

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD ALLEN PAZ,

Plaintiff-Appellant,

v.

CONSTABLE PRECINCT 4 KENNETH HAYDEN; CONSTABLE PRECINCT 4, NAME UNKNOWN; DEPUTY RICKY FORD; DEPUTY RONALD HAMLET; DEPUTY CHRISTOPHER TAYLOR,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
District Court Case No. 4:22-CV-1898

**MOTION OF THE CATO INSTITUTE FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT
RICHARD ALLEN PAZ'S PETITION FOR REHEARING EN BANC**

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May 6, 2025

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

CASE No. 24-20226

Paz v. Hayden, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

| <u>Person or Entity</u> | <u>Connection to Case</u> |
|-------------------------|----------------------------------|
| Cato Institute | <i>Amicus curiae</i> |
| Clark M. Neily III | <i>Counsel for amicus curiae</i> |
| Matthew P. Cavedon | <i>Counsel for amicus curiae</i> |
| Michael Z. Fox | <i>Counsel for amicus curiae</i> |
| Laura A. Bondank | <i>Counsel for amicus curiae</i> |

The Cato Institute is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the *amicus*'s participation.

/s/ Clark M. Neily III

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

On April 1, 2025, a panel of this Court decided the above-captioned appeal. The panel affirmed the lower court decision on an independent basis, finding that the defendants were entitled to qualified immunity. On April 29, 2024, plaintiff-appellant petitioned this Court for rehearing en banc.

Movant Cato Institute now seeks leave under FRAP 29(b)(2) for leave to file an *amicus curiae* brief in support of that motion. Attached to this motion is a copy of the Cato Institute's proposed *amicus curiae* brief.

IDENTITY OF THE PROPOSED *AMICUS CURIAE*

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.

INTEREST OF THE PROPOSED *AMICUS CURIAE*

Amicus is interested in this case because conducting review of qualified immunity claims in light of all relevant precedent is essential for the consistent and equal application of justice.

REASONS TO ALLOW THE PROPOSED *AMICUS CURIAE* BRIEF

This *amicus curiae* brief provides unique insight into qualified immunity's clearly established law standard and explains why it is necessary for courts to consider all relevant authority when conducting this inquiry. The brief further explains how the panel's decision will negatively impact victims of governmental misconduct by making it prohibitively difficult to overcome qualified immunity without the assistance of counsel.

For the foregoing reasons, *Amicus* respectfully requests that the Court grant this motion for leave to file an *amicus curiae* brief in support of Plaintiff-Appellant's en banc rehearing petition.

CERTIFICATE OF CONFERENCE

Amicus has contacted counsel for Plaintiff-Appellant and all Defendants-Appellees via email and all parties are unopposed to the filing of this motion and the filing of this *amicus curiae* brief.

CONCLUSION

Based on the foregoing, the Cato Institute respectfully requests this court to grant the motion for leave to file the attached *amicus curiae* brief in support of plaintiff-appellant's pending petition for rehearing en banc.

Respectfully submitted,

/s/ Clark M. Neily III

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May 6, 2025

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 377 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman typeface.

/s/Clark M. Neily III

May 6, 2025

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/Clark M. Neily III

May 6, 2025

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OF PLAINTIFF-APPELLANT RICHARD ALLEN PAZ'S
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/s/ Clark M. Neily III

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute, established in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Project on Criminal Justice focuses on the scope of 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.

Amicus is interested in this case because conducting review of qualified immunity claims in light of all relevant precedent is essential for the consistent and equal application of justice.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Richard Allen Paz was at home when police officers broke into his back yard and ordered him outside at gunpoint.² They had an arrest warrant for a fugitive, whom Mr. Paz denied knowing.³ Officers lacked a search warrant for

¹ Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *Amicus* made a monetary contribution to its preparation or submission. All parties are unopposed to the filing of this brief.

² Panel Op. at 2.

³ *Id.*

the property.⁴ They ran Mr. Paz’s fingerprints and arrested him upon discovering he had outstanding warrants.⁵

Mr. Paz brought a Section 1983 suit *pro se* seeking redress for the officers’ blatant violation of his Fourth Amendment rights.⁶ He was denied relief by the district court, which granted qualified immunity.⁷ A panel of this Court affirmed, holding that “[b]y failing to brief the matter before the district court and not having any evidence of clearly established law at the time of violation, Paz did not meet his burden to defeat qualified immunity.”⁸

The panel opinion imposes yet another baseless procedural hurdle between victims of government misconduct and the relief to which they are legally entitled under Section 1983. For many victims of civil-rights violations, the clearly established law standard in qualified immunity doctrine imposes a practically insurmountable barrier to holding public officials accountable for their misconduct. The panel’s decision exacerbates this injustice by gratuitously limiting courts’ legal inquiry to those cases cited by the plaintiff—shifting the focus from what officers

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 3.

⁷ *Id.*

⁸ *Id.* at 5.

should have known when they committed the conduct at issue to what litigants know about the law. This rule places yet another judicially invented obstacle to congressionally mandated relief for plaintiffs, like Mr. Paz, who cannot afford legal representation and are not conversant in legal research, analysis, or writing—and yet still have viable claims for which the legislature has established remedy. En banc review is needed to eliminate the conflict between the panel’s errant decision and Congress’s democratically enacted remedial scheme.

ARGUMENT

I. THIS COURT SHOULD APPLY ALL RELEVANT AUTHORITY AND DENY QUALIFIED IMMUNITY.

When reviewing qualified immunity claims, a court should independently identify and apply all relevant authority, rather than limiting itself to case law cited by a plaintiff—especially one appearing *pro se*. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994) (“Whether an asserted federal right was clearly established . . . presents a question of law, not one of ‘legal facts.’”). In the proceedings below, Mr. Paz sufficiently identified a clear constitutional violation, and the Defendants-Appellees should not have been granted qualified immunity.

Officials are not protected by qualified immunity when their conduct violates a clearly established constitutional right. *Green v. Thomas*, 129 F.4th 877, 883 (5th Cir. 2025). It is clearly established that the Fourth Amendment forbids a “search for the subject of an arrest warrant in the home of a third party” unless officers acquire

a search warrant, face exigent circumstances, or receive consent. *Steagald v. United States*, 451 U.S. 204, 205–06 (1981). This is because the right “of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions” is “weighty” compared with the “minimal” burden imposed by the warrant requirement. *Id.* at 222.

Here, officers forcefully entered Mr. Paz’s yard possessing only an arrest warrant for a third party they suspected may have been inside the home. Op. at 2. Doing so violated Mr. Paz’s constitutional rights as clearly established by *Steagald*. In spite of this, the panel decision affirmed the district court’s grant of qualified immunity because Mr. Paz “did not meet his burden” of overcoming qualified immunity by “not having any evidence of clearly established law at the time of violation.” *Id.* at 5. The panel holds that Mr. Paz “failed to cite adequate authority at a sufficiently high level of specificity to put [the defendant] on notice that his conduct [was] definitively unlawful.” *Id.* at 6 (citing *Cunningham v. Castloo*, 983 F.3d 185, 194 (5th Cir. 2020)) (quotation marks omitted).

The panel opinion misconceives the role of notice in this context. It is not a plaintiff’s legal briefs that put a government official on notice of his conduct being unconstitutional. Rather, it is the existence of controlling precedent. *E.g., Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (“[I]n the light of pre-existing law the unlawfulness must be apparent.”) (citation and quotation marks omitted); *Green*, 129 F.4th at 886

(“Our precedents—regardless of whether they were cited by [the plaintiff]—gave [the defendant] ‘fair warning’ of [the plaintiff’s] right to be free from false arrest under the Fourth Amendment”). In the universe conceived by qualified immunity doctrine, existing legal authority—not a plaintiff’s subsequent court filings—creates the awareness attributed to the defendant about what actions are legally permissible and what actions are not. *Elder*, 510 U.S. at 515 (holding that an approach focused on briefing does not further officials’ notice interest “because its operation is unpredictable in advance” of litigation).

Whether a right is clearly established is a question of law and a “court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own and other relevant precedents.” *Id.* at 516 (citation, punctuation, and quotation marks omitted). *Elder* specifically rejected a Ninth Circuit rule that “a plaintiff may not benefit on appeal from precedent” unless he “mentioned [it] in the first instance,” *id.* at 514—the same rule undergirding the panel decision here. The Supreme Court sensibly repudiated this rule because it does not protect any interests of officers or deter official lawlessness, and it prevents victims of wrongdoing from receiving compensation. *Id.* at 514–15. “[I]t simply releases defendants because of shortages in counsel’s or the court’s legal research or briefing”—or that of a *pro se* plaintiff like Mr. Paz. *Id.* at 515. Further, any such

doctrine “could have a number of untoward effects,” including “appellate affirmation of incorrect legal results.” *Id.* at 515 n.3.

This Court’s own precedent aligns with *Elder*. In *Green*, this Court reaffirmed that “we are not beholden to the cases cited by a plaintiff.” 129 F.4th at 886 (citation omitted). Likewise, in *Bailey v. Ramos*, 125 F.4th 667, 682 n.60 (5th Cir. 2025), this Court confirmed that “we have never understood [a Section 1983 plaintiff’s] burden to mean that we are artificially boxed in by only those cases cited in the plaintiff’s brief.” To be sure, *Green* was decided at the dismissal stage. 129 F.4th at 881; *cf. Santander v. Salazar*, 133 F.4th 471, 477 (5th Cir. 2025) (“[I]t was erroneous for the district court to insist that [the plaintiff] substantiate his claims by alleging relevant legal authority in his complaint.”). But this procedural posture is not determinative: *Elder* reversed a grant of summary judgment like the one Mr. Paz challenges here. 510 U.S. at 513.

The police in this case violated clearly established law, and controlling precedents from the Supreme Court and from this Court require application of *all* relevant authority—however identified—in determining whether to grant qualified immunity. The panel departed from those authorities and denied relief based not on a lack of relevant case law, but simply because the *pro se* litigant in this case failed to cite it. That error should be corrected before it causes any more confusion about the controlling rule in this Circuit.

II. INDEPENDENT CONSIDERATION OF ALL RELEVANT AUTHORITY IS ESSENTIAL FOR EQUAL JUSTICE.

Deciding qualified immunity based on precedent rather than a given plaintiff’s legal acumen is essential for equal justice—especially in cases like this one, where the plaintiff appears *pro se*. The clearly established law standard is central to modern qualified immunity doctrine and frequently bars plaintiffs from recovery even in the most egregious cases. *See Jessop v. City of Fresno*, 936 F.3d 937, 942 (9th Cir. 2019) (“We recognize that the allegation of any theft by police officers—most certainly the theft of over \$225,000—is deeply disturbing. Whether that conduct violates the Fourth Amendment’s prohibition on unreasonable searches and seizures, however, would not be clear to a reasonable officer.”) (citation and quotation marks omitted); *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019) (granting qualified immunity to an officer who shot a child in the leg while shooting at a non-threatening dog); *Young v. Borders*, 850 F.3d 1274 (11th Cir. 2017) (denying en banc review of a panel decision granting qualified immunity to an officer who fatally shot an innocent man who responded to commotion at his apartment door while holding a lawfully owned pistol).

Further, the Supreme Court teaches that clearly established law is not “defined at a high level of generality,” but must rather “be ‘particularized’ to the facts of the case.” *White v. Pauly*, 580 U.S. 73, 79 (2017) (quotation marks and citations omitted). While the Court has never required an exact case on point to demonstrate

that the law is clearly established, in practice, that is what lower courts frequently require.⁹ Thus, recovery for injured plaintiffs turns not on whether state actors broke the law, nor even the seriousness of their misconduct, but on whether the case law in their jurisdiction happens to include prior cases with fact patterns that match their own. The ability to meticulously scour the Federal Reports is thus critical for Section 1983 plaintiffs.

However, for many victims of civil-rights violations, legal representation—and the training to search for, identify, and assess potentially relevant cases law that comes with it—is often out of reach. From 2010 through 2020, one out of every three qualified immunity appeals in this Circuit were brought *pro se*, the highest rate in the country.¹⁰ From 1998 through 2017, 32% percent of all civil-rights plaintiffs in federal district courts appeared *pro se*.¹¹

⁹ See Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. POL’Y ANALYSIS 7 (Sept. 14, 2020), <https://tinyurl.com/36zbn29t>.

¹⁰ Jason Tiezzi et al., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, INST. FOR JUST. 20 (2024), <https://tinyurl.com/89mpwhhb>.

¹¹ Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1841 (2018).

It is difficult even for skilled lawyers to secure Section 1983 relief.¹² While courts do generally hold *pro se* litigants to less stringent standards, imprisoned and other indigent plaintiffs still “often lack the resources and freedom necessary to comply with the technical rules of modern litigation.” *Ricks v. Shover*, 891 F.3d 468, 479 (3d Cir. 2018) (citation and quotation marks omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972). To expect unrepresented plaintiffs to canvass the full gamut of potentially relevant precedent is more than unrealistic—it is unjust.

State actors should not receive qualified immunity windfalls due to their victims’ inability to identify supporting case law created by the very courts from which they seek relief, nor should a Section 1983 plaintiff’s ability to obtain legislatively mandated relief be contingent upon their ability to retain legal counsel.

CONCLUSION

America relies “upon private litigation as a means of securing broad compliance with [civil rights] law.” *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 (1968). Thus, when *pro se* plaintiffs are unable to have viable claims decided on the merits simply because they lack the ability to shoot down baseless procedural defenses like the one advanced here, we all lose. This Court should grant Mr. Paz’s

¹² Brandon Hasbrouck, *Unshielded: How the Police Can Become Touchable*, 137 HARV. L. REV. 895, 905 (2024) (reviewing JOANNA SCHWARTZ: HOW THE POLICE BECAME UNTOUCHABLE (2023)).

petition for rehearing en banc, reverse the panel decision, and deny Defendants-Appellees' request for qualified immunity since they violated clearly established law.

Respectfully submitted,

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