No. 18-17233

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Witherow,
Plaintiff-Appellant,
v.
Howard Skolnik, et al.,
Defendants-Appellees.

Opinion filed May 18, 2021
Before the Honorable Marsha S. Berzon,
Sandra S. Ikuta, and Ivan L.R. Lemelle

On appeal from the United States District Court
for the District of Nevada
Case No. 3:08-cv-353-RCJ-CBC
Hon. Robert C. Jones

BRIEF OF AMICUS CURIAE PUBLIC ACCOUNTABILITY IN SUPPORT OF REHEARING EN BANC

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June 21, 2021

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INTEREST OF AMICUS CURIAE[1]

Public Accountability is a nonpartisan, nonprofit organization that promotes access to justice for those injured by the government. Public Accountability has special expertise in the area of qualified immunity, and it uses that expertise to help individuals seeking redress, to inform lawmakers, and—through briefs like this one—to advise the courts.

This case directly implicates Public Accountability's mission. By leaving in limbo whether John Witherow had a right to communicate confidentially with his lawyer, the panel's decision weakens constitutional protections for all incarcerated persons. Nothing requires this result. To the contrary, the law of qualified immunity is full of reasons why the panel should have decided the important constitutional question at the heart of this case. As an organization with expertise in this area of the law, Public Accountability offers a perspective that will help inform the Court's decision.

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel has made any monetary contributions to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION

When John Witherow called his lawyer, he expected to be able to speak in confidence. Most of us do. Witherow was even using a special phone his prison provided for attorney calls. His subjective expectations converged with longstanding constitutional law, federal rules of evidence, and rules of professional ethics—not to mention objectively reasonable notions of privacy.[2] Still, over Judge Berzon's dissent, the panel here declined to decide whether Witherow had a right to confidential communications with his lawyer. *Evans v. Skolnik*, 997 F.3d 1060, 1067 (9th Cir. 2021). Instead, it skipped ahead to the second prong of qualified immunity and held that even if he had such a right, it wasn't clearly established. *Id.* So whether that right exists continues to be an open question in this circuit.

The full Court should answer that question, and it should answer in the affirmative. In recent years, a cross-ideological consensus has begun to emerge that the qualified immunity doctrine is broken.[3] Even

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[2] *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (recognizing, based on cases from the 1950s, 1970s, and 1990s, prisoner's Sixth Amendment right to confidential correspondence with his lawyer); *Gomez v. Vernon*, 255 F.3d 1118, 1131 (9th Cir. 2001) (recognizing attorney–client privilege for prisoners under federal common law); Nev. R. Pro. Conduct 1.6.

[3] *See, e.g.*, *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) (spotlighting "a growing, cross-ideological chorus of jurists and scholars urging

the doctrine's defenders acknowledge that serious problems emerge when courts regularly use qualified immunity to bypass underlying constitutional questions.[4] This case is the perfect example: People incarcerated in the Ninth Circuit *still* don't know whether they can talk to their lawyers unmonitored. For these roughly 500,000 individuals,[5] the question is one of "exceptional importance." Fed. R. App. P. 35(a)(2). And until it is resolved, prison staff throughout the circuit will remain able to listen in on attorney–client phone calls with impunity.

LEGAL FRAMEWORK

Qualified immunity protects government agents from liability for violating constitutional rights unless those rights were "clearly established." *Camreta v. Greene*, 563 U.S. 692, 705 (2011). Courts may tackle the two prongs of qualified immunity—whether the officer violated a right and whether that right was clearly established—in any

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recalibration of contemporary immunity jurisprudence" (footnotes omitted)).

[4] *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1884 (2018).

[5] *See 50 state incarceration profiles*, Prison Policy Initiative, https://www.prisonpolicy.org/profiles/ (last visited June 15, 2021) (combined federal and state data); *State Statistics Information*, National Institute of Corrections (2018) (state-only data), https://nicic.gov/state-statistics-information.

order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If a constitutional violation is sufficiently "obvious," courts can impose liability even without precisely analogous precedent. *Hope v. Pelzer*, 536 U.S. 730, 738, 741 (2002); *see also Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020).

ARGUMENT

In recent years, qualified immunity has come in for criticism from jurists and commentators of all ideological stripes. Critics have focused on courts' failure to decide constitutional issues. But that's not a component of the doctrine, nor a necessary byproduct. The Supreme Court has expressly authorized lower courts "to exercise their sound discretion" in choosing which of the two prongs of qualified immunity to address first. *Pearson*, 555 U.S. at 236. Indeed, the Court has stressed that courts may "avoid avoidance" in service of "promot[ing] clarity—and observance—of constitutional rules." *Camreta*, 563 U.S. at 705–06.

The panel here declined to address whether prisoners have a right to confidential phone calls with their lawyers. This Court should take up that question en banc. And it should hold that they do.

1. Qualified immunity has come under cross-ideological fire.

Academics and judges alike have lately penned broadsides against qualified immunity. Professor Joanna Schwartz of UCLA, a leading expert on police-misconduct litigation, has described qualified immunity as "a doctrine unmoored to common-law principles, unable or unnecessary to achieve the Court's policy goals, and unduly deferential to government interests."[6] Professor William Baude of the University of Chicago, a prominent scholar of originalism, has likewise examined the professed legal bases of qualified immunity and determined that "none of these rationales can sustain the modern doctrine."[7]

Based on the work of Professor Baude and others, Justice Thomas called for overruling the current doctrine in *Baxter v. Bracey*, concluding that it "appears to stray from the statutory text" of 42 U.S.C. § 1983. *Baxter*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from denial of certiorari). Justice Gorsuch, too, has expressed skepticism of the more stringent interpretations of the "clearly established" requirement. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.). And Justice Sotomayor, joined by Justice Ginsburg, has objected that the Court's most recent applications

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[6] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1800 (2018).

[7] William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 51 (2018).

of the doctrine involve "nothing right or just under the law." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

Meanwhile, in this Court, Judge Hurwitz has criticized qualified immunity as a "judge-made doctrine" found "nowhere in the text of § 1983." *Sampson v. Cty. of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part). Judge Reinhardt, before he died, wrote a law-review article inveighing against the doctrine.[8] And judges of other courts have also chimed in that "qualified immunity smacks of unqualified impunity." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part); *Fogle v. Sokol*, 957 F.3d 148, 158 n.11 (3d Cir. 2020).[9]

2. Critics have focused on courts' refusal to decide constitutional issues.

Until 2009, courts were forced to decide first whether a constitutional right existed and only then whether it was clearly established. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Permitting courts to "skip ahead" to the second step, the *Saucier* Court explained,

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[8] *See* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1245 (2015).

[9] *See also* Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 311 n.6 (2020) (collecting cases).

would deprive the law of the case-to-case elaboration that gives force to constitutional guarantees. *Id.* at 201. In *Pearson*, however, the Court relaxed this rule. 555 U.S. at 242. It acknowledged that the two-step *Saucier* procedure would still often be "advantageous," but predicted that permitting lower courts to skip ahead on occasion would not necessarily lead to "constitutional stagnation." *Id.*

Time and experience have given the lie to that prediction. More than a quarter of appellate qualified immunity decisions, like the one here, "leapfrog the underlying constitutional merits" and grant immunity directly. Schwartz, *supra* n.9, at 318 & n.33; *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part, dissenting in part). This practice has been a source of consistent criticism. *E.g.*, *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (en banc) (Grasz, J., dissenting).[10] Again and yet again, such cases "threaten[] to leave standards of official conduct permanently in limbo." *Camreta*, 563 U.S. at 706.

Take the First Amendment right to film the police. Every circuit to consider the issue has concluded that the right exists. But the Third and Fifth Circuits disposed of the question on the second prong for *years*—denying guidance to police and civilians alike, wasting resources

[10] *See also, e.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1 (2015).

of litigants and judges alike.[11] During this protracted period of indecision, officers in those circuits continued to arrest civilians for recording them. *See, e.g.*, *Karns v. Shanahan*, 879 F.3d 504, 524 (3d Cir. 2018). And for that, of course, they still get immunity. *See id.*

Other examples in which qualified immunity has "frustrate[d] the development of constitutional precedent" abound. *See Camreta*, 563 U.S. at 706 (quotation marks omitted). For example, it remains unclear:

- whether police officers' stealing hundreds of thousands of dollars in seized cash offends the Fourth Amendment, *Jessop v. City of Fresno*, 936 F.3d 937, 940–42 (9th Cir. 2019);
- whether consent to enter a home using a key freely given permits officers to nearly destroy the home, *West v. City of Caldwell*, 931 F.3d 978, 984–87 (9th Cir. 2019); and
- whether a public-school teacher can disparage Christianity in class and comply with Establishment Clause, *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 978, 988 (9th Cir. 2011).[12]

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[11] Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1897 (2018) (citing *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017)).

[12] *See also, e.g.*, *Larios v. Lunardi*, 2021 WL 1997941, at *1 (9th Cir. May 19, 2021) (whether a public employer may seize all the data on an employee's personal cellphone without a warrant); *Lowe v. Raemisch*,

The result is that plaintiffs face a Catch-22: They are asked to produce precisely on-point precedent "even as fewer courts are producing precedent." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part). All the while, constitutional clarity remains "exasperatingly elusive." *Id.* at 480; *see, e.g.*, *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (per curiam) ("This is the fourth time in three years that an appeal has presented [a particular] question . . . . Continuing to resolve [it] at the clearly established step means the law will never get established.").[13] And if the panel's decision here stands, the same result will obtain: "[This Court's] precedent will remain silent on the Fourth Amendment implications here, and give rise perpetually to grants of qualified immunity." *Evans*, 997 F.3d at 1074 n.3 (Berzon, J., dissenting in part).

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864 F.3d 1205, 1206–07 (10th Cir. 2017) (whether a prison may deny an inmate outdoor exercise for over two years); *Sama v. Hannigan*, 669 F.3d 585, 592 (5th Cir. 2012) (whether prison doctors may remove a prisoner's ovary and lymph nodes without her consent during a radical hysterectomy).

[13] *See also*, *e.g.*, *Kelsay*, 933 F.3d at 987 (Grasz, J., dissenting) (criticizing the majority for disposing of an excessive-force case on the second prong and "perpetuat[ing] the very state of affairs used to defeat [the plaintiff's] attempt to assert her constitutional rights"); *Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part); *Cole v. Carson*, 935 F.3d 444, 472 (5th Cir. 2019) (Willett, J., dissenting).

3. This Court should decide the constitutional issue in this case.

Nothing about this murky state of constitutional affairs is necessary or required. To the contrary, both Justice Alito in *Pearson* and Justice Kagan in *Camreta* recognized the value of "avoiding avoidance." The Supreme Court itself has several times reached the merits question before addressing the "clearly established" prong. So has this Court. And it should do so here.

3.1. The Supreme Court has repeatedly approved of "avoiding avoidance" in qualified immunity cases.

Even as the Supreme Court held in *Pearson* that courts *may* address the prongs of qualified immunity in either order, it continued to recognize that deciding the merits of constitutional cases first is "often beneficial." 555 U.S. at 236. Two years later, it spelled out again that lower courts have permission to "avoid avoidance"—specifically so they can "address novel claims," "establish[] controlling law," and "prevent[] invocations of immunity in later cases." *Camreta*, 563 U.S. at 704–06. Indeed, it praised this Court for having done so in that case. *Id.* at 707.

3.2. This Court, too, "typically" addresses the merits in qualified immunity cases.

In an en banc decision two years after *Pearson*, this Court announced that it would address both prongs of qualified immunity whenever doing so would "promote[] the development of constitutional precedent in an area where this court's guidance is sorely

needed." *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc) (quotation marks omitted). Using that rubric, this Court has decided several important issues, including:

- whether and when subduing a suspect with a taser is excessive force, *id.* at 436, 440;
- whether the state-created danger doctrine applied to officers who enabled a fellow officer's abuse of his wife, *Martinez v. City of Clovis*, 943 F.3d 1260, 1270 (9th Cir. 2019); and
- whether sexual harassment violates the Equal Protection Clause, *Sampson*, 974 F.3d at 1023.

In countless other cases, this Court has reached the constitutional merits without even providing a reason.[14] In this circuit, the default mode—"[e]ven in difficult cases"—is that courts "tend[]" to address the merits. *Martinez*, 943 F.3d at 1270 (quotation marks omitted); *see also Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013) (explaining that this Court "typically" addresses the merits).

[14] *See, e.g.*, *Monzon v. City of Murrieta*, 978 F.3d 1150, 1156 (9th Cir. 2020); *Cates v. Stroud*, 976 F.3d 972, 978 (9th Cir. 2020); *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019); *Est. of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1005 & n.6 (9th Cir. 2017); *C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1257 (9th Cir. 2016); *Tarabochia v. Adkins*, 766 F.3d 1115, 1121 (9th Cir. 2014); *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 454 (9th Cir. 2013); *see also Mattos*, 661 F.3d at 440–41 n.3 (collecting older cases).

3.3. This Court should address the merits issue here: Whether prisoners have a right to confidential phone calls with their lawyers.

Despite this Court's en banc direction and typical practice, the panel majority declined to address the merits of Witherow's constitutional claim. *Evans*, 997 F.3d at 1071. It explained that the Supreme Court had instructed courts to "'think hard, and then think hard again' before doing so." *Id.* (quoting *Camreta*, 563 U.S. at 707). But that was not the Court's instruction. It was expressly a statement of the Court's "general" policy of constitutional avoidance—which the Court followed up by reiterating that in qualified immunity cases, it can be "beneficial" to *avoid* avoidance. *Camreta*, 563 U.S. at 707.[15] The Court dedicated five pages to explaining why its "regular policy of avoidance sometimes does not fit the qualified immunity situation," and the panel majority plucked one sentence out of context to reach precisely the result the Court warned against—leaving standards of official conduct "permanently in limbo." *Id.* at 704–08.

For at least three reasons, the Court should rehear this case en banc and decide the merits issue. First, this is an "area where this court's guidance is sorely needed." *Mattos*, 661 F.3d at 440. Roughly

[15] To be sure, in *District of Columbia v. Wesby*, the Court suggested—for the first time—a preference for starting with the second prong of qualified immunity. 138 S. Ct. 577, 589 n.7 (2018). But then it went on to reach the merits, as it has in many other cases. *See, e.g.*, *id.*; *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014); *Scott v. Harris*, 550 U.S. 372, 377 n.4 (2007).

500,000 people are incarcerated within the Ninth Circuit's jurisdiction.[16] Many have valid complaints about the conditions of their confinement, the conduct of their jailers, the medical treatment they require, and so on. Those able to retain counsel are the ones *most* likely to have colorable legal claims. And confidential communications are the lifeblood of any attorney–client relationship. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Yet under this circuit's law as the panel leaves it, every prison guard in the Ninth Circuit knows he or she can eavesdrop on such conversations without fear of legal consequence. Unless this Court provides guidance en banc, they will do just that.[17]

Second, the Supreme Court explained in *Pearson* that addressing the merits is "especially valuable" for "questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." 555 U.S. at 236. Because the question at hand concerns only prisoners' *civil* cases, *Evans*, 997 F.3d at 1067, it's unlikely to arise in a suppression

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[16] *See* n.5, *supra*, and accompanying text.

[17] *See, e.g.*, *Head v. Cty. of Sacramento*, 2021 WL 2267669, at *2 (E.D. Cal. June 3, 2021) (in which a jail guard sent recordings of an inmate's calls with his lawyer to prosecutors—who used them against the inmate at trial); *Jayne v. Bosenko*, 2014 WL 2801198, at *9 (E.D. Cal. June 19, 2014) (in which a guard disciplined an inmate based on the contents of a voicemail the inmate left for his attorney); *Browning v. MCI Worldcom, Inc.*, No. 3:00-cv-633, Dkt. 248 (D. Nev. July 10, 2006) ("[F]ive of Plaintiff's legal calls were recorded between September 11 and September 25, 2000."); *Silva v. King Cty.*, 2008 WL 4534362, at *2 (W.D. Wash. Oct. 7, 2008) (similar).

motion under the Fourth Amendment. It might arise in a suit seeking injunctive relief—although, as Judge Berzon points out, such actions run a "high risk of mootness" because "prisoners are often transferred between institutions and institutional practices vary." *Id.* at 1073 (Berzon, J., dissenting). And even if such a suit could be maintained, the prison will enjoy an advantage few litigants can boast: The power to listen in on the other side's calls with their lawyers.

Third, the panel majority was mistaken that the question presented here is so "highly factbound" that deciding it would "provide 'little guidance for future cases.'" *See id.* at 1069 (quoting *Pearson*, 555 U.S. at 237). The majority reached that conclusion only by unnecessarily baking every contingent fact of this case—the disciplinary context, the intermittent nature of the monitoring, the backdrop of late-2000s cellphone technology—into its framing of the question. *See id.* at 1069–70. It may have gotten its facts wrong: There's evidence in the record that at least sometimes, prison officials eavesdropped on entire conversations between inmates and their lawyers. 3-ER-315. But even if not, the majority also acknowledged that prisoners are commonly subjected to "recording or monitoring [of] entire phone calls." *Evans*, 997 F.3d at 1069–70 & n.4; *see also* n.17, *supra*. Surely, then, the better question is the one framed by the dissent: "[W]hether prisoners have a Fourth Amendment privacy interest in the content of attorney–

client telephone calls related to civil cases." *Evans*, 997 F.3d at 1073. And that question is not factbound at all.

Nor do any of *Pearson*'s other reasons to avoid the merits apply here. *See* 555 U.S. at 236–42 (listing several factors that might counsel avoidance). Addressing the merits would not unnecessarily consume judicial resources: Previous panels addressed the Fourth Amendment question, and the dissent addressed the penological question. *Evans v. Skolnik*, 637 F. App'x 285, 288 (9th Cir. 2015); *Evans*, 997 F.3d at 1074–76. The question presented is not pending before this Court en banc or the Supreme Court. No interpretation of state law is in issue. The parties' summary judgment briefs were not "woefully inadequate." *See* Dkt. 57 at 18–19 (setting forth Witherow's counsel's qualifications). Defendants who prevail at step two no longer have trouble obtaining review of adverse merits decisions at step one. *See Camreta*, 563 U.S. at 708 (permitting such appeals). And for the reasons above, a decision on the merits is deeply necessary to protect prisoners' rights to meaningful access to justice.

There are strong reasons to decide the merits in this case, and no compelling reasons to avoid them. The Court should rehear this case en banc and decide, on the merits, whether prisoners have a right to confidential phone calls with their lawyers.

4. Prisoners have a clearly established right to confidential phone calls with their lawyers.

John Witherow had a Fourth Amendment right to confidential telephone calls with his lawyer. His merits briefing, his petition for rehearing en banc, and Judge Berzon's dissenting opinion all amply make that point; this brief will not reiterate their arguments. But there's more: Any reasonable prison guard would have known of that right, so Witherow can recover for its violation. This case should proceed to trial.

There may have been no case in 2008 that spelled out expressly that prisoners have a right to confidential attorney–client communications. But as Justice Gorsuch put it when he sat on the Tenth Circuit:

> [S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

Browder, 787 F.3d at 1082–83; *see also Mattos*, 661 F.3d at 442 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." (quoting *Hope*, 536 U.S. at 741)).

This doctrine first appeared in *Hope v. Pelzer*, 536 U.S. at 741. There, the Court held that handcuffing a prisoner to a "hitching post" in the hot sun was so obviously cruel and unusual that any reasonable officer would have known it was unconstitutional. *Id.* at 741–46. More recently, in 2020, the Court confirmed that the obvious-violation doctrine was alive and well. In *Taylor v. Riojas*, it held that "any reasonable officer should have realized" that housing a prisoner for six days in a cell teeming with human waste "offended the Constitution." 141 S. Ct. at 53–54. And in early 2021, it vacated and remanded, for further consideration in light of *Taylor*, a case in which the Fifth Circuit had granted a prison guard qualified immunity for pepper-spraying a non-threatening, cooperative prisoner. *McCoy v. Alamu*, 141 S. Ct. 1364 (2021), *granting cert. and vacating* 950 F.3d 226, 231 (5th Cir. 2020).

This Court, following *Hope* and *Taylor*, has "not hesitated to deny qualified immunity to officials in certain circumstances, 'even without a case directly on point.'" *Wright v. Beck*, 981 F.3d 719, 735 (9th Cir. 2020) (quoting *A.D.*, 712 F.3d at 455). For example, this Court has found obviously unconstitutional:

- destroying a person's guns without providing notice or an opportunity to be heard, *id.* at 735–37;

- searching and photographing a trans woman's body while she lay unconscious in a hospital bed, *Young v. Hauri*, 2021 WL 2206520, at *2 (9th Cir. June 1, 2021);
- shepherding attendees of a political rally into a violent crowd of protesters, *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018);
- "killing a person with no legitimate law enforcement purpose," *A.D.*, 712 F.3d at 455; and
- unreasonably destroying property while executing a search warrant, *Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005).

Eavesdropping on a prisoner's phone calls with his lawyer—violating a privilege that this Court has described as "nearly sacrosanct"—is just as obviously unconstitutional as any of these. *See Nordstrom*, 762 F.3d at 910. The Court should grant rehearing en banc, fix into writing this obvious but unwritten rule of constitutional law, and deny the defendant prison guards qualified immunity.

CONCLUSION

For all these reasons, the Court should rehear this case en banc.

Dated: June 21, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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