Nos. 17-1284 & 17-1289

In the
Supreme Court of the United States

JONATHAN APODACA, JOSHUA VIGIL, and DONNIE LOWE,
Petitioners,
v.

RICK RAEMISCH and TRAVIS TRANI,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners were incarcerated in a Colorado state prison under heightened security protocols. As part of those protocols, Petitioners were given frequent access to an exercise room with open-air windows and indirect sunlight, but not to outdoor exercise facilities. They sued prison officials under 42 U.S.C. § 1983, claiming that this lack of access to an outdoor exercise area violated their Eighth Amendment rights.

Below, the Tenth Circuit concluded that Petitioners' claims must be dismissed under the "clearly established" prong of qualified immunity, based on in-circuit precedent regarding Eighth Amendment challenges to the availability of inmate exercise opportunities. Petitioners present new arguments in their Petition that were never argued below. They did not assert below that a "security rationale" is a prerequisite to the denial of outdoor exercise (rather than a factor to be considered in the Eighth Amendment's facts-and-circumstances analysis). Instead, they focused on the duration of the exercise restrictions imposed on them. Nor did they rely on out-of-jurisdiction cases to argue that the law in this area is "clearly established."

The question presented is as follows:

> Did the Tenth Circuit properly rely on in-jurisdiction precedent and Petitioners' arguments below to determine that Petitioners' putative constitutional rights were not clearly established at the time of the alleged constitutional deprivation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Regulations

STATEMENT OF THE CASE

1. ***Facts.*** Petitioners were incarcerated in Colorado state correctional facilities under the supervision of the Colorado Department of Corrections ("CDOC").[1] Although they have since been moved or released, Petitioners were for a time housed in the Colorado State Penitentiary ("CSP"), where they were subject to a heightened security protocol then known as "administrative segregation."

Administrative segregation was an "offender management process," not a "punitive measure." CDOC Regulation No. 650-03 (May 15, 2012), p. 1. It was reserved for inmates who posed the greatest safety risks. Newly admitted inmates could be placed in administrative segregation for behavior that "constituted a serious threat to the security and orderly operation of the correctional setting or when other factors … indicate[d] the offender should be considered for administrative segregation status." *Id.* at 3, ¶ IV.A.1.a. An already admitted inmate could be moved to administrative segregation for a variety of reasons, including causing or attempting to cause serious physical harm or death; coercing another by force or threat of violence; organizing or inciting a

[1] Petitioner Lowe was convicted of second degree burglary of a dwelling (Prowers Cnty. Case No. 2000CR30) and introduction of contraband (Lincoln Cnty. Case No. 2001CR94). Petitioner Apodaca was convicted of second and third degree assault (Mesa Cnty. Case Nos. 2011CR1212 and 2006CR641), theft (Mesa Cnty. Case No. 2005CR1564), and forgery (Mesa Cnty. Case No. 2005CR882 and Garfield Cnty. Case No. 2005CR562). Petitioner Vigil was convicted of second degree murder, second degree kidnapping, and two counts of second degree assault (Jefferson Cnty. Case No. 2003CR812).

prison riot that resulted in significant property damage, physical harm, or loss of life; introducing or possessing dangerous contraband; or escaping, attempting to escape, or facilitating escape. *Id.* at 4, ¶¶ IV.B.1–6.

The CDOC provided procedural rights for those, like Petitioners, who were subject to administrative segregation, including notice, proof, hearings before a board, written documentation to the offender, and the right to appeal. *Id.* at 5–6, ¶¶ IV.D–E. During administrative segregation, inmates' behavior and progress were monitored by daily welfare checks and at least monthly reviews. *Id.* at 7–16, ¶¶ IV.G–K.

Inmates subject to administrative segregation were housed in cells with hot and cold running water, a desk, a stool, a mattress and bunk, and a toilet and sink. *Id.* at 7, ¶ IV.F.1. They were given access to regular laundry, health care, basic hygiene items, barbering and janitorial supplies, mail, and reading materials, and they were allowed telephone and visitation privileges. *Id.* at 7, ¶ IV.F.1. They also were provided "a minimum of one hour of recreation in a designated [out-of-cell] exercise area (5) days per week." *Id.* at 7, ¶ IV.F.1.q. CDOC's policy stated that inmates "shall" have these privileges "unless there is imminent danger" that the offender would destroy an item or induce self-injury. *Id.* at 7, ¶ IV.F.1.

2. *Revisions to CDOC's administrative segregation program.* CDOC began revising its segregation program before Petitioners filed their complaints. On June 30, 2014, CDOC amended its regulations to replace "administrative segregation" with a similar program known as "restrictive housing

maximum security status." CDOC Regulation 650-03 (June 30, 2014). Although the conditions of confinement under the new restrictive housing status were similar to the old administrative segregation, inmates were given a presumptive maximum limit of either 6 or 12 months, depending on why they were placed in restrictive housing. *Id.* at IV-B. Any stay beyond 12 months had to "be approved by the Director of Prisons as well as the Deputy Executive Director," based upon "documented exigent circumstances." *Id.* at IV-K.

Effective January 2015, CDOC further revised its policies to provide that inmates who were kept in restrictive housing for more than nine months would be afforded three hours of weekly outdoor recreation. CDOC Regulation 650-03 (Jan. 15, 2015), p. 8, ¶ IV.F.12. In November 2015, CDOC entered into a settlement agreement in a separate case, *Decoteau v. Raemisch*, No. 1:13-cv-03399 (D. Colo.), under which all inmates in restrictive housing would be moved from CSP to a different facility and given access to outdoor exercise facilities. The settlement agreement further provided that outdoor exercise units would be constructed at CSP itself. The agreement was approved by the district court.

Today, CDOC regulations provide that even inmates who are kept in the most restrictive level of housing are given both significant "out of cell" time and "access to outdoor recreation" of at least one hour per day, three days per week, subject to "security or safety considerations." CDOC Regulation No. 600-09 (Jan. 1, 2018), p, 2 ¶ III.E; pp. 6–7 ¶ IV.B.9.

3. *Petitioners' complaints.* Petitioners filed these cases in mid-2015, after CDOC began revising its administrative segregation program but before the *Decoteau* settlement agreement. Their complaints alleged that prison officials had violated their Eighth Amendment rights by denying them access to outdoor recreation. *Lowe*, No. 15-cv-01830, ECF No. 1, Complaint ¶¶ 8, 72, 88–89, 105 (D. Colo., filed Aug. 25, 2015) ("*Lowe* Compl."); *Apodaca*, No. 15-cv-00845, ECF No. 1, Complaint ¶¶ 76, 83, 86–97, 115 (D. Colo., filed Apr. 22, 2015) ("*Apodaca* Compl.").

Petitioners Apodaca and Vigil alleged that they were denied outdoor recreation for approximately 11 months, from September 2013 to August 2014. *Apodaca* Compl. ¶¶ 86–87. Petitioner Lowe alleged that he was denied outdoor recreation for approximately 25 months, from February 2013 to March 2015. *Lowe* Compl. ¶ 110. During those time periods, it is undisputed that Petitioners were allowed one-hour exercise sessions, five times per week, out of their cells in an exercise room. The exercise room received indirect sunlight and fresh air through windows that had metal grates instead of glass. Petitioners alleged that this arrangement violated their Eighth Amendment rights because they were entitled to *outdoor* exercise and not just out-of-cell exercise. *Lowe* Compl., ¶¶ 8, 72, 88–89, 105; *Apodaca* Compl., ¶¶ 76, 83, 86–97, 115.[2]

[2] Although Petitioners refer to their time in CSP as "solitary confinement," *see Lowe* Pet. i; *Apodaca* Pet. i, neither the district court nor the Tenth Circuit characterized it that way, other than a passing reference to Petitioner Lowe's allegations. *See Lowe*

4. *District court proceedings.* Respondents moved to dismiss under the qualified immunity doctrine. They argued that at the time of Petitioners' confinement in administrative segregation, no Tenth Circuit precedent clearly established a constitutional violation when inmates were allowed to exercise *out of their cells*—even if they were not granted *outdoor* exercise. They further argued that, based on particular allegations in the complaints, Petitioners' alleged deprivation was not sufficiently serious to trigger an Eighth Amendment violation under clearly established law. *Apodaca*, No. 15-cv-00845, ECF No. 18, Motion to Dismiss, at 6–11 (D. Colo., filed June 19, 2015); *Lowe*, No. 15-cv-01830, ECF No. 10, Motion to Dismiss, at 6–14 (D. Colo., filed Nov. 9, 2015).

Relying solely on Tenth Circuit and District of Colorado cases, Petitioners argued that the right to outdoor exercise for inmates *was* clearly established. Petitioners never contended that out-of-jurisdiction precedent established a constitutional violation. Nor did they argue that a "security rationale" is a prerequisite to the restriction of outdoor exercise. *Apodaca*, No. 15-cv-00845, ECF No. 29, Resp. to Motion to Dismiss, at 17–19 (D. Colo., filed Aug. 5, 2015); *Lowe*, No. 15-cv-01830, ECF No. 14, Resp. to Motion to Dismiss, at 7–10 (D. Colo., filed Dec. 18, 2015) (relying on the "law of this circuit"). Rather, their argument under the "clearly established" prong

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Pet. App. at 15a ("He alleges … he was housed in 'solitary confinement conditions' ….").

of qualified immunity focused on the length of time they were denied outdoor exercise.

The district court judges presiding over the two cases denied the motions to dismiss. Neither district judge relied on out-of-jurisdiction precedent, instead looking only to decisions within the Tenth Circuit. *Apodaca* Pet. App. 16a–32a; *Lowe* Pet. App. 15a–23a.[3]

5. *Tenth Circuit proceedings.* Respondents filed interlocutory appeals. The Tenth Circuit reversed, holding that, at the time of Petitioners' incarceration in administrative segregation, in-circuit precedent did not clearly establish that outdoor exercise was constitutionally required by the Eighth Amendment under the circumstances alleged in the complaints. *Apodaca* Pet. App. 2a–15a; *Lowe* Pet. App. 2a–14a.

In both *Lowe* and *Apodaca*, the court recognized that denial of outdoor exercise was, under the relevant Tenth Circuit case law, not a "per se" Eighth Amendment violation and thus a balancing test was necessary. In both cases, the court also held that under the totality of the circumstances, the length of the deprivation was a consideration. *Apodaca* Pet. App. at 9a; *Lowe* Pet. App. at 6a–8a. Because there were arguably conflicting in-circuit legal authorities regarding constitutional minimums for out-of-cell exercise, such that any alleged violation of Petitioners' Eighth Amendment rights was not clearly

[3] Although the district court in *Lowe* stated that Tenth Circuit cases "and many other cases" clearly established a constitutional violation, the court did not identify these "other cases." *Lowe* Pet. App. at 22a.

established, qualified immunity applied. *Apodaca* Pet. App. at 13a; *Lowe* Pet. App. at 10a.

On appeal, as in the district court, Petitioners did not rely on out-of-jurisdiction case law, leading the Tenth Circuit to expressly hold that they waived any argument under foreign precedent. *Apodaca* Pet. App. at 7a n.3; *Lowe* Pet. App. at 6a n.3. Nor did Petitioners raise the argument that a "security rationale" is a prerequisite for the denial of outdoor exercise, an argument they now make in their Petition. Instead, the parties and the court focused on the *duration* of the denial of outdoor exercise rather than the rationale for it. *Apodaca* Pet. App. at 13a ("[O]ur circuit has not clearly established a right to outdoor exercise over an eleven-month period."); *Lowe* Pet. App. at 12a ("[T]he deprivation of outdoor exercise for two years and one month would not have obviously crossed a constitutional line.").

REASONS FOR DENYING THE PETITIONS

The Petitions are essentially identical, and they present no compelling reasons to grant certiorari.

First, these cases are poor vehicles to address the Questions Presented. The arguments now pressed by the Petitioners—i.e., that a "security rationale" is a prerequisite to denial of outdoor exercise (rather than a factor to be considered in the Eighth Amendment analysis) and that out-of-jurisdiction case law "clearly establishes" the right to outdoor exercise under the facts of these cases—were never presented below. Instead, the briefing before the Tenth Circuit focused on in-jurisdiction case law and Petitioners' argument that the length of time they were denied outdoor exercise created an Eighth Amendment violation. In

any event, the out-of-jurisdiction cases do not create any circuit split. To the extent those cases discussed or relied on a "security rationale," they did so because of the specific arguments of the parties, not because the Eighth Amendment imposes particular prerequisites on the denial of outdoor exercise opportunities. Nor do those out-of-jurisdiction cases, even on their own terms, clearly establish a right to outdoor exercise that would have governed here.

Finally, the Tenth Circuit correctly applied the doctrine of qualified immunity, based on a correct and fair reading of in-circuit precedent. Petitioners ask this Court to grant certiorari or issue a summary reversal to upset current qualified immunity doctrine, but they provide no justification for taking that extreme step and overriding the doctrine of *stare decisis*.

I. Petitioners' "security rationale" argument and their argument based on out-of-circuit cases were never raised below, and, in any event, their purported circuit split does not exist.

The core arguments presented in the Petitions—as well as the Questions Presented themselves—were not raised in the Tenth Circuit. Rather, the Petitions are an attempt to litigate new issues in this Court for the first time. That alone counsels in favor of denying certiorari. *See United States v. Ortiz*, 422 U.S. 891, 898 (1975) (refusing to consider an argument presented for the first time in a petition for certiorari).

But even putting aside preservation issues, there is no circuit split. Many of the cases cited in the Petitions are simply off-point, and those that

purportedly discuss Petitioners' new "security rationale" argument do not establish any clear law that could have applied to Petitioners' putative Eighth Amendment claims.

A. Petitioners did not argue below that a "security rationale" is a prerequisite for denying outdoor exercise; they instead focused on the duration of the restriction on outdoor exercise.

The question presented by Petitioners was never presented below. The Tenth Circuit was never asked to assess whether a "security rationale" is a prerequisite for restricting outdoor activity of inmates. *Apodaca* Pet. i (stating that the question presented is "[w]hether clearly established Eighth Amendment law permits prison officials to permanently deprive a prisoner in solitary confinement of outdoor exercise *without a security rationale*" (emphasis added)); *Lowe* Pet. i (same). Of course, security concerns were relevant under CDOC policy at the time Petitioners were placed in administrative segregation. Had those security concerns been put at issue by the parties below, they could have been one subject for litigation before the District of Colorado and Tenth Circuit. But they were not put at issue. They thus fail to provide a justification for this Court's review.

Instead, Petitioners focused below on the *duration* of the denial of outdoor exercise, based on within-jurisdiction precedent discussing the distinction between outdoor and out-of-cell activity. This is why the Tenth Circuit confined its analysis to these issues, focusing on the core concern raised by

Petitioners: whether the length of the alleged deprivation constituted an Eighth Amendment violation. *Apodaca* Pet. App. 9a–10a; *Lowe* Pet. App. 6a–7a. Because Petitioners failed to raise the "security rationale" issue below, this Court should decline to grant certiorari to review it.

B. Petitioners relied exclusively on within-jurisdiction precedent below and failed to preserve any argument based on out-of-jurisdiction case law.

The most common way for plaintiffs to meet the "clearly established" prong of qualified immunity is by identifying "cases of controlling authority *in their jurisdiction* at the time of the incident that clearly established the rule on which they seek to rely." *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (emphasis added). This is precisely what Petitioners tried—and failed—to do below. The Tenth Circuit exhaustively analyzed relevant in-jurisdiction cases and concluded that Petitioners had failed to satisfy the "clearly established" prong of qualified immunity. *Apodaca* Pet. App. 9a–13a; *Lowe* Pet. App. 6a–10a.

What Petitioners did *not* attempt to do below was raise any argument about out-of-circuit cases. They did not assert, in either the district court or the Tenth Circuit, that out-of-circuit cases "clearly established" the putative right to outdoor exercise they contend was violated here. This is why the Tenth Circuit explicitly held that Petitioners failed to preserve these arguments. *Apodaca* Pet. App. 7a n.3 ("[T]he plaintiffs do not rely on Supreme Court precedent or the weight of authority in other circuits; thus, we do not consider these potential sources for a clearly

established right."); *Lowe* Pet. App. 6a n.3 ("Lowe does not allege that Supreme Court precedent or the weight of authority in other circuits has clearly established the law.").

Now, however, Petitioners argue that the Tenth Circuit's decision "creates a split with five other circuits." *Lowe* Pet. 10; *Apodaca* Pet. 10. This is incorrect, as explained below in Part I.C. But as a preliminary matter, it is unclear why Petitioners believe the purported split is relevant. Petitioners do not claim, for example, that these five other circuits analyze qualified immunity any differently than the Tenth Circuit does. Nor do they claim that courts like the Tenth Circuit are obligated to analyze out-of-circuit case law in qualified immunity cases even when the parties themselves fail to cite them.

Instead, Petitioners appear to imply that the purported split is relevant to the question of whether the law governing Petitioners' particular claim was, in fact, clearly established in their favor at the time their claims arose. *See Apodaca* Pet. i (asking whether the relevant law was "clearly established"); *Lowe* Pet. i (same). Again, however, whether out-of-circuit cases have any bearing on the "clearly established" prong of qualified immunity is a question that should have been put to the Tenth Circuit. Absent binding authority from this Court or from within the Tenth Circuit itself, Petitioners were required to show that their claims are supported by a "robust consensus of cases of persuasive authority" in the circuit courts of appeal. *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (quoting *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1779 (2015)). Here, however, Petitioners affirmatively elected to rely solely on

Tenth Circuit cases in attempting to demonstrate that their putative constitutional right to outdoor exercise was clearly established. *Apodaca* Pet. App. 7a n.3; *Lowe* Pet. App. 6a n.3. It is too late now to propose a new argument for relief. Asking this Court to assess the state of out-of-circuit case law for the first time is inappropriate and does not justify certiorari.

C. There is no circuit split because no out-of-jurisdiction case holds that a "security rationale" is a prerequisite to the denial of outdoor exercise.

Putting aside Petitioners' failure to raise out-of-jurisdiction cases or their "security rationale" argument below, the purported circuit split described in the Petitions does not exist. Petitioners cite five circuit cases, spanning nearly forty years, that allegedly conflict with the Tenth Circuit's opinions in these cases. *See Lowe* Pet. 10 (claiming that in those other circuits, "prison officials may not inflict even a temporary restriction of this nature without a security rationale"); *Apodaca* Pet. 10 (same). But several of the cases in the purported split involve *complete* denial of exercise opportunities (whether outdoors or out-of-cell), and none in fact held that a "security rationale" is a prerequisite to imposing such restrictions. Rather, the cases address security concerns because those concerns were put at issue by the parties—unlike here. In short, there is no circuit split for this Court to resolve.

First, in *Hernandez v. Velazquez*, an inmate was denied *both* "outdoor and out-of-cell exercise" for thirteen months, which, he alleged, constituted cruel

and unusual punishment. 522 F.3d 556, 559–60 (5th Cir. 2008). That alone makes *Hernandez* inapposite, given that here, Petitioners were given access to an exercise room five days per week. Additionally, however, the question in *Hernandez* had nothing to do with whether a "security rationale" justified the denial of exercise privileges; it had only to do with whether the plaintiff had established he was placed at "substantial risk of harm." *Id.* at 561. By way of background, the court discussed the security concerns that had led to the inmate's placement in segregation—a planned "war" between rival prison gangs—but the reason for the deprivation was irrelevant to the court's Eighth Amendment analysis. *Id.* at 558, 560–61. The court never suggested that a "security rationale" is a threshold requirement that prison officials must satisfy before restricting outdoor (or even out-of-cell) exercise. Indeed, the court specifically rejected any per se rule. *Id.* at 560 n.5 ("[T]his circuit has noted in the past that 'deprivation of exercise per se does not violate the cruel and unusual punishment clause' ….") (quoting *Miller v. Carson*, 563 F.2d 741, 751 n.12 (5th Cir. 1977)).

Second, in *Pearson v. Ramos*, an inmate claimed that his Eighth Amendment rights were violated by the denial of outdoor *and* out-of-cell exercise for an entire year. 237 F.3d 881, 883 (7th Cir. 2001); *see also id.* at 884 ("When unrelieved by opportunities for *out-of-cell* exercise, such confinement could reasonably be described as cruel and … unusual." (emphasis added)); *see also id.* at 890 (Ripple, J., concurring in the judgment) ("[I]t seems less than certain that [Pearson] could exercise in any meaningful way in his cell."). Here, Petitioners were not denied *out-of-cell*

exercise, making *Pearson* inapposite. And, in any event, while *Pearson* discussed the safety and security concerns that led to the denial of exercise opportunities, it neither said nor suggested that those concerns were prerequisites in the mode that Petitioners now urge. The court said only that the Eighth Amendment *could* be violated if exercise opportunities were denied for "some utterly trivial infraction of the prison's disciplinary rules" while at the same time acknowledging that it nonetheless could not "find any case to support such a suggestion." *Id*. at 885.

Third, in *Bass v. Perin*, two inmates had been placed in solitary confinement because they were "proven" dangers to the rest of the prison and had been denied outdoor exercise for more than two years and nine years, respectively. 170 F.3d 1312, 1315 (11th Cir. 1999); *see also id*. at 1316 (discussing the inmates' history of violence and escape attempts).[4] In discussing whether this restriction constituted the "unnecessary and wanton infliction of pain" the court first held that the restriction was not "unnecessary" because "it would be hard to imagine a situation in which two persons had shown a greater threat to the safety and security of the prison." *Id*. at 1316. Nor was it "wanton," because "prison officials were very concerned about the potential harm to inmates" and

[4] Although the court referred to denial only of "outdoor exercise," in context it appears that the inmates were denied *all* out-of-cell exercise. *See id*. at 1317 ("[A] booklet (along with training from medical personnel) was made available to the plaintiffs detailing proper methods of exercise *while in confinement*." (emphasis added)). This further undermines Petitioners' reliance on *Bass* as the source of a circuit split.

"took a variety of steps to ensure that the plaintiffs were not harmed as a result of their continuous confinement." *Id.* at 1317. Thus, although the court addressed safety and security factors, it did so as part of the larger "unnecessary and wanton infliction of pain" analysis because the parties put those factors at issue. *Id*. at 1316–17. It did not hold that a "security rationale" is a threshold prerequisite for the deprivation of outdoor exercise in the manner Petitioners suggest.

Fourth, in *Walker v. Mintzes*, prison officials had implemented restrictive measures in response to a series of prison riots. 771 F.2d 920, 924–25 (6th Cir. 1985). Among these measures was a limitation on "yard time." *Id*. at 926–27. The district court had held that the restriction violated the Eighth Amendment and imposed a schedule of required yard time that differed by prison and by prisoner classification. *Id.* In reversing and remanding, the Sixth Circuit held that prisoners in segregation can have yard time circumscribed significantly. *Id.* at 927. It declined, however, to specify what the minimum requirements for yard time might be and instead instructed the district court to "seek the *minimum* amount of yard time necessary for the inmates' well-being under minimal civilized standards," cautioning it not to guess "'how best to operate a detention facility.'" *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 351 (1987)). The court did not hold that a security rationale is a threshold requirement for restrictions on yard time, and in fact explicitly eschewed any "*per se* rule." *Id*. at 927 (citing *Spain v. Procunier*, 600 F.2d 189 (9th Cir.1979)). Instead, it held that security concerns are one factor to be considered, together with

factors such as "limitations placed on each class of inmates that might restrict prisoner interaction" and "whether restrictions are 'totally without penological justification.'" *Id.* at 928 (quoting *Rhodes*, 452 U.S. at 346).

Finally, in *Spain v. Procunier*—which Petitioners call the "seminal opinion" on this issue, *Lowe* Pet. 10; *Apodaca* Pet. 10—then-Judge Kennedy identified the inherent difficulty in "pass[ing] upon measures adopted by prison officials for the safe custody of some of the most dangerous men in the prison population." 600 F.2d at 192. The prisoners at issue were allowed to exercise "in a corridor fronting on eight or nine cells," but for years were "never permitted any outdoor exercise or recreation." *Id.* at 199. The Ninth Circuit explicitly declined "to decide whether deprivation of outdoor exercise is a per se violation of the eighth amendment." *Id.* at 199. Instead, it concluded only that outdoor exercise was required for inmates kept in isolated confinement "for more than four years." *Id.* at 200. While the court noted both the dangerousness of the confined plaintiff-inmates and the prison officials' argument regarding security concerns, its decision neither hinged on this rationale nor suggested it was a threshold requirement. *Id.*

To the extent these five decisions considered safety and security issues, they did so as one factor that bore consideration under the particular circumstances, based on the arguments presented by the parties. Petitioners' claim that these cases establish that "prison officials may not inflict even a temporary restriction of this nature without a security rationale" is puzzling, since even their own description of the cases does not support that claim.

See Lowe Pet. 10–13; *Apodaca* Pet. 10–14.[5] The cases stand for the proposition that security is one factor that can be relevant under the Eighth Amendment, assuming that factor is properly raised by the parties in their arguments to the reviewing courts. There is no circuit split to resolve, and certainly no indication that any differences among the case law would be outcome determinative here.[6]

II. The decisions below correctly applied settled United States Supreme Court precedent.

Petitioners ask this Court to grant certiorari (or issue a summary reversal) to engage in error correction or, failing that, to revisit the settled doctrine of qualified immunity. *See Apodaca* Pet. 19–27; *Lowe* Pet. 19–26. Neither course would be appropriate here. The Tenth Circuit expressly

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[5] Nor is there merit to Petitioners' assertion that this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), established a threshold requirement of a security rationale before an inmate can be denied access to outdoor exercise. *See Lowe* Pet. 20 (claiming that *Hope* "made clear that, consistent with the Eighth Amendment, restrictions of this nature may not be inflicted without a security rationale"); *Apodaca* Pet. 20 (same). *Hope* had nothing to do with exercise, but involved the 7-hour handcuffing of a shirtless inmate to a "hitching post" in the hot sun, without access to water or bathroom breaks. 536 U.S. at 734. And although the Court found it relevant under those facts that "[a]ny safety concerns had long since abated," it did not hold that a security rationale is a pre-condition to inmate deprivations generally, let alone the denial of access to outdoor exercise, which was not at issue in *Hope*.

[6] Nor do any of these cases materially address the difference between outdoor versus out-of-cell exercise—let alone "clearly establish" a constitutional right to the former.

recognized and applied this Court's settled test for qualified immunity. Because the Tenth Circuit correctly applied that test, and because Petitioners have not presented any compelling reason to upend it, there is no reason for this Court to either reassess the qualified immunity doctrine or summarily reverse the Tenth Circuit.

A. This Court has established a clear and consistent framework for qualified immunity that should not be overturned.

This Court has plainly and repeatedly established that state officials acting in their official capacity have qualified immunity against § 1983 claims. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that government officials are shielded from civil damages when their conduct does not violate clearly established statutory or constitutional rights a reasonable person would have recognized). Petitioners argue that this Court's qualified immunity jurisprudence is wrong, and they suggest that the Court should conduct an overhaul of the qualified immunity doctrine. *Lowe* Pet. 23–25; *Apodaca* Pet. 23–26.

In Petitioners' view, the qualified immunity analysis should be abandoned in favor of a strict liability standard, which could be coupled with an indemnification regime. *E.g.*, *Lowe* Pet. 24. Perhaps, as a matter of policy, that alternative regime may have merit. But "qualified immunity represents the norm." *Harlow*, 457 U.S. at 807. Petitioners fail entirely to explain why, under principles of *stare*

decisis, this Court should radically alter a framework that state and local jurisdictions across the country have relied upon for decades, and continue to rely upon to this day. *See Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015) ("Overruling precedent is never a small matter.").

This Court has repeatedly, frequently, and recently expressed, without ambiguity, the applicable test for qualified immunity. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.") (quotation omitted); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) ("Our cases have accommodated … conflicting [policy] concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."); *Harlow*, 457 U.S. at 818. The Petitions fail to provide adequate justification in support of their request to depart from that settled framework.

B. The Tenth Circuit correctly concluded that there was no "clearly established" in-jurisdiction law supporting Petitioners' claims.

In the context of out-of-cell and outdoor exercise for inmates, there are five relevant Tenth Circuit opinions, none of which "clearly establish" an Eighth Amendment rule requiring that inmates be given access to outdoor exercise under the circumstances of

the present cases. Below, the Tenth Circuit, in adjudicating Petitioners' claims, properly considered in-jurisdiction precedent and determined that the claims at issue here are not the subject of "clearly established" law. *See Lowe* Pet. App. 6a–10a; *Apodaca* Pet. App. 9a–13a.

In *Bailey v. Shillinger*, the court, in a single paragraph, analyzed a claim that an inmate had "been denied exercise and fresh air while in segregation." 828 F.2d 651, 653 (10th Cir. 1987) (per curiam). The court held that denial of fresh air and exercise could amount to an Eighth Amendment violation "under certain circumstances." *Id.* But it noted that "since [plaintiff] brought this suit, the prison officials have constructed an outdoor exercise facility"—as is the case here. *Id.* And, without any additional explanation of the facts and circumstances, the court held that making the new facility available one hour per week did not "fail[ ] to satisfy the demands of the Eighth Amendment." *Id.* Ultimately, the most the court suggested on the subject of "clearly established" law was that denial of exercise a fresh air is not "per se an Eighth Amendment violation." *Id.*

In *Housley v. Dodson*, the court addressed an allegation, which had been "prematurely" dismissed by the district court, that "only thirty minutes of out-of-cell exercise in three months" violated the inmate's Eighth Amendment rights. 41 F.3d 597, 599 (10th Cir. 1994). The court concluded that "there can be no doubt that total denial of exercise for an extended period of time would constitute cruel and unusual punishment." *Id.* Nevertheless, the court recognized that there were "no precise standards … delineating what constitutes constitutionally sufficient

opportunities for exercise"; rather, only "some" exercise was required. *Id.*; *see also id.* ("[W]hat constitutes adequate exercise will depend on the circumstances of each case, including the physical characteristics of the cell and jail and the average length of stay of the inmates."). The court's decision was based solely on denial of out-of-cell exercise and said nothing regarding the issue here—denial of *outdoor* exercise.[7]

In *Perkins v. Kansas Department of Corrections*, the Tenth Circuit reversed the district court's *sua sponte* dismissal of a claim involving a 9-month denial of outdoor exercise. 165 F.3d 803 (10th Cir. 1999). The court held only that the plaintiff had stated a potential claim for relief. It did not explain why that claim was potentially viable, and it did not address whether and to what extent the law on the subject was "clearly established." To the contrary, the court explicitly reaffirmed its earlier precedent: "what constitutes adequate exercise will *depend on the circumstances of each case*, including the physical characteristics of the cell and jail." *Id.* at 810 n.8 (quoting *Housley*, 41 F.3d at 599) (emphasis added). The court expressly disclaimed the ability to conduct the required facts-and-circumstances analysis "at this stage of litigation." *Id.* Additionally, the case involved more than denial of *outdoor* exercise; the inmate was not "permitted exercise outside his cell" *at all*. *Id.* at

[7] The court also mentioned that "there is no evidence that Mr. Housley was a particularly high security risk," *id.*, without ever stating or suggesting that a particular "security rationale" is an Eighth Amendment prerequisite that must be satisfied before denying exercise opportunities, as Petitioners now argue for the first time in this Court.

809 ("Plaintiff's allegations, accepted as true, showed that he is confined in an eight-foot by fourteen-foot concrete cell for twenty-three and one-half hours a day. He is permitted to leave his cell for thirty minutes each day, to take a shower …. Plaintiff has not been permitted exercise outside his cell for over a year."). Thus, *Perkins* addressed not the deprivation of "outdoor" exercise (the claim here) but the *total* deprivation of exercise.

In *Fogle v. Pierson*, the Tenth Circuit opined that a "factfinder might conclude that the risk of harm from *three years* of deprivation of any form of outdoor exercise was obvious." 435 F.3d 1252, 1259–60 (10th Cir. 2006) (emphasis added). But *Fogle* is of limited relevance because it addressed only whether the inmate's claims were "frivolous" for purposes of 28 U.S.C. § 1915(e)(2)(B)(i); i.e., whether they "could even be argued." 435 F.3d at 1260. This is a very different question from whether the inmate's claims were based on "clearly established" law under the qualified immunity doctrine. And, in any event, *Fogle* merely restated existing law: that denial of exercise opportunities could amount to an Eighth Amendment violation "under certain circumstances." *Id.* (quoting *Bailey*, 828 F.2d at 653.

Finally, in *Ajaj v. United States*, the court acknowledged the statement from *Fogle* that "some form of regular outdoor exercise is extremely important." 293 Fed. App'x 575, 584 (10th Cir. 2008) (unpublished) (quoting *Fogle*, 435 F.3d at 1260). But it recognized that although the right to some amount of exercise is clearly established, "no precise standards have been set forth delineating what constitutes constitutionally sufficient opportunities

for exercise." *Id.* at 584 (quoting *Housley*, 41 F.3d at 599). The court therefore held that deprivation of outdoor recreation for one year was "not sufficiently serious to implicate the Eighth Amendment." *Id.* Concurring in *Ajaj*, then-Chief Judge Henry expressed his view that "failure to allow adequate exercise (in most cases with an outdoor component) for a period of a year raises real constitutional concerns." 293 Fed. App'x at 591 (Henry, C.J., concurring). However, he agreed that the defendants should be granted qualified immunity, in part because "prison officials afforded [the inmate] regular solitary indoor exercise opportunities." *Id.* (Henry, C.J., concurring).[8]

The Tenth Circuit in both *Lowe* and *Apodaca* considered the above-cited cases and correctly concluded that they do not clearly establish a constitutional right to outdoor exercise under the circumstances of the present cases. *Lowe* Pet. App. 6a–10a; *Apodaca* Pet. App. 9a–13a. The closest case to establishing such a right is *Perkins*, and Petitioners rely on it heavily. *Lowe* Pet. 20–21; *Apodaca* Pet. 20–21. But as noted above, in *Perkins* the Tenth Circuit concluded only that a one-year deprivation of out-of-cell exercise *could be* a violation of the Eighth Amendment. 165 F.3d at 806–07, 809–10. And in *Ajaj*, the court concluded that Tenth Circuit case law had, even after *Perkins*, articulated "no precise standards" for constitutionally sufficient exercise

[8] Because the availability of indoor exercise in *Ajaj* closely parallels the circumstances here, it was reasonable for Respondents to believe that their course of action was not a violation of a clearly established constitutional right.

opportunities. 293 Fed. App'x at 584. Even the *Ajaj* concurrence recognized that the only established law entitled prisoners to "some out-of-*cell* exercise" and that *Perkins* had not established any precedential benchmark regrading *outdoor* exercise. *Id*. at 588–89, 591 (Henry, C.J., concurring) (emphasis added).[9]

As the Tenth Circuit noted in *Apodaca*, *Perkins* could be read either expansively (to require the provision of *outdoor* exercise) or narrowly (to require only the provision of *out-of-cell* exercise). However, if *Perkins* were read expansively to support Petitioners' claims, *Ajaj* "might appear to conflict" with it. *Apodaca* Pet. App. at 12a. That conflict at the very least demonstrates that the law was not clearly established at the time of Petitioners' confinement. *See id.* ("*Perkins*'s ambiguity means that our circuit has not clearly established a right to outdoor exercise over an eleven-month period."); *Lowe* Pet. App. 6a n.4 ("As discussed in [*Apodaca*], our opinion in *Perkins* … did not clearly establish a constitutional prohibition against a prolonged denial of outdoor exercise."). Thus, the Tenth Circuit properly recognized that Respondents were entitled to qualified immunity. This reflects the commonsense notion that "[i]f judges … disagree on a constitutional question, it is unfair to

[9] Even by itself, *Perkins* could not have clearly established that the policies here violated Petitioners' constitutional rights, since *Perkins* involved, unlike here, a total deprivation of out-of-cell exercise. Because Petitioners were allowed regular out-of-cell exercise, Respondents could not have reasonably understood that the policies in place here clearly violated any established constitutional right. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (cautioning courts not to define "clearly established" law "at a high level of generality").

subject [state officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 629 (1999).[10]

Finally, even if Petitioners had established a clear violation of their constitutional rights, there is no possibility of recurrence. CDOC has overhauled its segregation program into four tiers, the most restrictive of which provides for a minimum "access to outdoor recreation" of one hour per day, three days per week, subject to "security or safety considerations." CDOC Regulation No. 600-09 (Jan. 1, 2018), p, 2 ¶ III.E; pp. 6–7 ¶ IV.B.9.

CONCLUSION

The Petitions for writ of certiorari should be denied.

[10] Petitioners also argue that a recent district court case, *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1138 (D. Colo. 2012), "provided Respondents with substantial notice that their conduct was unconstitutional." *Lowe* Pet. 21 n.4; *Apodaca* Pet. 22 n.4. But as the Tenth Circuit held, even a district court decision involving the same conduct *by the same defendant* does not clearly establish the law for purposes of defeating qualified immunity. *al-Kidd*, 563 U.S. at 741; *see also Lowe* Pet. App. 13a; *Apodaca* Pet. App. 14a–15a.

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