Amicus IJ disagrees with Mack and argues that discretionary-act immunity cannot apply to constitutional claims because, according to IJ, “Nevada officials have no discretion to violate the Constitution.” IJ Br. 14-15. But this Court has already recognized that discretionary-act immunity can apply to claims based on an alleged violation of a mandatory directive (like a statutory or constitutional provision). *See Echeverria v. State*, 137 Nev. Adv. Op. 49, 495 P.3d 471, 475-76 (2021). That recognition does not limit the substantive constitutional right; it merely affects the remedies that may be available.⁶

B. Qualified immunity is a necessary part of *Bivens* doctrine that must be permitted if this Court imports *Bivens*.

The parties’ sole dispute remains Defendants’ ability to claim qualified immunity. Qualified immunity can shield government officials performing administrative and executive functions. Schwartz, *supra*, § 9.02. Unlike absolute immunity, qualified immunity doesn’t apply if the official violated “clearly established” constitutional law. *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 458 (2007).

⁶ Although Mack does not mention due-care immunity, it is part of the same statute as discretionary-act immunity and there is no reason why it should not apply to Nevada Constitution claims as well. *See* NRS 41.032(1). Due-care immunity protects Nevada employees from claims based on their execution of a statute or regulation. *Id.*

Mack argues that if this Court imports *Bivens*, it should not import qualified immunity. She argues that thus far qualified immunity has been applied solely to federal claims. OB 21. While technically true, this argument provides no support for her position. Mack is trying to bring a federal doctrine, *Bivens*, into Nevada law. Qualified immunity is an integral part of the federal *Bivens* analysis. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982).

If the federal-law *Bivens* doctrine is adopted by this Court, so too must this Court adopt qualified immunity as a defense. In addition to being logical, the adoption of qualified immunity is a practical part of the *Bivens* scheme. Qualified immunity helps mitigate the substantial costs imposed by *Bivens*-type actions.

1. Qualified immunity helps balance the burdens that creating a new damages remedy imposes.

This Court has recognized the benefits of qualified immunity. It “protect[s] the public from unwarranted timidity on the part of public officials, ensur[es] that qualified candidates are not deterred from entering public service, and reduc[es] the chance that lawsuits will detract public officials from their duties.” *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 360 (2009).

Qualified immunity has other benefits that address some of the problems created by *Bivens*-type claims. Nevada generally indemnifies government officials subject to personal liability. NRS 41.0349. Damages claims can therefore divert

public funds to paying money judgments instead of other priorities like education and public safety. By shrinking the universe of viable damages claims, qualified immunity reduces the Nevada treasury's exposure. And by giving courts the space to determine constitutional questions without having to impose substantial liability on the State, qualified immunity can promote the extension of constitutional rights. Jeffries, *supra*, at 98-99.

2. Qualified immunity continues to be applied in Nevada and at the federal level.

Implementation of qualified immunity is not “unworkable.” *See* Amicus Roderick & Solange MacArthur Justice Center (“MacArthur Center”) Br. 5-6 (arguing that qualified immunity should be severed from *Bivens* doctrine because it is purportedly “unworkable”). But this Court has been ably applying qualified immunity for years.⁷ There is no reason why it would be more difficult to apply to Nevada Constitution claims than to federal claims.

While other state legislatures have modified their qualified immunity doctrine, OB 10, Nevada has not. This fact highlights the Legislature's determination that qualified immunity has not fallen into disfavor in Nevada. Likewise, attempts to amend qualified immunity at the federal level have never

⁷ *See, e.g., Butler*, 123 Nev. at 458-60; *Angel v. Cruse*, 130 Nev. 220, 228-29 (2014); *Ortega v. Reyna*, 114 Nev. 55, 59-60 (1998), *abrogated on other grounds*, *Martinez v. Maruszczak*, 123 Nev. 433 (2007)

garnered majority support. See Richard Cowan, *U.S. Congressional Negotiations on Police Reforms Fail* (Sept. 22, 2021), <https://reut.rs/3BrNwqF>. And the U.S. Supreme Court has recently issued two unanimous decisions granting qualified immunity to law enforcement officers. *City of Tahlequah v. Bond*, ___ U.S. ___, 2021 WL 4822664, at *3 (Oct. 18, 2021) (per curiam); *Rivas-Villegas v. Cortesluna*, ___ U.S. ___, 2021 WL 4822662, at *3 (Oct. 18, 2021) (per curiam). Those decisions recognize qualified immunity’s role in balancing the benefits and burdens inherent in constitutional litigation.

3. Mack’s proposal for a novel form of qualified immunity misunderstands its purpose.

Mack’s request that this Court adopt a qualified immunity analysis that considers whether the defendant acted “intentionally” is contrary to U.S. Supreme Court precedent.⁸ *Harlow*, 457 U.S. at 815-18. Intent inquiries often allow “insubstantial claims” to proceed to trial. *Id.* at 815-16. That undermines qualified immunity’s purpose of sparing officials from the burdens of defending against unmeritorious claims in drawn-out lawsuits. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

⁸ Specifically, Mack proposes that if this Court adopts qualified immunity together with the *Bivens* doctrine, it should “preclude qualified immunity when [a] state agency’s mandatory administrative rules and regulations were clearly established against the alleged misconduct yet intentionally disregarded by the defendant.” OB 22.

The Court has likewise rejected considering regulatory provisions when assessing qualified immunity. *Davis v. Scherer*, 468 U.S. 183, 195-96 (1984). The purpose of constitutional litigation is to determine the scope of constitutional rights. It makes little sense to have the case turn instead on the scope of administrative regulations. There is already a remedy where a plaintiff alleges that she was injured by the violation of an “administrative regulation”: a negligence claim. *Ashwood v. Clark County*, 113 Nev. 80, 87 n.3 (1997).

IV. The only remedies available for alleged constitutional violations are those authorized by the Legislature: declaratory, injunctive, and writ relief.

The answer to the fourth certified question follows directly from the answers to the first three questions. The Legislature has authorized multiple forms of relief for alleged constitutional violations. *See supra* Argument Part II.A.2. It has not authorized damages liability. This Court should respect that choice.

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CONCLUSION

This Court should answer the first two certified questions in the negative and decline to answer the remaining questions as moot.

Defendants do not dispute the importance of the constitutional provisions at issue in this case. But Defendants recognize that the equally important constitutional principle of separation of powers dictates the correct outcome here. Under the Nevada Constitution, it is the Legislature's job to answer the questions presented here. Because the Legislature has not created a private right of action for damages, neither can this Court.

Dated this 22nd day of November, 2021.

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Dated this 22nd day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on November 22, 2021.

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