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NCLA Petitions U.S. Supreme Court to Undo Fifth Circuit’s Expansion of Qualified Immunity Doctrine

Dr. Ralph Claiborne Walsh, Jr. v. Lisa Hodge, et al.

Washington, DC (February 12, 2021) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group filed a [petition for a writ of certiorari](#) today asking the U.S. Supreme Court to reject the Fifth Circuit’s expansion of the qualified immunity doctrine in the case of *Dr. Ralph Claiborne Walsh, Jr. v. Lisa Hodge, et al.* and thereby to resolve two separate splits of authority in the federal courts of appeals.

NCLA represents Dr. Walsh, who was fired after a constitutionally inadequate Title IX university hearing on allegations that he sexually harassed a student. He was not permitted to introduce evidence to prove his innocence or have any real-time opportunity to confront and cross-examine his accuser to allow the hearing panel to evaluate her—and his—credibility. Instead, the university hired an outside investigator to look into the complaint and testify before the hearing. In response, Dr. Walsh filed a federal suit against the university officials involved in his disciplinary hearing.

The Northern District of Texas concluded that the Due Process Clause protects Dr. Walsh’s right to cross-examine his accuser and that allowing him to cross-examine an outside investigator who relayed the accuser’s story was not a reasonable substitute. It also decided that his due process right was “clearly established,” negating qualified immunity for Defendants.

On appeal, the Fifth Circuit conversely held that university officials were entitled to qualified immunity. While the Fifth Circuit agreed with the district court that the university officials violated Dr. Walsh’s procedural-due-process right to confront and cross-examine witnesses, it nonetheless accorded qualified immunity to the university officials because, it said, the law was not “clearly established.”

Justices from both ends of the jurisprudential spectrum—JJ. Thomas and Sotomayor—have criticized the “clearly established” prong of the qualified immunity test. Circuit courts are split on how to apply the Supreme Court’s past pronouncements. First, they differ as to whether the mere fact of a circuit split on a point of law suffices to make the law not clearly established. Second, they also disagree about the level of specificity a relevant precedent must have to shield unlawful deliberative, as compared to split-second, decisions made by officials. The uncommon pairing of Justices Thomas and Sotomayor, and two entrenched circuit splits, should help make this petition stand out.

NCLA argues that whatever may be the justifications for qualified immunity given to government officials forced to make split-second decisions that violate civil rights, those justifications do not support giving qualified immunity for official actions taken with time and opportunity to deliberate.

NCLA released the following statements:

“Ignorance of the law is not an excuse for nongovernmental defendants in suits for damages. It should not be an excuse for governmental defendants in suits for damages either—at least where the officials had time and opportunity to think through their actions before rights-violating conduct could occur.”

— **Adi Dynar, Litigation Counsel, NCLA**

“The court below agreed that the university violated Dr. Walsh’s constitutional rights when it created a disciplinary tribunal where he couldn’t question his accuser. It even agreed that prior case law from around the country confirmed that the university acted unlawfully when it designed its proceedings. Yet it concluded that Dr. Walsh is not entitled to any remedy for having his civil rights violated. Qualified immunity has become a caricature of fairness and justice, and the Court must restore sanity to this doctrine.”

— **Caleb Kruckenberg, Litigation Counsel, NCLA**

For more information about this case visit [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) 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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