**(ORDER LIST: 592 U.S.)**

**MONDAY, NOVEMBER 2, 2020***

**ORDERS IN PENDING CASES**

20M33 CIROTA, JOHN H. V. INCH, SEC., FL DOC

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

65, ORIG. TEXAS V. NEW MEXICO

The conditional motion of Texas for review of the River Master's 2020 final determination is granted.

19-416 ) NESTLé USA, INC. V. DOE I, JOHN, ET AL.
)
19-453 ) CARGILL, INC. V. DOE I, JOHN, ET AL.

The motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

20-219 CUMMINGS, JANE V. PREMIER REHAB KELLER, P.L.L.C.

The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

20-5531 HOLMES, CYNTHIA V. BECKER, JAMES Y., ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until November 23, 2020, within which to pay the docketing fee required by Rule 38(a).

* Justice Barrett took no part in the consideration or decision of the motions or petitions appearing on this Order List.

**CERTIORARI DENIED**

19-1436 DeMARTINI, DENISE V. GULF STREAM, FL

19-1445 HI-TECH PHARMACEUTICALS, ET AL. V. FEDERAL TRADE COMM'N, ET AL.

19-1447 MANZANO, YEHUDI V. UNITED STATES

19-8332 RHOADES, ROBERT B. V. CALIFORNIA

19-8375 ROBINSON, LAMARR V. HORTON, WARDEN

19-8594 DARRELL, JUSTIN H. V. UNITED STATES

19-8598 PIZZUTO, GERALD R. V. YORDY, WARDEN

19-8821 SANTIAGO-ORTIZ, JOSE V. UNITED STATES

19-8900 BROWN, JEFFREY C. V. UNITED STATES

19-8921 FLOYD, ZANE V. GITTERE, WARDEN

19-8929 PRESTON, TEDAREL L. V. UNITED STATES

20-50 VOSS, MONICA V. GOODE, GREGORY G.

20-53 AGUILAR FERMIN, CECILIA V. BARR, ATT'Y GEN.

20-58 SMITH, ANITA V. VESTAVIA HILLS BD. OF ED.

20-88 HZNP FINANCE LIMITED, ET AL. V. ACTAVIS LABORATORIES UT

20-188 SHENG, ZHIHENG V. SNYDER, DANIEL M.

20-195 MUCKLESHOOT INDIAN TRIBE V. TULALIP TRIBES, ET AL.

20-199 CLARK, GEORGE C. V. CHAMPION NATIONAL SECURITY, INC.

20-200 McCOY, MORGAN V. BULLOCK, MICHAEL, ET AL.

20-204 WEI, MING V. PENNSYLVANIA, ET AL.

20-207 BUSH-PENSY, LARA V. PFLIEGER, TIMOTHY

20-210 ZHENG, JING SHU V. ELLIS, CHRISTINA, ET VIR

20-213 DEY, DILIP V. TSAI, LI-HUEI, ET AL.

20-218 ABASCAL-MONTALVO, ISIDRO V. NEW YORK, NY

20-225 MUENSTER, JOHN R. V. WASHINGTON STATE BAR ASSOC.

20-229 WOOLEN, MICHAEL V. CALIFORNIA

20-235 MIERZWA, EDWARD J. V. DUDEK, ARKADIUSZ M., ET AL.

20-236 WELLS, JERRY W. V. NELSON, ROBBIN, ET AL.

20-242 CAVE, NORINE S. V. DELTA DENTAL, ET AL.

20-243 ROBISON, JAMES L. V. CITIBANK, N.A., ET AL.

20-246 PENCE, STEPHEN B., ET AL. V. VNB NEW YORK, LLC

20-247 BELANUS, DUANE R. V. DUTTON, LEO, ET AL.

20-248 ROUNDS, IRVING F. V. KOCH, CHARLES, ET AL.

20-262 ALEX, BRIDGET, ET AL. V. T-MOBILE USA, INC., ET AL.

20-264 BONA, STEPHEN S. V. ILLINOIS

20-270 ROSAS, IRMA V. R.K. KENZIE CORP., ET AL.

20-275 BOYD, BARRINGTON V. TIAA, ET AL.

20-284 BARONE, NICOLE V. WELLS FARGO BANK, N.A.

20-290 MEYERS, CHARLES, ET AL. V. NEW YORK, NY, ET AL.

20-323 BARTH, JOHN S. V. PEABODY, MA

20-328 WILSON, CHARLIE V. DALLAS CTY. HOSP. DIST.

20-329 SOWELL, JULIE M., ET AL. V. TINLEY, RENEHAN & DOST, ET AL.

20-339 WINER, JASON V. NEGRON, CORALYS, ET AL.

20-341 McDANIEL, NATALIE V. WILKIE, SEC. OF VA

20-342 KYKO GLOBAL INC., ET AL. V. BHONGIR, OMKAR

20-358 HENRY, RANDY V. JOHNSON, J. BRET, ET AL.

20-372 PHILLIPS, RICHARD L. A. V. CHAPPELL, WARDEN

20-373 ABRAMS, RICHARD L. V. NEWSOM, GOV. OF CA

20-383 PAR, INC., ET AL. V. RICHARDS, NICHOLE L.

20-384 CORN, PENNY N., ET AL. V. MS DEPT. OF SAFETY, ET AL.

20-390 MACK, BRANDAN A. V. FLORIDA

20-411 WASH, TRAIZE T. V. OHIO

20-415 ALEMAN, PABLO J. V. MARYLAND

20-420 JORDAN, JACK R. T. V. DEPT. OF LABOR

20-5217 SPARRE, DAVID K. V. FLORIDA

20-5395 SHEFFIELD, MARCUS T. V. LUMPKIN, DIR., TX DCJ

20-5452 THORPE, JUDY V. SWIDLER, JUSTIN, ET AL.

20-5454 SHIELDS, MARK V. SMITH, WARDEN, ET AL.

20-5455 SEPEHRY-FARD, FAREED V. AURORA BANK, FSB, ET AL.

20-5459 EARL, SEAN S. V. VIRGINIA

20-5461 CAMILO, JOSE V. NEW JERSEY STATE PAROLE BOARD

20-5462 ELLISON, SMITH V. NEUSCHMID, WARDEN

20-5466 CONE, JOHN E. V. DOWLING, WARDEN

20-5467 LOPEZ, CARLOS M. V. TEXAS

20-5468 MANNING, COREY V. MICHIGAN

20-5471 DANIELS, DARRYL C. V. FLORIDA

20-5483 BLACK, DION V. ROBINSON, WARDEN

20-5484 ABDULRAZZAK, HAIDER S. V. SMITH, J. C., ET AL.

20-5492 JOHNSTON, RAY L. V. INCH, SEC., FL DOC, ET AL.

20-5493 REED, TOBIAS O. V. VIRGINIA

20-5495 SANCHEZ, RUBEN V. UNITED STATES, ET AL.

20-5500 SPATARU, VALENTIN V. SUAREZ, PEDRO A., ET AL.

20-5501 HERSH, ANDREW D. V. GARMAN, SUPT., ROCKVIEW

20-5502 KIRK, KAREEM K. V. RICHARDSON, JANET, ET AL.

20-5505 JOHNSON, KEITH O. V. FLORIDA

20-5509 PUGH, CHRISTOPHER L. V. DELOACH, WARDEN

20-5511 PITTMAN, DEBBIE V. PITTMAN, RONNIE

20-5512 MILLER, JAMES L. V. HARRIS, SCOTT S., ET AL.

20-5516 GARBARINI, JOSEPH P. V. LUMPKIN, DIR., TX DCJ

20-5518 VANCE, LEWIS J. V. BUCHANAN, WARDEN

20-5521 WILLIAMS, WILBERT V. KELLY, ASSISTANT WARDEN, ET AL.

20-5522 BLOUNT, OBATALA V. BEECHER, BRIDGETT

20-5526 BLANCO, NORMAN P. V. ASUNCION, WARDEN

20-5529 BERNARD, HERMAN V. LUMPKIN, DIR., TX DCJ

20-5538 BOONE, MICHAEL G. V. MICHIGAN

20-5541 SACHS, BETSY V. BANK OF AMERICA, N.A.

20-5545 KLEBBA-SHULGA, MARY V. SHULGA, JODI

20-5547 BAKER, ROGER L. V. MAGISTRATE COURT OF GA

20-5550 LINDBLOOM, ROBERT K. V. MANATEE COUNTY, FL, ET AL.

20-5551 OHIO, EX REL. JEREMY KERR V. POLLEX, ROBERT, ET AL.

20-5556 DORANTES, GENARO E. E. V. GENOVESE, WARDEN

20-5567 AMES, LINDA V. HSBC BANK USA

20-5570 MOORE, RICHARD B. V. STIRLING, DIR., SC DOC, ET AL.

20-5591 EDWARDS, JOSEPH G. V. FRAKES, DIR., NE DOC

20-5592 LIPSEY, CHRISTOPHER V. GOREE, D., ET AL.

20-5593 EARP, CHAZ A. V. CLARKE, DIR., VA DOC

20-5594 LUCY, WILLIAM N. V. ESTATE OF ANNIE D. FOX

20-5618 RILEY, ADRIAN D. V. NOETH, SUPT., ATTICA

20-5629 WALLER, LESTER V. LAUGHLIN, WARDEN

20-5651 GISH, CHRISTOPHER R. V. HEPP, WARDEN

20-5671 WARD, MICHAEL V. MI ATT'Y GRIEVANCE COMM'N

20-5679 TANAMOR-STEFFAN, MARIE J. V. BARR, ATT'Y GEN.

20-5694 ENDSLEY, MARC A. L. V. CALIFORNIA

20-5698 HERNANDEZ, ADRIAN V. SHINN, DIR., AZ DOC, ET AL.

20-5699 MUHAMMAD, ABDUR-RASHID V. NEBRASKA

20-5700 MOSS, ANTONIO V. FLORIDA

20-5708 MIRANDA, FAGBEMI V. MASSACHUSETTS

20-5716 ZIEGENFUSS, JAMES V. MACKEY, ANTHONY, ET AL.

20-5729 WESTMORELAND, AMOS V. JOHNSON, WARDEN, ET AL.

20-5754 KARUPAIYAN, PALANI V. NYC DEPT. OF EDUCATION

20-5758 WOODARD, DAMON V. UNITED STATES

20-5769 BEAUCHAMP, BRADLEY V. UNITED STATES

20-5771 NIXON, TAVEON V. UNITED STATES

20-5772 PORTANOVA, MICHAEL V. UNITED STATES

20-5779 WOODS, CYNTHIA B. V. SC DEPT. OF HEALTH, ET AL.

20-5781 MUHAMMAD, ABDUR-RASHID V. NEBRASKA

20-5787 GODARD, THOMAS W. V. UNITED STATES

20-5792 PIERCE, RONALD L. V. UNITED STATES

20-5798 VELASQUEZ, JOSE V. UNITED STATES

20-5799 DAVIS, LORENZO V. UNITED STATES

20-5805 RESNICK, IAN V. UNITED STATES

20-5806 GRIEGO, ANTHONY R. V. INCH, SEC., FL DOC

20-5809 MARTINEZ, ALBERT V. UNITED STATES

20-5812 DUNLAP, JASON A. V. UNITED STATES

20-5818 JOHNSTON, TYRONE V. RANSOM, SUPT., DALLAS, ET AL.

20-5825 NANCE, LARRY L. V. UNITED STATES

20-5829 FRUIT, JERRY V. UNITED STATES

20-5832 GRAHAM, DAMON V. UNITED STATES

20-5860 WOOTEN, MIGUEL A. V. MONTGOMERY, WARDEN

20-5884 GIESE, CHARLES C. V. CALIFORNIA

20-5895 LOWE, MICHAEL C. V. MINNESOTA

20-5902 SEXTON, LARRY B. V. TENNESSEE

The petitions for writs of certiorari are denied.

19-1412 JOHNSON, MARK V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

19-7309 DAILEY, JAMES M. V. FLORIDA

The motion of United States Conference of Catholic Bishops,

et al. for leave to file a brief as *amici curiae* is granted. The motion of Conservatives Concerned About The Death Penalty for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

20-5557 CROWNHART, EARL V. STRIVE

The petition for a writ of certiorari is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

20-5559 SUNDY, TIM V. FRIENDSHIP PAVILION, ET AL.

20-5566 WILSON, JOHN J. V. FLORIDA, ET AL.

20-5682 RANTEESI, SIMON F. V. ARNOLD, WARDEN

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

**HABEAS CORPUS DENIED**

20-5896 IN RE DOUGLAS WEISSERT

20-5932 IN RE MAURICE JOHNSON

20-5944 IN RE GERALD M. CALMESE

The petitions for writs of habeas corpus are denied.

**MANDAMUS DENIED**

20-5515 IN RE TRACEY A. MERRILL

The petition for a writ of mandamus is denied.

20-269 IN RE BARBARA STONE

The petition for a writ of mandamus and/or prohibition is denied.

**REHEARING DENIED**

19-8227 CARRIER, JOSHUA D. V. COLORADO

The motion for leave to file a petition for rehearing is

denied.

Per Curiam

# SUPREME COURT OF THE UNITED STATES

DERAY MCKESSON *v.* JOHN DOE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No.19–1108. Decided November 2, 2020

PER CURIAM.

Petitioner DeRay Mckesson organized a demonstration in Baton Rouge, Louisiana, to protest a shooting by a local police officer. The protesters, allegedly at Mckesson's direction, occupied the highway in front of the police headquarters. As officers began making arrests to clear the highway, an unknown individual threw a "piece of concrete or a similar rock-like object," striking respondent Officer Doe in the face. 945 F. 3d 818, 823 (CA5 2019). Officer Doe suffered devastating injuries in the line of duty, including loss of teeth and brain trauma.

Though the culprit remains unidentified, Officer Doe sought to recover damages from Mckesson on the theory that he negligently staged the protest in a manner that caused the assault. The District Court dismissed the negligence claim as barred by the First Amendment. 272 F. Supp. 3d 841, 847–848 (MD La. 2017).

A divided panel of the Court of Appeals for the Fifth Circuit reversed. As the Fifth Circuit recognized at the outset, Louisiana law generally imposes no "'duty to protect others from the criminal activities of third persons.'" 945 F. 3d, at 827 (quoting *Posecai* v. *Wal-Mart Stores, Inc.*, 1999–1222, p. 5 (La. 11/30/99), 752 So. 2d 762, 766). But the panel majority held that a jury could plausibly find that Mckesson breached his "duty not to negligently precipitate the crime of a third party" because "a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest" onto the highway. 945 F. 3d, at 827. The dissent

would have demanded something more—a "special relationship" between Mckesson and Officer Doe—before recognizing such a duty under Louisiana law. *Id.,* at 836–838, and n. 11 (Willett, J., concurring in part and dissenting in part). The dissent likewise doubted that an intentional assault is the "particular risk" for which Officer Doe could recover for a breach of "Louisiana's prohibitions on highway-blocking," which "have as their focus the protection of other motorists." *Id.,* at 844, n. 56 (internal quotation marks omitted).

The panel majority also rejected Mckesson's argument that *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886 (1982), forbids liability for speech-related activity that negligently causes a violent act unless the defendant specifically intended that the violent act would result. According to the Fifth Circuit, the First Amendment imposes no barrier to tort liability so long as the rock-throwing incident was "one of the 'consequences' of 'tortious activity,' which itself was 'authorized, directed, or ratified' by Mckesson in violation of his duty of care." 945 F. 3d, at 829 (quoting *Claiborne Hardware*, 458 U. S., at 927). Because Mckesson allegedly directed an unlawful obstruction of a highway, see La. Rev. Stat. Ann. §14:97 (West 2018), the Fifth Circuit held that the First Amendment did not shield him from liability for the downstream consequences. 945 F. 3d, at 829. Again, the dissent disagreed, deeming the "novel 'negligent protest' theory of liability" to be "incompatible with the First Amendment and foreclosed—squarely—by" *Claiborne Hardware*. 945 F. 3d, at 842 (opinion of Willett, J.).

The Fifth Circuit subsequently deadlocked 8 to 8 on Mckesson's petition for rehearing en banc. 947 F. 3d 874, 875 (2020) (*per curiam*). Members of the Court of Appeals wrote separately to express further disagreement with both the panel decision's interpretation of state law, *id.,* at 879 (Higginson, J., dissenting from denial of rehearing en banc), and its application of *Claiborne Hardware*, 947 F. 3d, at 878

(Dennis, J., dissenting from denial of rehearing en banc).

The question presented for our review is whether the theory of personal liability adopted by the Fifth Circuit violates the First Amendment. When violence occurs during activity protected by the First Amendment, that provision mandates "precision of regulation" with respect to "the grounds that may give rise to damages liability" as well as "the persons who may be held accountable for those damages." *Claiborne Hardware*, 458 U. S., at 916–917 (internal quotation marks omitted). Mckesson contends that his role in leading the protest onto the highway, even if negligent and punishable as a misdemeanor, cannot make him personally liable for the violent act of an individual whose only association with him was attendance at the protest.

We think that the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the question presented. The constitutional issue, though undeniably important, is implicated only if Louisiana law permits recovery under these circumstances in the first place. The dispute thus could be "greatly simplifie[d]" by guidance from the Louisiana Supreme Court on the meaning of Louisiana law. *Bellotti* v. *Baird*, 428 U. S. 132, 151 (1976).

Fortunately, the Rules of the Louisiana Supreme Court, like the rules of 47 other States, provide an opportunity to obtain such guidance. In the absence of "clear controlling precedents in the decisions of the" Louisiana Supreme Court, those Rules specify that the federal courts of appeals may certify dispositive questions of Louisiana law on their own accord or on motion of a party. La. Sup. Ct. Rule 12, §§1–2 (2019). Certification is by no means "obligatory" merely because state law is unsettled; the choice instead rests "in the sound discretion of the federal court." *Lehman Brothers* v. *Schein*, 416 U. S. 386, 391 (1974). Federal courts have only rarely resorted to state certification procedures, which can prolong the dispute and increase the expenses incurred by the parties. See *id.,* at 394–395

(Rehnquist, J., concurring). Our system of "cooperative judicial federalism" presumes federal and state courts alike are competent to apply federal and state law. *Id.,* at 391 (opinion of the Court); cf. *Tafflin* v. *Levitt*, 493 U. S. 455, 465 (1990).

In exceptional instances, however, certification is advisable before addressing a constitutional issue. See *Bellotti*, 428 U. S., at 151; *Clay* v. *Sun Ins. Office Ltd.*, 363 U. S. 207, 212 (1960). Two aspects of this case, taken together, persuade us that the Court of Appeals should have certified to the Louisiana Supreme Court the questions (1) whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty, provided one exists. See 945 F. 3d, at 839 (opinion of Willett, J.).

First, the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts. See *Lehman Brothers*, 416 U. S., at 391. To impose a duty under Louisiana law, courts must consider "various moral, social, and economic factors," among them "the fairness of imposing liability," "the historical development of precedent," and "the direction in which society and its institutions are evolving." *Posecai*, 752 So. 2d, at 766. "Speculation by a federal court about" how a state court would weigh, for instance, the moral value of protest against the economic consequences of withholding liability "is particularly gratuitous when the state courts stand willing to address questions of state law on certification." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 79 (1997) (internal quotation marks and alteration omitted).

Second, certification would ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical. The novelty of the claim at issue here only underscores that "[w]arnings against premature adju-

dication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law." *Ibid.* The Louisiana Supreme Court, to be sure, may announce the same duty as the Fifth Circuit. But under the unusual circumstances we confront here, we conclude that the Fifth Circuit should not have ventured into so uncertain an area of tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court. We express no opinion on the propriety of the Fifth Circuit certifying or resolving on its own any other issues of state law that the parties may raise on remand.

We therefore grant the petition for writ of certiorari, vacate the judgment of the United States Court of Appeals for the Fifth Circuit, and remand the case to that court for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BARRETT took no part in the consideration or decision of this case.

JUSTICE THOMAS dissents.

Per Curiam

# SUPREME COURT OF THE UNITED STATES

TRENT MICHAEL TAYLOR *v.* ROBERT RIOJAS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19–1261. Decided November 2, 2020

PER CURIAM.

Petitioner Trent Taylor is an inmate in the custody of the Texas Department of Criminal Justice. Taylor alleges that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells.[1] The first cell was covered, nearly floor to ceiling, in "'massive amounts' of feces": all over the floor, the ceiling, the window, the walls, and even "'packed inside the water faucet.'" *Taylor* v. *Stevens*, 946 F. 3d 211, 218 (CA5 2019). Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.

The Court of Appeals for the Fifth Circuit properly held that such conditions of confinement violate the Eighth Amendment's prohibition on cruel and unusual punishment. But, based on its assessment that "[t]he law wasn't clearly established" that "prisoners couldn't be housed in

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[1] The Fifth Circuit accepted Taylor's "verified pleadings [as] competent evidence at summary judgment." *Taylor* v. *Stevens*, 946 F. 3d 211, 221 (2019). As is appropriate at the summary-judgment stage, facts that are subject to genuine dispute are viewed in the light most favorable to Taylor's claim.

cells teeming with human waste" "for only six days," the court concluded that the prison officials responsible for Taylor's confinement did not have "'fair warning' that their specific acts were unconstitutional." 946 F. 3d, at 222 (quoting *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002)).

The Fifth Circuit erred in granting the officers qualified immunity on this basis. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau* v. *Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*). But no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time. See *Hope*, 536 U. S., at 741 (explaining that "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question'" (quoting *United States* v. *Lanier*, 520 U. S. 259, 271 (1997))); 536 U. S., at 745 (holding that "[t]he obvious cruelty inherent" in putting inmates in certain wantonly "degrading and dangerous" situations provides officers "with some notice that their alleged conduct violate[s]" the Eighth Amendment). The Fifth Circuit identified no evidence that the conditions of Taylor's confinement were compelled by necessity or exigency. Nor does the summary-judgment record reveal any reason to suspect that the conditions of Taylor's confinement could not have been mitigated, either in degree or duration. And although an officer-by-officer analysis will be necessary on remand, the record suggests that at least some officers involved in Taylor's ordeal were deliberately indifferent to the conditions of his cells. See, *e.g.,* 946 F. 3d, at 218 (one officer, upon placing Taylor in the first feces-covered cell, remarked to another that Taylor was "'going to have a long weekend'"); *ibid.*, and n. 9 (another officer, upon placing Taylor in the second cell, told

Taylor he hoped Taylor would "'f***ing freeze'").

Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution.[2] We therefore grant Taylor's petition for a writ of certiorari, vacate the judgment of the Court of Appeals for the Fifth Circuit, and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BARRETT took no part in the consideration or decision of this case.

JUSTICE THOMAS dissents.

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[2] In holding otherwise, the Fifth Circuit noted "ambiguity in the caselaw" regarding whether "a time period so short [as six days] violated the Constitution." 946 F. 3d, at 222. But the case that troubled the Fifth Circuit is too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor's right. See *Davis* v. *Scott*, 157 F. 3d 1003, 1004 (CA5 1998) (no Eighth Amendment violation where inmate was detained for three days in dirty cell and provided cleaning supplies).

# SUPREME COURT OF THE UNITED STATES

TRENT MICHAEL TAYLOR *v.* ROBERT RIOJAS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19–1261. Decided November 2, 2020

JUSTICE ALITO, concurring in the judgment.

Because the Court has granted the petition for a writ of certiorari, I will address the question that the Court has chosen to decide. But I find it hard to understand why the Court has seen fit to grant review and address that question.

## I

To see why this petition is ill-suited for review, it is important to review the procedural posture of this case. Petitioner, an inmate in a Texas prison, sued multiple prison officers and asserted a variety of claims, including both the Eighth Amendment claim that the Court addresses (placing and keeping him in filthy cells) and a related Eighth Amendment claim (refusing to take him to a toilet). The District Court granted summary judgment for the defendants on all but one of petitioner's claims under Federal Rule of Civil Procedure 54(b), which permitted petitioner to appeal the dismissed claims. On appeal, the Fifth Circuit affirmed as to all the claims at issue except the toilet-access claim. On the claim concerning the conditions of petitioner's cells, the court held that the facts alleged in petitioner's verified complaint were sufficient to demonstrate an Eighth Amendment violation, but it found that the officers were entitled to qualified immunity based primarily on a statement in *Hutto* v. *Finney*, 437 U. S. 678 (1978), and the Fifth Circuit's decision in *Davis* v. *Scott*, 157 F. 3d 1003 (1998).

The Court now reverses the affirmance of summary judgment on the cell-conditions claim. Viewing the evidence in the summary judgment record in the light most favorable to petitioner, the Court holds that a reasonable corrections officer would have known that it was unconstitutional to confine petitioner under the conditions alleged. That question, which turns entirely on an interpretation of the record in one particular case, is a quintessential example of the kind that we almost never review. As stated in our Rules, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law," this Court's Rule 10. That is precisely the situation here. The Court does not dispute that the Fifth Circuit applied all the correct legal standards, but the Court simply disagrees with the Fifth Circuit's application of those tests to the facts in a particular record. Every year, the courts of appeals decide hundreds if not thousands of cases in which it is debatable whether the evidence in a summary judgment record is just enough or not quite enough to carry the case to trial. If we began to review these decisions we would be swamped, and as a rule we do not do so.

Instead, we have well-known criteria for granting review, and they are not met here. The question that the Court decides is not one that has divided the lower courts, see this Court's Rule 10, and today's decision adds virtually nothing to the law going forward. The Court of Appeals held that the conditions alleged by petitioner, if proved, would violate the Eighth Amendment, and this put correctional officers in the Fifth Circuit on notice that such conditions are intolerable. Thus, even without our intervention, qualified immunity would not be available in any similar future case.

We have sometimes granted review and summarily reversed in cases where it appeared that the lower court had conspicuously disregarded governing Supreme Court precedent, but that is not the situation here. On the contrary,

as I explain below, it appears that the Court of Appeals erred largely because it read too much into one of our decisions.

It is not even clear that today's decision is necessary to protect petitioner's interests. We are generally hesitant to grant review of non-final decisions, and there are grounds for such wariness here. If we had denied review at this time, petitioner may not have lost the opportunity to contest the grant of summary judgment on the issue of respondents' entitlement to qualified immunity on his cell-conditions claim. His case would have been remanded for trial on the claims that remained after the Fifth Circuit's decision (one of which sought relief that appears to overlap with the relief sought on the cell-conditions claim), and if he was dissatisfied with the final judgment, he may have been able to seek review by this Court of the cell-conditions qualified immunity issue at that time. *Major League Baseball Players Assn.* v. *Garvey*, 532 U. S. 504, 508, n. 1 (2001) (*per curiam*). And of course, there is always the possibility that he would have been satisfied with whatever relief he obtained on the claims that went to trial.

Today's decision does not even conclusively resolve the issue of qualified immunity on the cell-conditions claim because respondents are free to renew that defense at trial, and if the facts petitioner alleges are not ultimately established, the defense could succeed. Indeed, if petitioner cannot prove the facts he alleges, he may not be able to show that his constitutional rights were violated.

In light of all this, it is not apparent why the Court has chosen to grant review in this case.

## II

While I would not grant review on the question the Court addresses, I agree that summary judgment should not have been awarded on the issue of qualified immunity. We must

view the summary judgment record in the light most favorable to petitioner, and when petitioner's verified complaint is read in this way, a reasonable fact-finder could infer not just that the conditions in the cells in question were horrific but that respondents chose to place and keep him in those particular cells, made no effort to have the cells cleaned, and did not explore the possibility of assignment to cells with better conditions. A reasonable corrections officer would have known that this course of conduct was unconstitutional, and the cases on which respondents rely do not show otherwise.

Although this Court stated in *Hutto* that holding a prisoner in a "filthy" cell for "a few days" "might be tolerable," 437 U. S., at 686–687, that equivocal and unspecific dictum does not justify what petitioner alleges. There are degrees of filth, ranging from conditions that are simply unpleasant to conditions that pose a grave health risk, and the concept of "a few days" is also imprecise. In addition, the statement does not address potentially important factors, such as the necessity of placing and keeping a prisoner in a particular cell and the possibility of cleaning the cell before he is housed there or during the course of that placement. A reasonable officer could not think that this statement or the Court of Appeals' decision in *Davis* meant that it is constitutional to place a prisoner in the filthiest cells imaginable for up to six days despite the availability of other preferable cells or despite the ability to arrange for cleaning of the cells in question.

For these reasons, I concur in the judgment.

# SUPREME COURT OF THE UNITED STATES

NATIONAL FOOTBALL LEAGUE, ET AL. *v.*
NINTH INNING, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19–1098. Decided November 2, 2020

The petition for a writ of certiorari is denied. JUSTICE BARRETT took no part in the consideration or decision of this petition.

Statement of JUSTICE KAVANAUGH respecting the denial of certiorari.

In this antitrust case, the plaintiffs challenged the National Football League's contract with DirecTV for the television rights to out-of-market games. That contract has been in place for 26 years. The District Court dismissed the plaintiffs' suit. But the Court of Appeals reversed, holding that the plaintiffs' complaint sufficiently alleged that the contract may be illegal under the antitrust laws. Ordinarily, a decision of such legal and economic significance might warrant this Court's review. But the case comes to us at the motion-to-dismiss stage, and the interlocutory posture is a factor counseling against this Court's review at this time. See *Abbott* v. *Veasey*, 580 U. S. ___, ___ (2017) (ROBERTS, C. J., statement respecting denial of certiorari) (slip op., at 2).

I write separately simply to explain that the denial of certiorari should not necessarily be viewed as agreement with the legal analysis of the Court of Appeals.

Under the existing contract, the 32 NFL teams have authorized the NFL to sell the television rights for out-of-market games to a single buyer, DirecTV. The plaintiffs argue, and the Court of Appeals agreed, that antitrust law may require each team to negotiate an individualized contract

for televising only its own games. But that conclusion appears to be in substantial tension with antitrust principles and precedents. The NFL and its member teams operate as a joint venture. See *Smith* v. *Pro Football, Inc.*, 593 F. 2d 1173, 1179 (CADC 1978). And antitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights. Cf. *American Needle, Inc.* v. *National Football League*, 560 U. S. 183, 202 (2010) ("NFL teams . . . must cooperate in the production and scheduling of games"); R. Bork, The Antitrust Paradox 278 (1978).

Moreover, the plaintiffs may not have antitrust standing to sue the NFL and the individual teams. This Court's case law "authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." *Apple Inc.* v. *Pepper*, 587 U. S. ___, ___ (2019) (slip op., at 5). The plaintiffs here did not purchase a product from the NFL or any team, and may therefore be barred from bringing suit against the NFL and its teams under *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977).

In sum, the defendants—the NFL, its teams, and DirecTV—have substantial arguments on the law. If the defendants do not prevail at summary judgment or at trial, they may raise those legal arguments again in a new petition for certiorari, as appropriate.