18-2181

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

CHARLES HAMNER,
Plaintiff/Appellant,

v.

DANNY BURLS, *et al.*,
Defendants/Appellees.

Appeal from the United States District Court
Eastern District of Arkansas - Pine Bluff
The Honorable J. Leon Holmes, District Judge

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

Ruth Brown
Sarah Grady
Debra Loevy
LOEVY & LOEVY
311 N. Aberdeen Street
Third Floor
Chicago, Illinois 60607
(t) (312) 243-5900
(f) (312) 243-5902

Attorneys for Amici Curiae Legal Scholars

In accordance with Federal Rules of Appellate Procedure 27 and 29 and Eighth Circuit Rule 27A(a)(10), legal scholars Dean Erwin Chemerinsky and Professors David Rudovsky and Joanna Schwartz respectfully move for leave to file an *amici curiae* brief in support of Plaintiff-Appellant's petition for rehearing *en banc*. As legal scholars who study and teach about constitutional law, federal civil procedure, and qualified immunity, the group has a significant interest in the outcome of this proceeding, which concerns the Circuit Court's *sua sponte* assertion of a qualified immunity defense to defeat constitutional claims arising from government actors' extended solitary confinement of a mentally ill prisoner. A proposed brief accompanies this motion.

1. This case implicates matters of federal appellate procedure, constitutional litigation, and the defense of qualified immunity, on which amici have scholarly expertise. Their participation as amici curiae will provide substantial assistance to the Court in deciding whether to grant rehearing.

2. **Erwin Chemerinsky** is the Dean of Berkeley Law, where he serves on faculty as the Jesse H. Choper Distinguished Professor of Law. Professor Chemerinsky previously served as the founding Dean

and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law, with a joint appointment in Political Science. Before that he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004-2008, and from 1983-2004 was a professor at the University of Southern California Law School, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. He also has taught at DePaul College of Law and UCLA Law School. Dean Chemerinsky has authored eleven books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. He also is the author of more than 200 law review articles. He writes a regular column for the Sacramento Bee, monthly columns for the ABA Journal and the Daily Journal, and frequent op-eds in newspapers across the country. In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

3. **David Rudovsky** is a Senior Fellow at the University of Pennsylvania Law, teaching courses in criminal law, evidence, and

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5. The proposed brief provides an academic perspective regarding the role of the judiciary in the adversarial system and the implications of the Court's departure from accepted federal civil

procedure principles. The legal scholars believe their perspective is important to ensure that the Circuit Court's alteration of the adversarial relationship between the courts and the parties is judiciously considered and that the Court does not expand the qualified immunity defense beyond its doctrinal support.

Accordingly, legal scholars Dean Erwin Chemerinsky and Professors David Rudolvsky and Joanna Schwartz respectfully ask that the Court grant leave to file the accompanying brief in support of Plaintiff-Appellant's petition for rehearing *en banc*.

Respectfully submitted,

/s/ Ruth Brown

Ruth Brown
Sarah Grady
Debra Loevy
LOEVY & LOEVY
311 N. Aberdeen Street
Third Floor
Chicago, Illinois 60607
(t) (312) 243-5900
(f) (312) 243-5902

Attorneys for Amici Curiae Legal Scholars

CERTIFICATE OF COMPLIANCE

I certify that:

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 833 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

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/s/ Ruth Brown

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Ruth Brown

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Debra Loevy
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(312) 243-5900
(312) 243-5902

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INTEREST OF AMICI

Amici are law professors and scholars of federal civil procedure and constitutional litigation Erwin Chemerinsky, David Rudovsky, and Joanna Schwartz. More detailed information on amici appears in this brief's appendix.[1]

INTRODUCTION

In a stark departure from established federal civil procedure, the panel disposed of this appeal by asserting qualified immunity *sua sponte* on behalf of Defendants. The law, however, is clear: qualified immunity is an affirmative defense that defendants themselves must invoke and plead. *Gomez v. Toledo*, 466 U.S. 635, 640 (1980); *Jones v. United States*, 97 F.3d 1121, 1124 (8th Cir. 1996). The panel's maneuver violated the central tenets of the adversarial model: that courts act as passive and neutral decisionmakers, reviewing only the legal and factual disputes presented for adjudication by the parties. It also circumvented established rules governing waiver and forfeiture of affirmative defenses on appeal, transforming the panel into a court of

[1] No party's counsel contributed to authoring this brief, nor did any person contribute money intended to fund preparing or submitting this brief.

first view rather than a court of review. That the affirmative defense invoked here was qualified immunity—a judicially-imposed restriction on statutorily-authorized civil rights actions—makes the court's *sua sponte* assertion particularly problematic.

The panel justified its maneuver as a more efficient way to dispose of the case at hand and suggested that "there was nothing to be profited" by requiring the Defendants to assert their own affirmative defense. Op. 6. To the contrary, fidelity to accepted federal civil procedure, including party presentation of arguments and enforcement of waiver and forfeiture on appeal, serves critical functions. It consolidates power in the hands of the litigants and away from the judiciary, promotes litigant autonomy and acceptance of judicial decisions, prevents gamesmanship, ensures long-term judicial economy, and perhaps most importantly, maintains the court's neutrality, both in practice and perception. The panel's approach, in turn, permits courts to join litigants in making decisions about the best legal arguments to resolve a case, damaging this Court's legitimacy. This Court should intervene to correct the panel's departure from foundational principles of federal appellate procedure.

BACKGROUND

Amici incorporate by reference the factual and procedural background in the petition for rehearing. Pet'n for Rehr'g at 9-14.

ARGUMENT

I. The panel's *sua sponte* assertion of an affirmative defense contravened core tenets of the adversarial process.

It is well-established that in our adversarial system, "[courts] do not, or should not, sally forth each day looking for wrongs to right" and instead "normally decide only questions presented by the parties." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (quotation omitted). The American adversarial system differs from its European inquisitorial counterparts in that its central features are "party presentation of evidence and arguments" for resolution before a "neutral and passive decision maker[]." Adam Milani & Michael Smith, Playing God: A Critical Look at *Sua Sponte* Decisions by Appellate Courts, 69 Tenn. L. Rev. 245, 272 & n.143 (2002); *see also Greenlaw*, 554 U.S. at 243 (2008); *Wood v. Milyard*, 566 U.S. 463, 472 (2012). The judge "does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *Sanchez-Llamas v. Oregon*, 548 U.S. 331,

356 (2006) (quotation omitted). Likewise, "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

These structural features serve important functions. They consolidate power in the hands of the parties rather than the judiciary. *See, e.g.*, Monroe Freedman, *Our Constitutionalized Adversary System*, 1 Chapman L. Rev. 57, 85-87 (1998). They avoid the risk of partiality and premature commitment to one side that arises when courts stray from a passive role. *Greenlaw*, 554 U.S. at 243; Milani & Smith at 273-278; Stephan Landsman, *The American Approach to Adjudication* 2 (1988). They avoid the appearance of bias. Milani & Smith at 279-82; *Burgess v. United States*, 874 F.3d 1292 (11th Cir. 2017). They afford litigants autonomy and control over the litigation and increase acceptance of judicial decisions. Freedman at 87-88; Milani & Smith at 282-286. And they further the search for truth. *See, e.g.*, Milani & Smith at 247 & n.3.

The panel's *sua sponte* invocation of an affirmative defense abandoned these core principles in favor of a more inquisitorial approach, blurring the line between advocate and decisionmaker. *See Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *Arizona v. California*, 530 U.S. 392, 412-13 (2000); *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1109 (D.C. Cir. 2019). The panel failed to account for the resulting costs: subversion of party control of the litigation, an appearance of judicial bias and partiality, reduction of litigant and societal acceptance of judicial decisions, and, ultimately, damage to this Court's legitimacy.

The panel decision also impermissibly gives other courts "*carte blanche* to depart from the principle of party presentation basic to our adversary system." *Wood*, 566 U.S. at 472. The panel's primary rationale—expediency—justifies the *sua sponte* invocation of any affirmative defense in civil or criminal litigation, and even legitimizes the assertion of new claims or theories on a plaintiff's behalf to dispose of a defendant's appeal. As one judge observed in the criminal context, such judicial maneuvers, while tempting, create a slippery slope:

> Should we be willing to overlook counsel's failure to raise a clearly winning argument—even in civil cases—if by doing so we can save the expense of a new trial (or other societal costs)? . . . .
>
> When judges think of themselves as bearing responsibility for the results dictated by a neutral application of the law, whether in the civil or criminal field, they tend to exceed appropriate bounds of judicial restraint. By compromising its neutrality, I think the court does so here. That "cost" far exceeds the costs of a new trial[.].

United States v. Pryce, 938 F.2d 1343, 1355 (D.C. Cir. 1991) (Silberman, dissenting).

II. The panel's *sua sponte* consideration of qualified immunity contravened established rules governing waiver and forfeiture of affirmative defenses on appeal.

The panel's decision also ran afoul of rules governing waiver and forfeiture of affirmative defenses on appeal. While an appellate court may affirm on any basis supported by the record, "[a]ppellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance." *Wood*, 566 U.S. at 473; *see also Angarita v. St. Louis Cty.*, 981 F.2d 1537, 1548 (8th Cir. 1992). The Supreme Court has made clear that a federal appellate court may not address a non-jurisdictional affirmative defense that the government has consciously waived. *Wood*, 566 U.S. at 474.

Even forfeited non-jurisdictional affirmative defenses—those not pressed below because of mere inadvertence—may be "resurrect[ed]" by a reviewing court only "in a small number of narrow, carefully defined contexts," and, even then, only in "exceptional" cases. *Maalouf*, 923 F.3d 1095, 1109 (D.C. Cir. 2019) (discussing *Wood*, 566 U.S. at 471; *Arizona*, 530 U.S. at 412-13; *Day v. McDonough*, 547 U.S. 198 (2006); & *Granberry v. Greer*, 481 U.S. 129 (1987)). To qualify for one of these "cabined and rare exceptions," an affirmative defense must implicate more than policy concerns; it must "squarely implicate the institutional interests of the judiciary." *Maalouf*, 923 F.3d at 1109. For example, courts are permitted assert timeliness defenses to *habeas* actions *sua sponte* to accommodate "considerations of comity, federalism, and judicial efficiency to a degree not present in ordinary civil actions" that "eclipse the immediate concerns of the parties." *Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002).

As the Supreme Court has explained, "good reason" exists for these tight constraints on appellate review. *Wood*, 566 U.S. at 473. An appellate court is to act as "a court of review"—not "one of first view"—and must maintain respect for the trial court's "processes and time

investment." *Id.* at 473-74. When litigants have "steered" the trial court away from affirmative defenses and "towards the merits," an appellate court that raises such defenses on its own motion disregards the entire course of the trial court's adjudication. *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1201 (10th Cir. 2014); *see also Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 269-70 (6th Cir. 2010); *Arreola-Castillo v. United States*, 889 F.3d 378, 384 (7th Cir. 2018) (refusing to "effectively discount the district court's efforts."). Restraint "is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would have anticipated in developing their arguments on appeal," as appellate adjudications made prior to development of the record can compromise accuracy. *See Wood*, 566 U.S. at 473. Here, for example, the panel's maneuver deprived Mr. Hamner of the ability to seek leave to replead or conduct discovery to unearth evidence that defeats qualified immunity, such as records showing that Defendants violated the law knowingly or purposefully. *See generally Gomez*, 446 U.S. at 640-41 (recognizing that "whether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant").

The panel's approach promotes gamesmanship, encouraging defendants to seek a merits adjudication and, if they fail to get traction, suggest an affirmative defense at the eleventh hour as a fallback strategy. It also "invite[s] strategic use" of late-asserted affirmative defenses as a dilatory tactic "by defendants who stand to benefit from delay." *See Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 668 (1st Cir. 1996).

Even if Defendants' failure to raise qualified immunity is seen as mere forfeiture, rather than waiver, qualified immunity "does not implicate the 'exceptional conditions' that justify review of newly raised issues." *WBY, Inc. v. DeKalb Cnty.*, 695 F. App'x 486, 492 (11th Cir. 2017) (unpublished); *see also Lewis v. Kendrick*, 944 F.2d 949, 953 (1st Cir. 1991); *Calabretta v. Floyd*, 189 F.3d 808, 818 & n.34 (9th Cir. 1999); *Walsh v. Mellas*, 837 F.2d 789, 800-801 (7th Cir. 1988).[2] As the panel recognized, qualified immunity is an "obvious" potential defense in civil rights suits. Op. 4. Government officials are savvy enough to know how to assert the defense; when they choose not to, courts should presume that the decision was strategic and decline to intervene. *See,*

[2] Appellate courts routinely refuse to consider qualified immunity defenses not raised below. *See* Pet'n for Rehearing at 12-13.

e.g., Walls v. Bowersox, 151 F.3d 827, 833 (8th Cir. 1998) (reviewing courts presume counsel's conduct to be "within the range of competence demanded of attorneys under like circumstances.") (citation omitted). Moreover, federal civil procedure affords government officials multiple opportunities to raise qualified immunity, and thus they suffer no "manifest injustice" when their waiver or forfeiture is recognized at one early stage in the litigation. *Bines v. Kulaylat*, 215 F.3d 381, 385 (3d Cir. 2000).

Judicial invocation of qualified immunity *sua sponte* also exceeds any arguable implicit Congressional mandate for the defense. Qualified immunity is a judicially-imposed limit on statutorily-authorized civil rights actions that is "for the official to claim." *Gomez*, 446 U.S. at 640; *see also* 42 U.S.C. § 1983; *Malley v. Briggs*, 475 U.S. 335, 341 (1986); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1801 (2018). Because the underlying basis for qualified immunity is from a common law crafting, and not by statute, the Supreme Court cautions that the judicial role in implementing qualified immunity must be circumspect: "[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy

choice, and . . . we are guided in interpreting Congress' intent by the common-law tradition." *Malley*, 475 U.S. at 342. In other words, courts should not subvert the will of Congress by taking qualified immunity too far beyond its common law roots. *Id.*; *see also Imbler v. Pachtman*, 424 U.S. 409, 421 (1976) (immunities are "not products of judicial fiat"; rather they must honor "the immunity historically accorded the relevant official at common law and the interests behind it.").

Admittedly, over the years, the Court has on occasion expanded qualified immunity beyond its common law roots. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (discussing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). This evolution, however, has provoked vociferous disagreement. *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) (admonishing that the Court "should not substitute our own policy preferences for the mandates of Congress" by exceeding the doctrine's common law origins). The panel decision below takes the judicially-created qualified immunity defense far beyond its common law precedent.

III. The panel's efficiency rationale does not justify departure from established procedure.

The panel decision's primary justification for its approach—that divergence from norms would be more efficient in the case upon review—fails to consider the broader, longer-term effects of such a ruling on judicial economy. For instance, when the panel here invoked immunity *sua sponte*, the need for supplemental briefings generated delay, caused the total party briefings to exceed the word-count permitted by the Rules, and pre-empted an issue that ordinarily would have been decided by the district court on summary judgment, if Defendants chose to raise it at all.[3] In contrast, had the panel deferred, Defendants could have chosen to raise the defense in a motion for judgment on the pleadings or at summary judgment, the lower court would then have adjudicated the defense based on a developed record and already-completed briefings, and, depending on the state of the evidence, the losing party might not even have elected to appeal.

[3] Notably, Defendants continued to decline to assert qualified immunity from Plaintiff's deliberate indifference claim even *after* the panel requested supplemental briefing on the defense. Pet'n for Rehearing at 7-8.

The far more efficient procedure is to allow defendants to choose whether to assert their waivable affirmative defenses below. "Over the long term," holding parties to the consequences of their forfeiture or waiver will encourage consolidation of arguments before district and appellate courts. *Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 322 (3d Cir. 2015); *see also E. Coast Test Prep LLC v. Allnurses.com, Inc.*, 2016 WL 5109137, at *3 (D. Minn. Sept. 19, 2016) ("Litigants and federal courts are all better off when parties consolidate their defenses" to "best serve[] principles of efficiency and judicial economy.").

More generally, valuing judicial efficiency above all else has an unfairly pro-defense bent in civil litigation because the most "efficient" result—without regard for other values such as accuracy and party acceptance of the judicial process and decision—favors dismissal of a case. Short-term expediency should not eclipse other values promoted by adversarial appellate procedure. *See, e.g., In re Illinois Marine Towing, Inc.*, 498 F.3d 645, 652 (7th Cir. 2007); *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, Louisiana, Inc.*, 37 F.3d 193, 197 n.9 (5th Cir. 1994).

CONCLUSION

The panel's *sua sponte* invocation of qualified immunity deviated from the adversarial model and transgressed rules on waiver and forfeiture of affirmative defenses. This Court should grant the petition for rehearing to correct this error, vacate the panel decision, and address the issues presented on appeal by the parties for decision: whether Mr. Hamner's solitary confinement offends the Fourteenth and Eighth Amendments of the United States Constitution.

Date: October 23, 2019

Respectfully submitted,

/s/ Ruth Brown
Debra Loevy
Ruth Brown
Sarah Grady
LOEVY & LOEVY
311 N. Aberdeen St., 3rd Floor
Chicago, IL 60607
(312) 243-5900
debra@loevy.com

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In accordance with Circuit Rule 28A(h), I certify that this brief has been scanned for viruses and is virus-free.

/s/ Ruth Brown

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/s/ Ruth Brown

APPENDIX
LIST OF AMICI CURIAE

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