No. 21-30625

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PERCY TAYLOR,

Plaintiff–Appellee,

v.

JAMES LEBLANC, Secretary,

Defendant–Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA
No. 3:21-CV-77

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, ALLIANCE DEFENDING FREEDOM, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, AND TEXAS PUBLIC POLICY FOUNDATION IN SUPPORT OF PERCY TAYLOR

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for *amici curiae* Cato Institute, Alliance Defending Freedom, Foundation for Individual Rights and Expression, and Texas Public Policy Foundation certifies that the following listed persons and entities described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF INTEREST[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is how qualified immunity affects the ability of citizens to vindicate their constitutional rights and the consequent erosion of accountability among and confidence in public officials that the doctrine encourages.[2]

Alliance Defending Freedom (ADF) is the world's largest law firm dedicated to protecting religious freedom, free speech, the sanctity of life,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that no party's counsel authored this brief in whole or in part, and no party, counsel for a party, or person other than *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Cato Institute certifies that it has no parent corporation and that it does not issue stock.

parental rights, and marriage and family. ADF often confronts the issue of qualified immunity when government officials have egregiously violated individuals' constitutional rights. As a result, ADF is part of the growing cross-ideological consensus that the qualified immunity doctrine misunderstands Section 1983 and its common-law backdrop, denies justice to victims of obvious constitutional violations (as here), and fails to hold government officials accountable for official wrongdoing, even when they know such wrongdoing violated constitutional rights.

ADF's concern in this case is that the qualified immunity doctrine's unfairness and lack of workability has diminished the public's confidence in government institutions. This Court should take every opportunity to clarify and narrow the doctrine. This case presents just such an opportunity, in which Plaintiff Taylor asks the Court to clarify that government officials cannot escape liability for obvious infringements of the Constitution.[3]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential

[3] Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Alliance Defending Freedom states that it has no parent corporation and that it does not issue stock.

qualities of liberty. Since 1999, FIRE has successfully defended expressive rights nationwide through public advocacy, targeted litigation, and *amicus curiae* participation. As part of its mission, FIRE directly represents individuals in Section 1983 lawsuits who endured First Amendment violations. Thus, FIRE routinely tackles the threat to protected expression that qualified immunity poses.

FIRE's concern in this case is that too often qualified immunity allows officials to dodge accountability while depriving Americans of a vital remedy for constitutional violations—including when officials violate the Constitution in obvious ways. What's more, courts keep granting qualified immunity to officials who violate First Amendment and other constitutional rights despite having ample time to recognize the constitutional limits on their actions. Because this case includes both an obvious and a deliberate constitutional violation, it presents the Court with an opportunity to limit qualified immunity's excesses and uphold the promises of Section 1983.[4]

[4] Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Foundation for Individual Rights and Expression states that it has no parent corporation and that it does not issue stock.

The Texas Public Policy Foundation (TPPF) is a nonprofit, nonpartisan research foundation dedicated to promoting and defending liberty, personal responsibility, and free enterprise throughout Texas and the Nation. For decades, TPPF has worked to advance these goals through research, policy advocacy, and impact litigation.[5]

TPPF's concern is this case turns on qualified immunity's incompatibility with both the text of the statute and original public meaning. TPPF's litigation depends on judges being willing to eschew public policy choices in favor of an originalist interpretation of both statutes and the Constitution. Qualified immunity, as currently constructed, demands that judges do the opposite. This case provides an ideal vehicle for the Court to at least minimize the damage of this judicially created doctrine by not expanding non-originalist precedent.

[5] Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Texas Public Policy Foundation states that it has no parent corporation and that it does not issue stock.

INTRODUCTION

Courts' applications of the doctrine of qualified immunity have increasingly diverged from the statutory and historical framework on which it is supposed to be based. The text of 42 U.S.C. § 1983 makes no mention of immunity, and the common law of 1871 did not include a broad defense for all public officials. With limited exceptions, the baseline assumption at the founding and throughout the nineteenth century was that public officials were strictly liable for unconstitutional misconduct. Judges and scholars alike have thus increasingly concluded that the contemporary doctrine of qualified immunity is unmoored from any lawful justification and in serious need of correction.

Qualified immunity's shortcomings are at the forefront of this litigation, in which Plaintiff Percy Taylor was one of multiple individuals victimized by the Louisiana Department of Public Safety's pattern of detaining inmates *after* their sentences expired. The panel's withdrawn opinion suggests that Taylor has the task of proving not only that his constitutional rights were violated (a straightforward task given the undisputed circumstances), but also that he has a clearly established right to a specific method of remedying those constitutional violations. But that

requirement turns the remedies afforded by Section 1983 into a fictitious hope, even when, as here, there is an obvious and blatant deprivation of constitutional rights. If qualified immunity is a viable defense to a Section 1983 claim, it should not bar recovery for plaintiffs who can establish they have constitutional rights that have been violated under the guise that they cannot prove a constitutional right to a specific *remedy* for that violation.

ARGUMENT

1. The qualified immunity doctrine lacks statutory and historical foundations.

In Section 1983, Congress enacted a civil remedy for those whose rights are violated by government actors. But the judicially created qualified immunity doctrine has rendered Section 1983 remedies largely aspirational for many victims of even the most egregious constitutional violations. Yet modern qualified immunity doctrine does so largely without basis—the doctrine is not supported by historic common law or statutory text.[6] Recent Supreme Court and Fifth Circuit judges have recognized that the "kudzu-

[6] *See generally* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201 (2023).

like creep" of the doctrine needs to be curtailed.[7] This case gives the Court a chance to clarify the application of the doctrine, particularly when government officials ignore blatant, repeated notices of constitutional violations.

a. Section 1983's codified text does not provide immunity.

The Supreme Court has observed that Section 1983 "on its face does not provide for any immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The statute instead states that "[e]very person" who acts under the color of law deprives "any citizen" of "any rights, privileges or immunities secured by the Constitutions and its laws *shall be liable* to the party injured." 42 U.S.C. § 1983 (emphasis added). Section 1983's unqualified nature makes sense—it was passed in 1871 as one of several "Enforcement Acts" that sought to combat civil rights violations in the southern states during post-Civil War reconstruction.[8] The modern qualified immunity test, under which a

[7] *See, e.g.*, K*isela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring); *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018).

[8] Baude, *supra*, at 49.

constitutional rights violation is actionable only if the right was "clearly established" when the misconduct occurred,[9] would not have made sense in the reconstruction era. Indeed, such a test would have largely thwarted Section 1983's purpose, as the full power of the Fourteenth Amendment, passed only three years earlier, could hardly be considered "clearly established" law at the time.

So where did the qualified immunity doctrine come from? At best, the doctrine is based on a flawed application of the canon of derogation ("Derogation Canon").[10] The Court introduced a progenitor of the qualified immunity doctrine in a 1967 case involving police officers who enforced an unconstitutional anti-loitering statute, *Pierson v. Ray*, 386 U.S. 547, 553–57 (1967). There, the Court held that Section 1983 incorporated a "good faith" immunity defense that protected government officials from liability. *Id.* at 557. *Pierson*'s logic seems to have emanated from the Supreme Court's prior decision in *Tenney v. Brandhove*, which held that Section 1983 did not

[9] *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

[10] This canon generally includes that: (1) the common law is not to be overruled by implication, and (2) a presumption the common law provides the "default" rule against which Congress legislates. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) (using "default rule" ideation); *see generally* Reinert, *supra.*

abrogate legislative immunity recognized in the common law. 341 U.S. 367, 376 (1951).

But the Derogation Canon "is a tenuous one upon which to base any importation of immunity doctrine into Section 1983."[11] Even accepting that the Derogation Canon should influence statutory interpretation, applying the canon to Section 1983 is dubious. This is because the presumption that remedial statutes—such as Section 1983—should be read broadly inherently conflicts with invocation of the Derogation Canon.[12] Further, outside the criminal context, courts have generally relied on the canon to disfavor displacement of common law *claims* or *rights*, not common law defenses.[13]

b. Section 1983's original, as-enacted text expressly forecloses qualified immunity.

Recent scholarship has also revealed historical evidence that the entire qualified immunity doctrine is, essentially, a jurisprudential misadventure. The congressionally adopted statute that became Section 1983 explicitly

[11] Reinert, *supra*, at 205.

[12] Karl Llewellyn noted the tension between these two canons in his classic article on statutory construction. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

[13] Reinert, *supra*, at 206.

sought to displace common law defenses. The Civil Rights Act of 1871 contained additional language not contained in the current codified text:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (omitted language emphasized).

The added language was meant to encompass common law, a "custom, or usage of the State."[14] The 1871 Congress intended to create liability for state actors who violate federal law, *notwithstanding* any state law to the contrary.[15] But today's codified text derives from a historical accident—the first Revisor of Federal Statutes removed this italicized

[14] This was the basis for the Court's overruling of *Swift v. Tyson,* 41 U.S. 1 (1842), in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *See also W. Union Tel. Co. v. Call Pub. Co.*, 181 U.S. 92, 102 (1901) (citing Black's Law Dictionary for proposition that common law springs from "usages and customs").

[15] *See* Reinert, *supra*, at 235–46.

language when publishing the first edition of the Revised Statutes of the United States.[16] Although the Revised Statutes were corrected over time, the Revisor's error in omitting the "notwithstanding" clause from the enacted version of the Civil Rights Act of 1871 was never corrected.[17] At bottom, the omitted clause shows that common law barriers to Section 1983 liability were meant to be ignored when considering violations of a person's constitutional rights. The Supreme Court's qualified immunity jurisprudence to date has not yet reconciled this discrepancy, and its decisions are not congruent with the text, purpose, or context of the Civil Rights Act of 1871.

c. History does not support applying qualified immunity to Section 1983 claims.

Qualified immunity amounts to a form of a generalized good-faith defense for all public officials because it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Yet the relevant legal history does not justify a good-faith defense to Section 1983. Historically, the sole defense against constitutional violations was legality.[18] For example, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),

[16] See XXIV Rev. Stat. § 1979, at 348 (1874).

[17] Reinert, *supra*, at 237.

[18] *See* Baude, *supra*, at 55–58.

involved a claim against a captain who captured a foreign ship under illegal circumstances. The Supreme Court rejected the captain's defense based on instructions received directly from President Adams, holding that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* at 179. In other words, the officer's only defense was legality, not good faith.

Most important, the Supreme Court has expressly *rejected* the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Supreme Court held that a state statute was racially discriminatory and unconstitutional. *Id.* at 380. The defendants' primary argument against Section 1983 liability was that they acted on a good-faith belief that the statute was constitutional, but the Court ultimately rejected any such good-faith defense. *Id.* at 378. The denial of any general good-faith defense is thus "exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983's enactment."[19]

[19] Baude, *supra*, at 58 (citation omitted).

d. Despite any basis in history or statute, qualified immunity has become an increasingly impossible hurdle for Section 1983 claimants.

While ignorance of the law is typically no excuse, qualified immunity has been applied to Section 1983 to shield any government actor that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson*, 555 U.S. at 231. Decades of increasingly broad application of qualified immunity to Section 1983 claims has created "an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations,"[20]—including violations of free-speech and free-exercise rights. The easier it becomes for public officials to blatantly violate citizens' rights without legal consequence, the more illusory a Section 1983 remedy—and the rights Section 1983 was specifically designed to protect—becomes. Courts, like this one, should curtail this trend to carry out the congressional goal of Section 1983 as a remedy to *all* constitutional violations.

[20] *N.S. v. Kan. City Bd. of Police Comm'rs*, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting from denial of certiorari); *see also Zadeh*, 902 F.3d at 498 (Willett, J., concurring).

2. If qualified immunity is a viable defense to a Section 1983 claim, then this Court should clarify the "clearly established" step of the current test.

Overcoming a qualified immunity defense already requires meeting a high (and, at times, confusing) standard. The current two-step test, clarified in *Pearson v. Callahan*, is (1) whether the facts alleged by the plaintiff establish a violation of a constitutional right and (2) whether the right at issue was "clearly established" at the time of the complained-of conduct. 555 U.S. at 232. The Supreme Court and this Court have regularly emphasized the difficulty of both applying and meeting this standard.[21] Perhaps there is room for debate on how high the qualified immunity bar should be—or whether there should be a bar at all.[22]

One fact generally agreed upon is that qualified immunity does not extend to obvious constitutional violations. As the Supreme Court has made clear: "[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even

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[21] *Henderson v. Harris Cnty.*, 51 F.4th 125, 132–33 (5th Cir. 2022), *cert. denied*, 2023 WL 4163233 (U.S. June 26, 2023); *Cope v. Cogdill*, 3 F.4th 198, 205 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573 (2022) (citing *Kisela*, 138 S. Ct. at 1151–52 (2018); *Mullenix v. Luna*, 577 U.S. 7, 12–13 (2015); *Brosseau v. Haugen*, 543 U.S. 194, 196–97 (2004)).

[22] *See generally* Reinert, *supra*.

though the very action in question has [not] previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (denying qualified immunity to officials based on "the obvious cruelty inherent" in tying a prisoner to a hitching post in the sun); *see also Taylor v. Riojas*, 141 S. Ct. 52, 54 n.2 (2020) (per curiam) (recognizing the "obviousness" of the right not to be held in a feces-filled jail cell for days). And recently, this Court affirmed the obvious-violation principle, denying qualified immunity for a sheriff's deputy alleged to have sexually assaulted the plaintiff during a welfare check. *Tyson v. Sabine*, 42 F.4th 508, 520 (5th Cir. 2022). In any case, courts certainly should not make the qualified immunity standard higher in the face of an obvious and blatant deprivation of constitutional rights, like detaining a citizen well after his release date. *See Crane v. City of Arlington*, 60 F.4th 976, 977–78 (5th Cir. 2023) (Ho, J., concurring).

But the now-withdrawn opinion here and the Court's opinion in *Porter v. Epps*, 659 F.3d 440 (5th Cir. 2011), do just that. Those opinions hinder Section 1983 plaintiffs who suffered blatant deprivations of constitutional rights by applying both the "fair warning" and "objectively unreasonable" analysis in the second step of the qualified immunity test. For example, the

now-withdrawn opinion extended qualified immunity to LeBlanc by narrowly holding that failing to designate lawyers, rather than other, less-qualified staff to calculate release dates, was not objectively unreasonable (as such requirement is not clearly established by constitutional law). *Taylor v. LeBlanc*, 68 F.4th 223, 228 (5th Cir. 2023), *withdrawn*, 2023 WL 4155921 (5th Cir. June 23, 2023). Similarly, in *Porter v. Epps*, this Court noted that no evidence showed that an official would have had actual or constructive knowledge that existing policies would result in over-detention. 659 F.3d at 447. Because there was no evidence that the official could have known of the risk but disregarded it, this Court held that failure to promulgate new policies was not objectively unreasonable. *Id.*

Both *Porter* and *Taylor* acknowledged the role "fair warning" plays in an objectively unreasonable analysis. *Taylor*, 68 F.4th at 228; *Porter*, 659 F.3d at 447 (discussing "actual or constructive notice"). Both opinions also incorrectly concluded that because a single, specific remedial or preventive action is not constitutionally mandated, then failing to take that action is not objectively unreasonable. *Taylor*, 68 F.4th at 228; *Porter*, 659 F.3d at 447. These holdings have run afoul of a sound application of the two-step analysis.

By inserting an objective-unreasonableness component into the step-two analysis, the Court turned to a now-outmoded qualified immunity test, as acknowledged last month by Judge Southwick in a case involving the same misconduct:

> There is variance in this circuit's caselaw when articulating the second part of the analysis for qualified immunity. An objective-unreasonableness component, dating from some of our older caselaw, is sometimes applied to require a finding that "the defendant's actions were objectively unreasonable in light of clearly established law at the time of the violation." That language is a vestige of older case law that predates the Supreme Court's current test adopted in *Saucier v. Katz* and *Pearson v. Callahan*.

Parker v. LeBlanc, 73 F.4th 400, 406 n.1 (5th Cir. 2023) (citations omitted) (quoting *Porter*, 659 F.3d at 445).

As for the "fair warning" piece, that may be a valid framework for step-two analysis. But the question cannot be narrowly focused on the specific way to *remedy* the violation. Instead, the question should be whether there was fair warning that a constitutional violation *occurred* (or would occur without corrective action). In fact, this Court has affirmed that fair warning of a *violation* is the "central concept" of the clearly established question: "The law can be clearly established 'despite notable factual

distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue *violated* constitutional rights.'" *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope*, 536 U.S. at 740) (emphasis added). So here, the question is not whether it is "clearly established" that attorneys instead of non-attorneys should calculate release dates. Rather, the question is whether it is "clearly established" that a prisoner must be timely released (it is) and whether the department had fair warning that a constitutional violation would occur without action (it did).

a. LeBlanc had actual and constructive fair warning of a constitutional violation.

Just last year, in *Crittindon v. LeBlanc*, this Court examined similar Section 1983 claims against Secretary LeBlanc by five Louisiana inmates detained for at least 90 days past their release dates. 37 F.4th 177, 184 (5th Cir. 2022). The Court's analysis there reflects the proper treatment of a fair-warning inquiry.

The Court examined whether Secretary LeBlanc received fair warning of actual or potential constitutional violations related to over-detention. *Id.* at 185–87. Focusing on a report commissioned by the Louisiana Department

of Public Safety & Corrections—which highlighted rampant over-detention issues in Louisiana's state prisons—the Court noted that there is a "clearly established right to timely release from prison" and examined whether Secretary LeBlanc's conduct was objectively unreasonable because he had fair warning of the constitutional violation. *Id.* at 188.[23] In deciding that Secretary LeBlanc had fair warning of the problem, the Court noted:

> [I]t is without question that holding without legal notice a prisoner for a month beyond the expiration of his sentence constitutes a denial of due process. Indeed, Defendants knew not just of delay, but that there was, on average, a month-long delay in receiving paperwork from the local jails. Therefore, they had "fair warning" that their failure to address this delay would deny prisoners like Plaintiffs their immediate or near-immediate release upon conviction.

Id. Importantly, the Court *did not* examine whether Secretary LeBlanc had fair warning that the *obligation to promulgate policies and procedures* was clearly

[23] The Court's use of an external report to establish "fair warning" that an official's action or inaction violates a clearly established constitutional right reflects the Supreme Court's explanation of "fair warning." *Hope*, 536 U.S. at 741–42 ("Regardless, in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"); *see also Parker*, 73 F.4th at 405 (relying on an October 2017 legislative audit report on the Louisiana DPSC entitled "CFE Management of Offender Data: Processes for Ensuring Accuracy Department of Corrections").

established, or even that such an obligation was clearly established in the first place. *See id.* Rather, the Court held that Secretary LeBlanc had fair warning that the actions or inactions denied prisoners a clearly established constitutional right. *Id.* Full stop.

Crittindon fits with examinations of fair warning and objective unreasonableness throughout the Fifth Circuit's jurisprudence. In 2015, for instance, the Court used the same framework found in *Crittindon* to examine a qualified immunity defense in response to an alleged Eighth Amendment violation involving inmate exposure to extreme temperatures. *Hinojosa v. Livingston*, 807 F.3d 657, 661 (5th Cir. 2015). As in *Crittindon*, the Court first articulated the qualified immunity standard. *Id.* at 669. Then the Court explained that copious precedent from the Fifth Circuit put the officials on notice that they were "overseeing a system that violated the Constitution" and "made [it] very clear" that subjecting inmates to extreme temperatures without adequate remedial measures violates the Eighth Amendment. *Id.* at 670 (collecting cases). The Court then decided that, considering the clearly established law on exposing inmates to extreme temperatures, officials had fair warning that they needed to adequately address the extreme temperatures. *Id.*

In sum, "fair warning" under the qualified immunity must focus on *fair warning of a rights violation*, not fair warning of an appropriate remedy to that rights violation. *Kinney*, 367 F.3d at 350. To hold otherwise and require a plaintiff to establish that a specific remedial action is constitutionally required differs from how this Court has articulated the "clearly established" prong. This Court has had several occasions to analyze qualified immunity defenses. And although not every qualified immunity case analyzes the "objectively unreasonable" inquiry with detail, this Court describes the second prong as focusing on clear establishment of the right violated—not the specific procedural remedy to correct the right:

- *Smith v. Lee*, 73 F.4th 376, 381 (5th Cir. 2023) ("whether *the right* was clearly established at the time of the violation" (emphasis added));
- *Henderson*, 51 F.4th at 132 ("whether *the right at issue* was clearly established at the time of the alleged misconduct" (emphasis added));
- *Williams v. City of Yazoo*, 41 F.4th 416, 426 (5th Cir. 2022) ("Williams's survivors must show that *his constitutional rights* were clearly established at the time of the violation." (emphasis added));
- *Solis v. Serrett*, 31 F.4th 975, 981 (5th Cir. 2022) ("we ask whether the *right in question* was 'clearly established' at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct" (emphasis added));
- *Betts v. Brennan*, 22 F.4th 577, 582 (5th Cir. 2022) ("*the right* was clearly established at the time of the violation" (emphasis added)).

If the Court examines fair warning at all, it should not require that the government actor be on notice of a clearly established procedural remedy (like tasking lawyers with calculating release dates). Instead, it should focus exclusively on whether the asserted constitutional right is clearly established (here, the right to be released from prison on time) so as to put the government actor on notice, actual or presumed, that a violation occurred or would occur without some sort of action.

b. LeBlanc had more than fair warning that Taylor's rights would be violated without corrective action.

Accepting that Taylor meets this first prong and that his right not to be detained past his release date was violated, Taylor also satisfies the proper application of prong two. First, as this Court explained in its withdrawn opinion[24] and in several other opinions involving over-detention of Louisiana state prisoners,[25] Secretary LeBlanc was more than fairly warned—by precedent, outside reports, and actual knowledge[26]—that under his watch, prisoners were being regularly detained for more than a

[24] *Taylor*, 68 F.4th at 225.

[25] *Parker*, 73 F.4th at 407; *Crittindon*, 37 F.4th at 183; *Porter*, 659 F.3d at 445; *Douthit v. Jones*, 619 F.2d 527, 532 (5th Cir. 1980).

[26] *See also generally* Appellee's Br. (Taylor's representations about the record).

month past their proper release dates, and that such detention violated the prisoners' constitutional rights.

Second, Taylor's right not to be detained beyond his release date was clearly established—if not obvious.[27] As far back as 1968, this Court has recognized that unlawful over-detainment of a prisoner is a constitutional violation. *Whirl v. Kern*, 407 F.2d 781, 792 (5th Cir. 1968). In light of the fair warning and the clearly established constitutional right to timely release, Secretary LeBlanc's failure to act to prevent untimely releases is objectively unreasonable. As in *Hinojosa*, it does not matter if the right to a single, specific remedial measure (*e.g.*, having lawyers rather than non-lawyers calculate release dates under Louisiana statute) was clearly established. Such a requirement deviates from how this Court consistently articulates the "clearly established" prong and substitutes the need to prove a clearly established right for a need to prove a clearly established remedy. That is not what qualified immunity requires.

In the end, Secretary LeBlanc knew about the failures of his department, knew prisoners have a right to be released on time, and failed

[27] *See Taylor*, 68 F.4th at 226; *see also Parker*, 73 F.4th at 407; *Crittindon*, 37 F.4th at 183; *Porter*, 659 F.3d at 445; *Douthit*, 619 F.2d at 532.

to do anything about it. That is objectively unreasonable. This Court should therefore affirm the district court's finding that Secretary LeBlanc is not entitled to qualified immunity and, in doing so, should clarify the scope of this Circuit's qualified immunity inquiry.

CONCLUSION

This Court should affirm the district court's finding that Secretary LeBlanc is not entitled to qualified immunity.

Dated: August 8, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 4,811 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32.2.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) and Fifth Circuit R. 32.1 because this brief has been set in a plain, roman style in a proportionally spaced, 14-point, serif typeface and the footnotes are set in 12-point proportionally spaced typeface.

Dated: August 8, 2023

/s/ Daniella P. Main
Daniella P. Main

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2023, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

Dated: August 8, 2023

/s/ Daniella P. Main
Daniella P. Main