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NCLA Asks Supreme Court to Repair (or Abolish) Fatally-Flawed Qualified Immunity Doctrine

Desiree Martinez v. Channon High, Officer

Washington, DC (September 6, 2024) – The New Civil Liberties Alliance has filed an *amicus curiae* [brief](#) urging the U.S. Supreme Court to hear *Desiree Martinez v. Channon High*. NCLA urges the Justices to reexamine the modern qualified immunity doctrine and abolish the atextual, ahistorical standard for qualified immunity that requires violations of the law to be “clearly established” via prior court precedents before officials can be held to account. The Court must at least refine the perilously pro-government “clearly established law” standard and clarify that government officials with time to reflect and make calculated choices before acting should not receive the same protection as a police officer making a split-second decision to use force.

The U.S. Court of Appeals for the Ninth Circuit found police officer Channon High violated Desiree Martinez’s Fourteenth Amendment due process rights after disclosing a confidential domestic violence report to her abuser over the phone while fully aware that the abuser was in the room with her. The court determined that, as a result of Officer High’s reckless-at-best disclosure, Ms. Martinez was horrifically assaulted. In concluding that Officer High’s misconduct constituted a clear constitutional violation, the court pointed out that the “danger was obvious” and that Officer High had “acted with deliberate indifference toward the risk of future abuse.” Still, the court granted Officer High qualified immunity. Despite the violation of Ms. Martinez’s rights, it found the “clearly established” law standard had not been met because existing case precedent—though extremely similar—was not similar enough to unambiguously provide “fair notice” to every reasonable officer of the unlawfulness of High’s specific conduct. The only real “clearly established” element of today’s qualified immunity is that it tells government officials like Officer High they may violate constitutional rights with impunity, insulated by judge-made immunity from 42 U.S.C. § 1983, the statute designed to combat and deter just such misconduct.

NCLA also urges the Supreme Court to take account of recent scholarship (and commonsense), which concludes qualified immunity has been textually unmoored and historically flawed since its creation. The Court must realize the doctrine has failed to fulfill any of the public policy objectives used to justify qualified immunity at its inception. In creating qualified immunity, the Supreme Court wielded legislative power that is reserved for Congress alone. It is vital that the Justices recognize the grave harm today’s qualified immunity has inflicted (and continues to inflict) on American citizens and their constitutional rights, stepping in to right this wrong—whether by repairing the unworkable and unconstitutional standard or by abolishing it entirely.

NCLA released the following statement:

“Modern qualified immunity serves as a get-out-of-jail-free card for government officials when they violate Americans’ constitutional rights—no matter how clear the violation nor how heinous the misconduct. For decades, the judge-made ‘clearly established law’ standard of qualified immunity has been employed as an Orwellian form of double-think, by which courts may simultaneously, and contradictorily, find: (i) a clearly established constitutional right, (ii) an official’s clear—and sometimes egregious—violation of that constitutional

right, and yet (iii) that the official should be fully insulated from liability because the law was somehow not ‘clearly established.’ It is imperative that the Supreme Court step in and right this wrong before countless more American citizens suffer the consequences.”

— **Casey Norman, Litigation Counsel, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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