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No. _____

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IN THE

Supreme Court of the United States

LYNN HUST,

Petitioner,

v.

FRANK MARVIN PHILLIPS, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

**Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth
Circuit**

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QUESTIONS PRESENTED

1. Did a prison librarian violate a prisoner's right of access to courts when she declined to let the prisoner use the library's comb-binding machine to bind a petition for writ of certiorari, even though comb-binding is not required by this Court's rules and is, in at least some circumstances, affirmatively discouraged?
2. Was the law imposing liability in this specific context so clearly established that a reasonable librarian would know that denying a prisoner's request to comb-bind his petition was unlawful?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and Order of the United States District Court for the District of Oregon granting plaintiff's motion for summary judgment as to liability on his access-to-courts claim was reported at 338 F. Supp. 2d 1148 (D. Or. 2003), and is reproduced at App. 41-76. The district court's Findings of Fact and Conclusions of Law awarding plaintiff compensatory damages of \$1,500 were not reported. They are reproduced at App. 77-81.

The decision of the United States Court of Appeals for the Ninth Circuit affirming on liability is reported at 477 F.3d 1070 (9th Cir. 2007), and is reproduced at App. 4-40. The Ninth Circuit's order denying defendant Lynn Hust's petition for panel rehearing or for rehearing en banc, and the accompanying dissent, are reported at 2007 U.S. App. LEXIS 23639 (9th Cir. 2007), and are reproduced at App. 2-3.

STATEMENT OF JURISDICTION

The Ninth Circuit entered the decision at issue on February 13, 2007. App. 4. The Ninth Circuit denied Hust's timely petition for panel rehearing or for rehearing en banc on September 14, 2007. App. 2. This petition is timely because it is filed within 90 days of the order denying rehearing en banc. Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in full, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment to the United States Constitution provides in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

The provisions of 42 U.S.C. § 1983 are set out in the appendix to this petition at App. 1.

INTRODUCTION

The Ninth Circuit held that (1) a prison librarian violated a prisoner's constitutional right of access to courts when she denied the prisoner's request to use the library's comb-binding machine to bind a petition for certiorari, even though comb-binding is not required by this Court's rules; and (2) the librarian is not entitled to qualified immunity from damages because a reasonable prison official in her position would know that denying the prisoner's request to comb-bind his petition violated clearly established law. According to the Ninth Circuit, the librarian is liable because the prisoner's failure to file a timely petition was foreseeable, even though that injury was not actually caused by the librarian's conduct. The Ninth Circuit's use of "foreseeability" to establish

proximate causation is contrary to *Lewis v. Casey*, 518 U.S. 343 (1996), *Christopher v. Harbury*, 536 U.S. 403 (2002), and decisions in other circuits. The Ninth Circuit’s denial of qualified immunity is contrary to *Saucier v. Katz*, 533 U.S. 194 (2001).

Ten circuit judges dissented from the order denying rehearing en banc in this case, expressing their “utter astonishment that we’re leaving an opinion on the books that not only denies the prison librarian qualified immunity but actually holds her liable.” App. 3 (Kozinski, J., dissenting). Because the Ninth Circuit’s error is “obvious,” this Court should grant the petition for certiorari and summarily reverse. *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006); see also *Horn v. Banks*, 536 U.S. 266, 267 (2002) (summary reversal appropriate where decision “directly contravene[s]” Supreme Court precedent); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (summary reversal appropriate where decision is “flatly contrary to this Court’s controlling precedent”). Alternatively, this Court should grant the petition and set the case for briefing and argument. The Ninth Circuit’s use of foreseeability to establish proximate causation on a prisoner’s denial-of-access claim—and its analysis in denying qualified immunity—threatens to significantly expand the responsibilities and liability of prison officials in every state in the Circuit.

STATEMENT OF THE CASE

I. Factual background

Plaintiff Frank Phillips was convicted in Oregon state court of second degree manslaughter and other crimes. He sought post-conviction relief in the Oregon

courts, challenging his manslaughter conviction by contending that his counsel's assistance had been constitutionally deficient. The Oregon courts denied relief, and Phillips planned to seek review by filing a petition for writ of certiorari in this Court. The deadline for filing a timely petition was June 18, 2001. On June 13, 2001, the prison librarian, defendant Lynn Hust, received Phillips's written request to use the comb-binding machine for "a brief that needs to be bound and sent soon." App. 7. Hust responded on June 18 that "we do not comb bind materials for inmates." App. 7. Phillips had been allowed to use the comb-binding machine on prior occasions. Phillips was ultimately allowed to use the comb-binding machine on June 29, eleven days after the deadline for filing a timely petition for certiorari. This Court rejected Phillips's comb-bound petition as "out of time." App. 7.

Phillips then filed suit in the United States District Court for the District of Oregon under 42 U.S.C. § 1983, alleging (among other things) that Hust had violated his First Amendment right of access to the courts¹ by refusing to let him use the prison library's comb-binding machine in time to file his petition for

¹ The constitutional right of access to the courts is well established, though its textual basis is "unsettled," with prior decisions grounding the right in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. *Christopher*, 536 U.S. at 415 n. 12.

certiorari. The parties filed motions for summary judgment that the district court treated as cross-motions. The district court denied Hust's motion for summary judgment, granted Phillips's motion for summary judgment as to liability on the denial-of-access claim, and denied it as to his other claims. Phillips's other claims were eventually settled, and the court held a bench trial to determine damages on the denial-of-access claim. The district court ultimately awarded Phillips \$1,500 in compensatory damages on that claim. App. 9.

II. The Ninth Circuit's decision

The Ninth Circuit affirmed as to liability, vacated the judgment and remanded "for the limited purpose of allowing [the] district court to supplement its findings regarding its award of damages." App. 26. The court noted that, under *Lewis*, state prisoners have a constitutional right of access to the courts, a right that includes the opportunity "to prepare, file, and serve pleadings and documents essential for pleading their causes." App. 13 (citing *Lewis*, 518 U.S. at 346). The court acknowledged that this right "does not demand that any means of preparation selected by the inmate be made available, so long as the inmate has some means of preparing documents that comply with the rules of the court in which his case is pending." App. 13. The court also acknowledged that "Phillips must show that the alleged violation of his rights was caused by Hust, the state actor." App. 12-13. Nevertheless, the court did not determine whether combining a petition for certiorari was required to "comply with the rules" of this Court. Instead, the court

examined whether Phillips's failure to file a timely petition was foreseeable, because "[t]he touchstone of proximate cause in a § 1983 action is foreseeability." App. 13.

The Ninth Circuit concluded that Phillips's failure to file a timely petition "was entirely foreseeable," because denying his request to comb-bind the petition was "arbitrary," and it was foreseeable to Hust "that this arbitrary denial would obstruct Phillips's ability to prepare his petition and file it in a timely manner." App. 15. Thus, the court concluded that Hust's refusal to allow Phillips to use the comb-binder on this occasion "quite predictably interfered with his efforts to prepare his petition for certiorari and thereby violated his right of access to the courts." App. 15-6. The court was "unpersuaded" by Hust's argument that her actions did not cause Phillips's injury "because the Supreme Court's rules do not require comb-binding." App. 16. The Ninth Circuit thought the Supreme Court rules were "less than clear as to whether some form of binding is required in the circumstances presented in this case, where Phillips's petition was too long for stapling, the method specified in the rules." App. 16. Hust's suggestion "that the rule permits the filing of unbound petitions where stapling is impossible" was rejected; the court thought that was "one reasonable view of the rule, [but] it is not the only reasonable interpretation." App. 16-17. According to the court, Hust's actions placed Phillips "in the untenable position of having to decide whether to file the petition on the date it was due in the hopes that it would be accepted unbound or partially bound, or to

wait until he could bind the petition in the hopes that it would be accepted late.” App. 17.

The Ninth Circuit also rejected Hust’s contention that she was entitled to qualified immunity even if her actions violated Phillips’s right of access to the courts. The court acknowledged that, under the qualified-immunity analysis in *Saucier*, the “relevant, dispositive inquiry in determining whether a [constitutional] right is clearly established is whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted.” App. 18 (quoting *Saucier*, 533 U.S. at 201). The court stated that this inquiry “must be undertaken in light of the specific context of the case.” App. 19 (quoting *Saucier*, 533 U.S. at 201). Nevertheless, the Ninth Circuit concluded that “a reasonable official in [Hust’s] position should know that if her actions could *foreseeably* result in causing an inmate plaintiff to miss a court filing deadline or violate a published court rule, thereby placing his claims in jeopardy of dismissal, such actions would be unlawful under the clearly established constitutional access to court standards set forth in *Lewis*.” App. 21 (quoting district court opinion; emphasis added).

III. Dissenting opinion

Judge O’Scannlain dissented “from the court’s holding that prison librarian Hust’s refusal to allow inmate Phillips access to the prison comb-binding machine hindered his ability to file his petition for certiorari timely in the Supreme Court.” App. 26 (O’Scannlain, J., dissenting). He also dissented “from the court’s holding that Hust is not entitled to quali-

fied immunity.” App. 26. The dissent explained that, “[w]hile *Lewis* recognized that the tools of litigation must be made available when *necessary* to ensure ‘meaningful access’ to the courts, the majority opinion goes beyond that to require prison officials to provide inmates with whatever tools seem *reasonable* in a given situation, even if not necessary to vindicate the inmate’s right of action.” App. 27 (emphasis in original). According to the dissent, the court’s decision “ignores the sensible limitations recognized by the Supreme Court in *Lewis*.” App. 27.

The dissent believed that Phillips could prevail on his denial-of-access claim only if he could show “that use of the comb-binding machine was a necessary pre-requisite to allowing him ‘meaningful access’ to the courts.” App. 31. Phillips had not made that showing, according to the dissent, because “[t]he applicable Supreme Court rule neither requires *nor allows* comb-binding” a petition for certiorari. App. 33 (emphasis in original). Thus, the dissent explained, “there is no nexus between the denial of access to the comb-binding machine and the late filing of Phillips’s petition.” App. 33. The dissent also believed that Hust was entitled to qualified immunity because “it was ‘objectively legally reasonable,’ even if ultimately mistaken, for Hust to conclude that her denial of access to the comb-binding machine would not hinder Phillips’s ‘capability’ to file his petition.” App. 40 (internal citations omitted).

IV. Dissent from denial of rehearing en banc

The Ninth Circuit denied Hust’s petition for rehearing and petition for rehearing en banc, with 10

judges dissenting. App. 2-3. Judge Kozinski, writing for the dissenting judges, expressed his “utter astonishment” that the court holds a prison librarian liable for “[f]ailing to help a prisoner bind a brief in a way that’s not even permitted, and certainly not required, by the Supreme Court’s rules.” App. 3 (Kozinski, J., dissenting). The dissent found it

“perfectly clear that a timely cert. petition, bound or unbound, would have been accepted under Supreme Court Rule 39.3. If the prisoner didn’t file it, he has only himself to blame. How the prison librarian violated any of his rights, let alone his clearly established rights, is a mystery that repeated readings of the majority opinion do not dispel.”

App. 3. The dissent concluded by expressing the belief that “the Justices, who know their precedents and filing procedures all too well, would not agree with our opinion.” App. 3.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit’s decision is clearly wrong. Using foreseeability to establish proximate causation on a prisoner’s denial-of-access claim is contrary to this Court’s decisions and decisions in other circuits. Denying qualified immunity to the prison librarian in this context is also contrary to this Court’s decisions. The Ninth Circuit’s decision threatens to expand—inappropriately—prison officials’ potential liability in every state in the Circuit.

I. The Ninth Circuit's use of "foreseeability" to establish proximate causation on a prisoner's denial-of-access claim is contrary to this Court's decisions.

A prisoner's constitutional right of access to the courts "guarantees no particular methodology but rather the conferral of a *capability*—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis*, 518 U.S. at 356 (emphasis added); *see also Christopher*, 536 U.S. at 414 (prisoner claiming denial of right to access courts must show that "[t]he official acts claimed to have denied access * * * caused * * * the loss of an opportunity to seek some particular order of relief"). It follows that the required nexus between the prison official's conduct and the prisoner's lost opportunity to pursue a claim is, as the Court stated in *Christopher*, causation, not foreseeability. The Ninth Circuit erred by concluding that foreseeability alone can establish proximate causation in a denial-of-access claim.

If foreseeability were all that is required, a prisoner could establish a denial-of-access claim whenever prison officials denied him a "particular methodology"—whether or not court rules required that methodology—to prepare and file his claim. In such cases, it might be "foreseeable" that a prisoner requesting a "particular methodology" would not use available alternatives, thus losing the opportunity to pursue his claim. But the right of access guarantees only that prisoners be *capable* of pursuing a claim. It does not give prisoners the right to use a particular

methodology to prepare their claims. That is why the Court has defined the right in terms of what “the inmates need”—not what they request, or what they erroneously may *think* they need—in order to pursue their claims. *Lewis*, 518 U.S. at 355.

Denying Phillips’s request to comb-bind his petition did not proximately cause him to miss the filing deadline. Phillips could have filed a timely petition without using the library’s comb-binding machine. Under this Court’s rules in effect at the time, if Phillips moved to proceed *in forma pauperis*, he could have submitted his petition “stapled or bound at the upper left-hand corner.” Sup. Ct. R. 33.2 (1999); *see also* Sup. Ct. R. 12.2 (1999) (“A petitioner proceeding *in forma pauperis* * * * shall file an original and 10 copies of a petition for a writ of certiorari prepared as required by Rule 33.2”); Sup. Ct. R. 39.3 (1999) (“every document presented by a party proceeding under this Rule [governing proceedings *in forma pauperis*] shall be prepared as required by Rule 33.2”).² Rule 39.3 also included an exception: a party proceeding *in forma pauperis* did not need to comply with the preparation requirements of Rule 33.2 if “such preparation is impossible.” And the Rule acknowledged that the Clerk will make “due allowance for any case presented under the Rule by a person appearing *pro se*[.]” Sup. Ct. R. 39.3 (1999).

² The record does not reflect whether Phillips ever filed a motion to proceed *in forma pauperis* in this Court.

If Phillips did not move to proceed *in forma pauperis*, he would have been required to submit his petition in a “booklet format” that was “bound firmly in at least two places along the left margin[.]” Sup. Ct. R. 33.1(c) (1999). The rule governing documents submitted in that format stated that “[s]piral, plastic, metal, or string bindings may not be used.” *Id.* Thus, comb-binding—which uses plastic spiral material—would not have been permitted if Phillips did not move to proceed *in forma pauperis*.

Because comb-binding a petition for certiorari was not required by the governing Court rules, Phillips did not actually “need” to use the comb-binding machine to file his petition for certiorari. He was not “unable” to file his petition without it. Thus, Hust’s refusal to let Phillips use the comb-binding machine did not cause him to miss the filing deadline.³ The

³ Phillips generally had access to the materials and supplies he actually needed pursuant to Administrative Rules adopted by Oregon’s Department of Corrections. Those rules establish “policy and procedure for affording inmates reasonable access to law library or contract legal services, and to necessary supplies for the preparation and filing of legal documents with the courts and parole board authorities.” Or. Admin. R. 291-139-0005(2) (1998). The rules require each prison library to have supplies “available for inmates...for legal research and the preparation of legal documents.” Or. Admin. R. 291-139-0040(1)(a) (1998). Indigent inmates “will be provided such supplies and mailing services...to make required filings with the courts and parole board authorities required by law, and court and procedural rules.” Or. Admin. R. 291-139-0040(5)(a) (1998).

Ninth Circuit's use of "foreseeability" to establish the causal link between Hust's actions and Phillips's injury was contrary to prior decisions of this Court. Summary reversal is appropriate because the Ninth Circuit's error is obvious.

The Ninth Circuit may have been led astray by its perception that Hust's actions were "arbitrary." The court thought that Hust's denial of Phillips's request to use the comb-binding machine in this instance was "arbitrary" because "comb-binding was the method the department routinely made available to Phillips on every occasion except the one at issue here." App. 12. But "arbitrariness"—as a matter of law—is not relevant because it is not an element of a denial-of-access claim. A prison official might be liable for arbitrary actions on some other legal theory, but the issue in a denial-of-access claim is whether the prisoner was denied meaningful access to the courts. A prison official who prevents a prisoner from bringing his claim may violate the prisoner's right of access to the courts even if her actions were *not* arbitrary. Conversely, arbitrary action that does not deprive the prisoner of the *capability* of bringing his claim cannot violate the prisoner's right to access the courts.⁴

⁴ In any case, the fact that comb-binding was "routinely" made available to Phillips on other occasions does not necessarily mean that Hust's actions were arbitrary in this instance. Briefs filed in the Oregon Court of Appeals or the Oregon Supreme Court "may be bound with a plastic comb binding, with the binding to be within 3/8 inch of the left edge of the brief." Or. R. App. P. 5.05(4)(i). Comb-binding also may be allowed for briefs, appendices or other papers filed in the

II. The Ninth Circuit's use of "foreseeability" to establish proximate causation conflicts with decisions from other circuits.

No other circuit has used "foreseeability" to establish proximate causation on a prisoner's denial-of-access claim. *See, e.g., Broudy v. Mather*, 460 F.3d 106, 120 (D.C. Cir. 2006) (to establish causation element of denial-of-access claim, "plaintiffs must show that it was the defendants' actions that cut off their remedy"); *Gentry v. Duckworth*, 65 F.3d 555, 558 (7th Cir. 1995) (issue is whether materials requested by petitioner were "necessary to conform his brief to Indiana's procedural rules"; noting that "prisoners are not entitled to limitless supplies [but] merely to that amount minimally necessary to give them meaningful access to court"); *Harrell v. Keohane*, 621 F.2d 1059, 1061 (7th Cir. 1980) (prisoner not entitled to access to photocopier to file a cert. petition because "the rules do not require photocopies"); *Boivin v. Black*, 225 F.3d 36, 42-43 (1st Cir. 2000) (right of access to courts "is narrow in scope" and mandates only "the minimal help necessary" to present a claim); *Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981) (prisoner entitled to use photocopier because court

Ninth Circuit. Fed. R. App. P. 32(a)(3) (brief "must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open."). The record does not reveal the type of brief Phillips was preparing, or the courts in which the briefs were filed, on the other occasions that he was allowed to use the prison library's comb-binding machine.

rules required him to submit multiple copies of his complaint and there was no practical alternative to photocopying). The Ninth Circuit is the only circuit to hold a prison official liable because it was *foreseeable* that the prisoner would miss the filing deadline if not allowed to use the materials or equipment that he requested—but did not need—to prepare his claim. Certiorari should be granted—and the Ninth Circuit’s decision summarily reversed—to eliminate the circuit split created by the decision below.

III. The Ninth Circuit’s foreseeability test for denial-of-access cases will increase litigation and expand the potential liability of prison officials in every State in the circuit.

Prisoners can be very litigious. The burden of prisoner litigation on states, corrections officials, and the courts led Congress to enact the Prison Litigation Reform Act of 1995, 110 Stat. 1321-71, as amended, 42 U.S.C. § 1997e *et seq.* (“PLRA”). See *Woodford v. Ngo*, 126 S. Ct. 2378, 2382, 2387 (2006) (noting that PLRA was “designed to bring [prisoner] litigation under control” and that PLRA “attempts to eliminate unwarranted federal-court interference with the administration of prisons”); *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002) (noting that Congress enacted PLRA’s exhaustion requirement “to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.”). The number of prisoner lawsuits will undoubtedly increase if prisoners can state a viable denial-of-access

claim merely by invoking a “foreseeability” standard to establish the causal link between a prison official’s conduct and a prisoner’s loss of a claim.

Even if it was somehow foreseeable that Phillips would fail to file a timely petition for certiorari after Hust denied his request to use the library’s comb-binding machine, Hust’s decision did not actually prevent Phillips from filing a timely petition that complied with this Court’s rules. Basing liability on foreseeability expands prison officials’ potential liability because it is always foreseeable that a prisoner might fail to pursue legal claims after his request for specific types of equipment, materials or assistance is denied. Expanding a prisoner’s right of access to courts to include the right to use any equipment, materials or assistance that the prisoner requests—but does not actually need—to pursue his claim thus places a substantial burden on prison officials seeking to avoid liability. The petition should be granted to summarily reverse the decision below (or, alternatively, to set the case for full briefing and argument), preventing an unwarranted and unwise expansion of prison officials’ potential liability in a variety of contexts.

IV. The Ninth Circuit’s qualified-immunity analysis is contrary to prior decisions of this Court.

In determining whether Hust is entitled to qualified immunity, the Ninth Circuit applied the “clearly

established” standard⁵ at a level of generality that is so broad that it renders the requirement essentially meaningless. Hust would have had no inkling that her conduct was unlawful in this situation under then-existing law. Before the Ninth Circuit’s decision in this case, no reasonable prison librarian would have thought that denying a prisoner’s request to use a comb-binding machine to bind a petition for certiorari would violate the prisoner’s right of access to the courts. That is because the prisoner was still *capable* of filing his claim even without access to the comb-binding machine, and because the prisoner’s established constitutional right of access only protected prisoners’ *capability* of bringing a claim. *See Lewis*, 518 U.S. at 356. No court had previously defined a prisoner’s right of access to include a right to equipment, materials or assistance that the prisoner did not actually need to pursue a claim, or held a prison official liable for creating a foreseeable risk of injury that the official did not cause. Qualified immunity should be denied only when “various courts have

⁵ *See Saucier*, 533 U.S. at 201 (requiring courts to determine “whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted[,]” an inquiry that “must be undertaken in light of the specific context of the case”). *See also Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (explaining that “the right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right”).

agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand[.]” *Saucier*, 533 U.S. at 202-03.

The Ninth Circuit offered two explanations for denying qualified immunity to Hust. First, it suggested that applying the “clearly established” inquiry to the specific right claimed here—the right to use the library’s comb-binding machine to file a petition for certiorari—“takes this requirement to an absurd level.” App. 19. Instead, the court concluded that the “clearly established” requirement was satisfied because “both the right of access to the courts and the right not to be subjected to arbitrary and selective enforcement of prison regulations were clearly established at the time of Hust’s action.” App. 20. But if that level of generality is all that is required, then *Saucier*’s requirement that the analysis be “undertaken in the specific context of the case” would be completely eviscerated. Qualified immunity under *Saucier* depends on whether the facts of a particular case are “distinguishable in a fair way” from the facts of prior cases finding a constitutional violation. *Saucier*, 533 U.S. at 202-03. The Ninth Circuit’s analysis, however, would require no examination of the facts at all. Other circuits have applied a more specific contextual analysis of the facts in deciding whether prison officials are entitled to qualified immunity on denial-of-access claims. *See, e.g., Simkins v. Bruce*, 406 F.3d 1239, 1243 (10th Cir. 2005) (describing the “critical question” under *Saucier* as “whether a reasonable prison official should have known that delaying delivery of plaintiff’s legal mail for over a year

would violate his right of access to courts”); *Siggers-El v. Barlow*, 412 F.3d 693, 704 (6th Cir. 2005) (prison official not entitled to qualified immunity where “a reasonable officer would certainly know that a retaliatory transfer for a prisoner’s exercise of his right to access the courts which inhibits the prisoner’s ability to access the courts”).

The Ninth Circuit’s second reason for denying qualified immunity fares no better. The court pointed out that Hust “did not deny access to the comb-binding machine because *she reasonably believed* that cert. petitions need not be bound.” App. 20 (emphasis added). That could not be the case, the court reasoned, because Hust acknowledged that “she did not know” that Phillips was filing a petition for certiorari. App. 20. But that reasoning is flawed because the relevant inquiry is not whether Hust knew the type of brief Phillips wanted to file. Rather, the “relevant, dispositive inquiry* * *is whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202. As noted above, comb-binding is *allowed* by the Oregon appellate courts and the Ninth Circuit, but it is not *required* by any court. Thus, it would not be “clear” to a reasonable prison librarian that denying a prisoner’s request to use a comb-binding machine would be unlawful. That is true regardless of the type of brief the prisoner wanted to bind and regardless of the court in which he wished to appear.

The Ninth Circuit extended prisoners’ right of access to courts to include requested equipment, materials, or assistance that is not actually needed to pur-

sue a claim, and held Hust liable because it was foreseeable that Phillips would miss the filing deadline if he was not allowed to comb-bind his cert. petition. The law announced by the Ninth Circuit was not “clearly established” at the time of Hust’s actions. Thus, on the “dispositive inquiry,” it would not be clear to a reasonable prison official in Hust’s position that her conduct would violate a prisoner’s right of access to the courts. Even if Hust did violate Phillips’s rights, it therefore follows that Hust is entitled to qualified immunity.

CONCLUSION

The Ninth Circuit’s decision is plainly wrong and quite significant. This Court should grant the petition for certiorari and summarily reverse. Alternatively, the Court should grant the petition and set the case for briefing and argument.

Respectfully submitted,
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