18-1590

NO. ____

In the Supreme Court of the United States

COREY LAMAR SMITH, ET AL.,

Petitioners,

v.

ARNOLD SCHWARZENEGGER, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit misapply the clearly established test's generality principles by analyzing the issue so specifically as to create a logical absurdity relative to principles of *Helling v. McKinney*?

2. Did the Ninth Circuit err in applying qualified immunity by misunderstanding the applicable incident rate statistics, which drives the quantum of danger?

3. Can state officials be relieved of responsibility because the California *Plata* health care Receiver allegedly did not order them to take more robust precautions?

PARTIES TO THE PROCEEDING

PETITIONERS AND PLAINTIFFS-APPELLANTS BELOW

Petitioners are 50 current prisoners and 67 formerly-incarcerated private citizens who contracted valley fever while in California state custody, identified as follows:

Petitioners	
Abukar Abdulle	Asad Lewis
Richard Adams	Cleofas Lewis
Ruben Arechiga	George Lewis
David T. Atzet	Joe Lewis
Aubrey Derrico	Robert Maeshack
Garland Baker	Michael Manning
Fredrick Beagle	Daniel Masushige
Don Belardes	Ellis McCloud
Michael Blue	Jeffrey McDonald
Daniel Boland	James McGinley
Floyd Boyd	Charles McQuarn
Ray Bracamonte	Juan Mermejo
Gordon Bruce	Juan Meza
Richard Burke	Thomas Milford
Kevin Call	Dale Miller
Charles Carter	Herschel Mitchell
Pablo Castaneda	Grady Montgomery
Clifford Chaney	Michael Morrow
Otha Clark	Freddy Neal
Robert Conley	Raymond Newson
Kenneth Corley	Chek Ngoun
Roy Corning	Emmanuel Ocular
Walter Cornethan	Sim Peav

Petitioners	
David Cox	Juan Penalva
Orlando Creswell	Marvin Pierce
Danny Dallas	Robert Preston
Joe DeJesus	Harvey Rayburn
Donald Dibble	Jorge A. Reyes
Gerald Dickson	Paul Richardson
Joseph Duran	Ronald Ripoyla
James Farr	Jay Roach
Estate of Joseph Ferris	Rodney R. Roberts
Alvin Scott Flowers	David Robinson
Steve G. Franklin	Peter Romero
Aubrey Galloway	Lorenzo Sams
Christopher Garner	Johnny Sanchez
Candelario Garza	Tyrone Sanders
John Gholar	Albert Sherrod
Robert Gonzalez	Corey Lamar Smith
Vernon Grant	Kirk Smith
Robert Harris	Ed Spence
Herman Haynes	Willie Steels
Clifford Hayter	Tracy Stewart
Sinohe Hercules	Hector Talamantes
Bret Hill	Maurice Thomas
Damor Hill	Tyrone Thompson
Ellis Hollis	Aaron Tillis
Jeremy Hollis	Estate of John Enos
Scott Imuta	Vance Utley
Infinity (NLN)	Patrick Wallace
Kenji Jackson	Kenneth Washington
Danilo Jalotjot	Byron West
George Johnson, III	Bertrum Westbrook

Petitioners	
Anthony Jones	Thomas Wiley
Edward Jones	Darren Williams
Lawrence Kerner	Wayne Woods
Milos Klvana	Donald Wright
Bruce Koklich	Gerald Young
Titi Lavea, Jr.	

RESPONDENTS AND DEFENDANTS-APPELLEES BELOW

Respondents are 14 state officials who were connected to the decision process in terms of declining to implement safety precautions to insulate prisoners or otherwise reduce the risk of contraction during the epidemic. They are:

- Arnold Schwarzenegger
  Former Governor of the State of California
- Jeffrey Beard
  Former Secretary of the California
  Department of Corrections and Rehabilitation
- Estate of Paul Brazelton
  Former Warden Pleasant Valley State Prison
- Matthew Cate
  Former Secretary of the California
  Department of Corrections and Rehabilitation
- James Hartley
  Former Warden of Avenal State Prison

- Susan L. Hubbard
  Former Director Division of
  CDCR Adult Operations
- Deborah Hysen
  Director CDCR Facilities
  Planning Construction & Management
- Felix Igbinosa M.D.
  Former Medical Director
  Pleasant Valley State Prison
- Scott Kernan
  Former Chief Deputy Secretary
  of Adult Institutions
- Chris Meyer
  Former CDCR Chief of Facilities Planning
  Construction & Management
- Tanya Rothchild
  Former Chief of the Classification Services Unit
- Teresa Schwartz
  Former Director Division of Adult Institutions
- Dwight Winslow M.D.
  Former CDCR Medical Director
- James A. Yates
  Former Warden of Pleasant Valley State Prison

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the district court was published as *Smith, et al. v. Schwarzenegger, et al.*, 137 F.Supp. 3d 1233 (E.D.Cal.2015). (App.35a). The Ninth Circuit opinion was published as part of a larger consolidated VF appellate effort, denominated as *Hines, et al. v. Youseff, et al.*, 914 F.3d 1218 (9th Cir. 2019). (App.1a). The petition for rehearing was denied on March 26, 2019. (App.158a).

JURISDICTION

The judgment and opinion of the district court were entered on October 23, 2015. (App.35a). Petitioners appealed on October 25, 2015. The Ninth Circuit filed its opinion on February 1, 2019. (App.1a). Petitioners timely sought rehearing on February 13, 2019. The Ninth Circuit denied the petition on March 26, 2019. (App.158a). This petition is timely filed within 90 days, by June 24, 2019.

Federal court jurisdiction is premised on 42 U.S.C. § 1983, with federal appellate court jurisdiction founded

on 28 U.S.C. § 1291. This Court's appellate jurisdiction is premised on 28 U.S.C. § 1254(1) and § 2101(c).

INTRODUCTION

This petition is presented by 117 personal injury victims, consisting of 50 current and 67 former California state inmates subjected to a 10-year epidemic of the lung disease coccidioidomycosis, also known as "valley fever."

Most cases of valley fever do not result in serious health impacts, but for those it does seriously affect, it causes varying degrees of debilitation and occasionally results in death. It is usually treatable. However, in virtually all cases it requires a lifetime of medical management including side effects from the strong, anti-fungal medication.

From 2004-2014, thousands of inmates contracted the ailment due primarily to a series of irresponsible penological decisions by prison officials. They declined to implement recommended safety precautions within two facilities located inside the "hyperendemic" zone of the San Joaquin Valley of California. This failure cost taxpayers millions of needlessly-incurred medical care costs in a decade long display of professional irresponsibility, including violation of the Hippocratic oath, which prioritizes prevention of disease over treatment of it.

Other serious mistakes include a decision to build a state hospital next to one prison without adhering to standard construction practices for dust suppression.

This caused the infectious fungal spores residing in the ground to enter the air and then invade the lungs of the neighboring prisoners.

Additionally, the failure to take responsible measures within the prisons themselves via traditional clean-and-sanitary protocol allowed the spores to achieve maximum impact on the incarcerated population.

Two hundred seventy (270) plaintiffs banded together to press individual tort actions for wrongful contraction, beginning in 2013. They were dismissed at the 12(b)(6) pleading stage in 2015 based on the defense of qualified immunity, a decision that was upheld by the Ninth Circuit in 2019.

The Ninth Circuit's ruling is problematic for two major reasons: first, this Court's 1993 case of *Helling v. McKinney*, 509 U.S. 25, provided the prerequisite published notice to state officials to take safety precautions to prevent contraction of diseases and indeed to take reasonable measures to protect prisoners from all environmental conditions adverse to inmate health. It illustrated an example in that case by announcing protection for inmates from a new kind of danger, second-hand cigarette smoke.

The Ninth Circuit effectively negates *Helling* by applying unprecedented specificity to this Court's paradigm established in *Saucier v. Katz*. *Saucier* established the paradigm of generality to the clearly established test and the Ninth Circuit held that a prior case specific to valley fever was necessary to put officials on formal notice.

But *Helling* notified officials to protect inmates from all diseases. Coccidioidomycosis is a disease. Its laboratory safety protocols are one level below Ebola. To immunize officials until a case is published for each and every disease, including one specific to valley fever, results in a logical absurdity. It turns a simple directive from this Court for officials to protect inmates from danger (in this case, the well-established danger of diseases) to one that impossibly requires every individual disease to be recognized in published appellate litigation before this Court's directions apply. The Ninth Circuit's interpretation effectively negates *Helling*'s meaning and application.

Moreover, ten intervening years passed during the epidemic in which the Ninth Circuit five times declined to publish a valley fever case. The enforceability of the Eighth Amendment should not be held hostage to a court system that repeatedly declines to formally notify state officials to take safety seriously. This is another way the Ninth Circuit defeats the application of *Helling*. In this example, the California federal court system effectively extended official immunity until the epidemic was over, a 12-year window of formalized unaccountability for a series of ill-advised penological decisions, ones that merited more than passing scrutiny if *Helling* means anything.

The California federal court's publication decisions separately represent a negation of the notice concepts integral to the legitimate function of the qualified immunity doctrine, as established by this Court's *Saucier* decision and its progeny.

The second major error is that the panel argued that, in line with language originating in *Helling* (and

seen again in cases like *Ashcroft*), society residing in the hyperendemic zone accepted a heightened risk of valley fever contraction in electing to live there; prisoners could expect no safer environment than the larger public.

Apart from the fact that Petitioners did not elect to live there, and the fact that they did not enjoy innate immunity as native residents often do, this comparison fails to acknowledge the statistical reality that the prisons were 10-50 times more dangerous; the rate of contraction was exponentially greater inside the prisons as compared to private citizens living in the nearby communities. The decision by the Ninth Circuit to foreclose relief on this factual equivalence rests on a well-documented and indisputable mathematical error.

A grant of certiorari of this case cannot be justified on the basis of an existing conflict between the appellate circuits. No other government agency has argued that the duty to protect prisoners from diseases is somehow unsettled after *Helling*. Nor has any court in Petitioners' research attempted to stake out the (controversial) view that each disease must be individually litigated before *Helling* applies. *See* Supreme Court Rule 10(c).

The Ninth Circuit opinion defies the language, meaning and spirit of *Helling*, in a triplicate exercise of assigning the *Saucier* generality level too specifically, obfuscating the disparate incidence numbers between the prisons and the surrounding area, and expanding the window of official immunity by withholding timely publication.

Understanding these sorts of complaints nevertheless constitute a less common reason for this Court to

grant certiorari as compared to inter-circuit conflict, a perusal of the California federal court system's ever-changing arguments, internal contradictions, above violations, inconsistent intra-circuit opinions, and most noticeably, several 180-degree reversals of their own legal positions, amounts to an exceptionally troubled case history worthy of some form of correction.

The Ninth Circuit's historical application of the *Saucier* generality paradigm has typically resulted in some protection for civil rights claimants against qualified immunity. If anything, the California courts have sometimes applied the level of generality too broadly, and thus too liberally, according to this Court. *See, e.g, Escondido v. Emmons*, 586 U.S. ___, 139 S.Ct. 500 (2019).

This case stands in diametric contrast to that dynamic wherein here the *Saucier* test was applied so hyper-specifically, it deprives the plaintiffs of the benefit and supremacy of this Court's rulings and the consistency that the application of those rulings require.

Sadly, this case chronicles an indefensible transgression from the Ninth Circuit's ordinarily protective stance toward the health of human beings and respect for their civil rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

From 2004-2014, prison officials observed dramatically increased rates of contraction of the disease valley fever, in prisons located in California's San Joaquin Valley. App.174a-189a. The most danger originated in two particular facilities, Pleasant Valley State Prison (PVSP) and Avenal State Prison (ASP). App.178a-186a. The disease begins as a fungus in the lungs, and left untreated, spreads to other parts of the body resulting in increasing degrees of debilitation, up to and including death. App.174a-178a, 206a-215a.

Inmates began filing *pro se* lawsuits as early as 2007. A systematic effort through counsel to assert Eighth Amendment claims based on the right to protection against cruel and unusual punishment was formalized in an initial filing in October, 2013. App.164a.

At the same time, in December 2013, a federal district judge in the Northern District, within a different lawsuit, the *Plata* action (relating more generally to reform of inmate medical care), ordered high-risk inmates (ones biologically at higher risk than most native citizens of the Central Valley) to be transferred out of Pleasant Valley and Avenal due to unacceptable danger from the risk of contraction of cocci. *See Plata v. Brown*, No. 3:01-cv-01351-TEH, Dkt. 2661 (N.D.Cal.2001).

Notably, the Northern District's legal argument sits in operative contradiction to the positions of the Eastern District Court and Ninth Circuit Court in

this appeal, which materially deviate from each other in their legal reasoning, all of which conflict with a different Ninth Circuit case (*Edison*), despite all legal arguments being based on the same set of facts. Regardless, *Helling* should control all of these matters.

By December 2015, 270 plaintiffs distributed across 13 complaints asserted individual actions. The first 7 actions were consolidated into a single complaint in November 2014, representing 160 "*Smith*" plaintiffs. App.164a-166a.

The remaining 6 actions consisting of 110 plaintiffs were stayed pending the outcome of the appellate decision made in the consolidated action. This latter body of 110 plaintiffs ("*Alaniz*") intend to re-visit the Ninth Circuit's qualified immunity ruling now that the stay has been lifted, despite the doctrine of *stare decisis*. Of the 160 *Smith* plaintiffs directly governed by the Ninth Circuit ruling, there are 117 before this Court.

The state's qualified immunity challenge in this litigation was initially rejected by both the magistrate and district court in the Eastern District. App.157a, 129a. However, both judges later reversed their legal position after the number of *Smith* plaintiffs became apparent. App.71a, 125a.

These self-reversals by the Eastern District Court resulted in the trial-level dismissal of the case in October, 2015 and contribute to a larger body of contradictory jurisprudence by the California federal court system when it comes to the handling of valley fever claims. App.71a, 125a, 129a, 157a; *Edison v. Geo*, 822 F.3d 510, 522 (9th Cir. 2016); see fn. 2.

The *Smith* group appealed to the Ninth Circuit while the Alaniz group was stayed at the trial level. The Ninth Circuit ruled against the *Smith* plaintiffs in February, 2019, by holding that qualified immunity barred all claims. App.1a, 6a.

Its decision rests on three arguments: (i) that the level of generality for application of the *Saucier* clearly-established test is to require a prior published case specifically finding valley fever to be a potential Eighth Amendment violation; (ii) that the rates between the subject prisons and the local area were not materially different so as to make the risk of contraction unacceptable to Central Valley society; and (iii) state officials allegedly deferred to the alleged policies of the prison system's alleged true authority on the subject, the *Plata* Receiver. App.20a, 23a-24a.[1]

The *Smith* Plaintiffs petitioned for rehearing to an en banc panel of the Ninth Circuit in February, 2019, which was denied on March 22, 2019. App.158a-163a.

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[1] The *Jackson* plaintiffs also asserted certain racial discrimination claims. *See* App.27a. The *Smith* plaintiffs did not, in deciding to stand on the disparate danger in the prisons, as to all inmates. App.168a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition based on three legal arguments:

(1) the Ninth Circuit has periodically misapplied the clearly-established test's generality principles, usually in the manner of applying it too broadly, but in this case by applying it so narrowly as to effectively emasculate this Court's opinion in *Helling v. McKinney*, 501 U.S. 25 (1993) and *Helling*'s application of the Eighth Amendment's prohibition against cruel and unusual punishment.

Requiring a prior published case specifically addressed to valley fever violates the language and principles established in *Helling*, which 20 years earlier announced protection for inmates against environmental dangers including diseases–ergo, including coccidioidomycosis.

In addition, the Ninth Circuit's five-year declination to publish a valley fever case, and thus failure to put officials on formal notice to implement safety measures, results in an outcome that amounts to immunity for all mistakes and misconduct during the 10-year window of mass infection. This translates to zero accountability for a preventable epidemic. App. 178a-197a.

This is in spite of the fact that, during the epidemic, dozens of inmates died, countless others were maimed, thousands infected, and treatment-over-prevention resource misallocations (borne by taxpayers) exceeded an estimated $100 million. App.195a.

Nonetheless, the Ninth Circuit concluded that prison officials had no obligation by virtue of the qualified immunity doctrine to implement safety precautions or to compensate injured victims. App.6a.

The concept of the qualified immunity doctrine's clearly established test being applied in this fashion, to effectively require every disease, toxin, chemical and/or environmental danger to be uniquely recognized in appellate litigation before officials are required to take action is anathema to this Court's expectations under *Helling* with respect to the Eighth Amendment. It results in a blank check for prison officials to behave in a systematically irresponsible manner with regard to prisoner safety, from the period between their first detection of danger (here, in 2004) and formal appellate publication, which in this case did not occur until 12 years later in 2016. *Compare* App.178a-197a to *Edison v. Geo*, 822 F.3d 510 (9th Cir. 2016).

(2) The Ninth Circuit position is also premised on the factual assumption that the risk of contraction at the subject prisons was no different from the surrounding geographic area, in derogation of facts alleged in the operative complaint and undisputed statistical detail in the appellate record. App.203a-205a, 219a-221a, 226a-235a, 20a.

The panel's factual predicate is inaccurate. Data on appeal established without contradiction that the prisons, from 2004-2012, were 10-50 times more dangerous than the geographic valley area around them, and were 100-600 times more dangerous than the larger State of California. App.203a-205a, 219a-221a, 226a-235a.

The Ninth Circuit ruled under the premise that the rates between the prisons and the local area were effectively equivalent (both being treated as "heightened") and maintained this position even after its statistical misunderstanding was pointed out in plaintiffs' Petition for Rehearing. App.20a.

This misapplication marks the difference between a risk that society accepts, and a risk that is exponentially higher, and thus one society does not accept. *Scott v. Harris*, 550 U.S. 372, 379, fn. 6 (2007).

(3) The Court should also grant review because the Ninth Circuit's decision to effectively assign fault to the *Plata* Receiver is based on an under-developed record that does not support the sweeping conclusions and findings it made, nor does it represent a realistic assessment of who possessed the necessary information and controlled the levers of power to prevent the spread of the disease in real time. *See* App.23a-24a.

I. SINCE THIS COURT'S *HELLING* OPINION, THIS CASE STANDS ALONE AS REQUIRING THE EXACT DISEASE FROM A DANGEROUS ENVIRONMENTAL CONDITION TO FIRST BE LITIGATED TO A PUBLISHED APPELLATE OPINION BEFORE OFFICIAL RESPONSIBILITY FOR INMATE SAFETY IS OBLIGATORY.

When state officials hold a person in custody, the Constitution imposes a corresponding duty for them to take reasonable safety measures. *DeShaney v. Winnebago County*, 489 U.S. 189, 199-200 (1989); *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

As early as 1978, this Court first formally recognized prison officials' failure to prevent the spread of

disease as a potential Eighth Amendment violation. *Hutto v. Finney*, 437 U.S. 678, 682, 685 (1978).

In 1993, in the more widely-recognized case of *Helling v. McKinney*, 509 U.S. 25 (1993), this Court generally announced that inmates should be protected from all dangers in their environment, in that case second-hand cigarette smoke from a prisoner's cellmate, by commenting that diseases and dirty water merit protection. *Id.*, 33-34.

As alleged by the operative complaint, beginning in 2004, state prison officials received a steady stream of warnings and alerts from their experts and from other authorities that epidemic-level numbers of inmates were contracting valley fever and some were dying. App.178a-197a. Various safety recommendations, principally exclusion but alternatively environmental suppression, were made and effectively ignored. App. 178a-197a.

Prison officials passed a policy in 2007 that excluded a select group of ultra-vulnerable inmates, such as those who had recently undergone heart surgery, while ignoring the safety needs of the vast majority of the population, including persons at well-known higher biological risk, per the applicable medical and scientific research. App.178a-197a.

Because of the extremely limited exclusion policy, thousands of inmates contracted valley fever, and over the next seven years through 2014, a large number suffered serious health consequences, including debilitation and death. App.178a-197a.

Inmates filed at least 36 *pro se* VF lawsuits from 2007-2014 in response.[2]

Of these, at least five were appealed to the Ninth Circuit: *Smith*, *Gray*, *Johnson*, *Ahlin* and *Gregge*, in 2010, 2012, 2013, and the latter two in 2014. In all five instances, the Ninth Circuit implicitly or explicitly recognized that contraction of valley fever at least potentially stated an Eighth Amendment violation. *Smith v. Schwarzenegger*, 393 Fed.Appx. 518 (9th Cir. 2010); *Gray v. Robinson*, 481 Fed.Appx. 380 (9th Cir. 2012); *Johnson v. Pleasant Valley*, 505 Fed.Appx. 631 (9th Cir. 2013); *Samuels v. Ahlin*, 584 Fed.Appx. 636 (9th Cir. 2014); *Gregge v. Cate*, 584 Fed.Appx. 421 (9th Cir. 2014).

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[2] *See, e.g., Widby v. Lewis*, 2007 WL 528766 (E.D.Cal. 2007); *Thurston v. Schwarzenegger*, 2008 WL 2129767 (E.D.Cal. 2008); *Love v. Mekemson*, 2008 WL 942945 (E.D.Cal. 2008); *Hunter v Yates*, 2009 WL 233791 (E.D. 2009); *King v. Avenal*, 2009 WL 546212 (E.D.Cal. 2009); *Lancaster v. Aung*, 2012 WL 1355762 (E.D.Cal. 2009); *Cruz v. Schwarzenegger*, 2009 WL 256649 (E.D. Cal. 2009); *Williams v. Yates*, 2009 WL 3486674 (E.D.Cal. 2009); *Moreno v. Yates*, 2010 WL 1223131 (E.D.Cal. 2010); *Smith v. Schwarzenegger*, 393 Fed.Appx. 518 (9th Cir. 2010); *Gilbert v. Yates*, 2010 WL 5113116 (E.D.Cal. 2010); *Gregge v. Cate*, 584 Fed.Appx. 421, 2015 WL 2448679 (9th Cir. 2014); *Clark v. Igbinosa*, 2011 WL 1043868 (E.D.Cal. 2011); *Gray v. Robinson*, 481 Fed.Appx. 380, 2011 WL 489035 (9th Cir. 2011); *Stevens v. Yates*, 2012 WL 2520464 (E.D.Cal. 2012); *Smith v. Brown*, 2012 WL 1999858 (E.D.Cal. 2012); *Johnson v. Pleasant Valley*, 505 Fed.Appx. 631 (9th Cir. 2013); *Holley v. Scott*, 2013 WL 3992129 (E.D.Cal. 2012); *Samuels v. Ahlin*, 584 Fed.Appx. 636 (9th Cir. 2014); *Lua v. Smith*, 2014 WL 1308605 (E.D.Cal. 2014); *Brown v. Cate*, 2015 WL 6535469 (E.D.Cal. 2015); *Wilner v. Biter*, 2015 WL 1830770 (E.D.Cal. 2015), *Davis v. Kelso*, 2015 WL 7007982 (E.D.Cal. 2015).

Its rejection of this case contravenes in certain ways a body of its own unpublished prior jurisprudence, despite an operative complaint that was pled with scientific certainty and statistical detail. *Ibid*; *see, e.g.*, App.167a-198a.

The Ninth Circuit in each of the five instances above also declined to publish its decision thereby never placing prison authorities on formal notice to implement precautionary safety measures.

Before the mass tort actions represented by the *Smith* and *Alaniz* plaintiffs, valley fever litigation originated in a single case (*Panah v. United States*, No. 09-cv-6535 (C.D.Cal. 2009)), which the government settled, and which was then followed by a class action, *Jackson v. California*, filed in July 2013. *Jackson v. California*, No. 1:13-cv-01055 (E.D.CA 2013).

In *Jackson*, as relevant here, the magistrate judge originally dismissed the state's qualified immunity argument in observing, based on *Helling*, that "[t]he law was sufficiently clear prior to the claims raised here that if prison officials are aware that certain inmates are at a significantly higher risk of contracting a disease based upon identifiable criteria, it would be deliberate indifference to fail to take action to protect those inmates." App.155a.

The district judge adopted the magistrate's position on qualified immunity without comment, in his order adopting the *Jackson* magistrate's report and recommendations. App.129a.

In October, 2013, the *Smith* plaintiffs began filing cases. By October, 2015, this activity had resulted in 253 individual claims.

The state renewed its qualified immunity challenge to 160 of those claims, the *Smith* plaintiffs, arguing that they had no clearly established right to avoid the risk of contracting valley fever.

The magistrate documented the allegations of the operative complaint in relating the disease process by which cocci spores attack the body, the severity it poses to those who for whatever reason are immunologically vulnerable, and the extensive history of memos, warnings and alerts afforded to state officials prior to the onset of the full-scale epidemic. App.77a-87a.

However, this time the magistrate reversed his position. He acknowledged that he had previously viewed the issue as whether officials had an obligation to protect high risk inmates from diseases, which was exactly consistent with this Court's position as reflected by *Helling*. Now, with the reality of 253 additional pending claims, he redefined the issue as whether "housing inmates in prisons in areas endemic for valley fever, a naturally occurring soil-borne fungus which can lead to serious illness, would violate the Eighth Amendment." App.90a.

Using this more specific phraseology, the magistrate concluded that no prior published case had found valley fever to constitute a viable Eighth Amendment claim and *Helling* was therefore not applicable. App. 90a-105a.

The magistrate also found that "society accepts exposure to Valley Fever . . . [because] over a million people live in areas in which the cocci spores are endemic and are subjected to the risk of contracting [it]. Further, tens of thousands of individuals live in

those areas which are considered to be hyperendemic." App.101a, 110a.

The problem with this observation is that the referenced population lives outside the prisons, where the risk of contraction is 10-50 times lower. App.219a-221a, 226a-235a. People who choose to be employed by the San Jose Valley prisons, like employees of a nuclear plant, do so for the financial benefits such occupation affords, including automatic (workers' compensation) benefits in the event of infirmity. Local employees are also far more likely to enjoy innate immunity.

Plaintiffs filed objections to challenge the magistrate's ruling. The district judge, who had also previously rejected the state's qualified immunity defense, went in a third direction. He argued that this Court's *Saucier* paradigm regarding generality did not matter at all, by curiously holding that "under any definition of the constitutional right at issue in this case . . . the substantial and unsettled case law concerning Valley Fever at the district court level establishes that Defendants are entitled to qualified immunity." App. 49a.

The district judge then surveyed the universe of differing outcomes and intellectual routes of the many district level cases (and several unpublished Ninth Circuit cases), to say that state officials could not have clearly understood what their obligations were given this body of muddled jurisprudence. App. 109a-121a.

By the end of the district court's extended intellectual journey, which was neither quick nor easy, it concluded, up front, that "[t]his is a case

where the Court can 'rather quickly and easily decide that there was no violation of clearly established law.'" App.50a-68a.

The district court's analytical approach is inaccurate. Its position that the level of generality is irrelevant to an accurate conclusion contravenes the *Saucier* paradigm. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the level of generality is framed as a question of whether officials have been given published notice to protect inmates from diseases, *Helling* provided that notice in 1993. It would supersede any body of lower court jurisprudence. District level cases are only relevant in qualified immunity circles if no higher authority is available. *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

Helling was at all times binding on US district courts. The lower courts nevertheless wiggled out of *Helling* by engaging the *Saucier* paradigm at such a hyper-specific level that enforcing compliance with *Helling* becomes a practical impossibility.

Moreover, the premise of reviewing district level *pro per*-pled cases for resulting jurisprudential consistency itself constituted a design flaw in the district court's analysis, in that such consistency can hardly be expected by judicial scrutiny of complaints prepared by persons with no legal training. *See* fn. 2.

Given these several perceived errors, Plaintiffs appealed. With a trial-level record of the lower courts engaging in self-reversals, counter-factual inaccuracies, and unorthodox applications of the established qualified immunity analysis, Plaintiffs detailed, and provided a bulk of statistical data to support, a precisely

accurate analysis of the qualified immunity defense. *See* App.199a-205a, 220a-221a, 226a-235a.

Petitioners in particular proved on appeal that the magistrate's factual predicate was statistically inaccurate, in that the prisons were far more dangerous on an incident-rate basis than the surrounding hyper-endemic zone. App.220a-221a, 226a-235a. A motion for judicial notice on appeal was granted validating the authenticity of the statistical data Plaintiffs relied on. Their conclusions disproving the magistrate's claim were met with virtual acquiescence by all defendants.

However, the Ninth Circuit panel did not acknowledge or discuss this problem. Instead, it compiled other statistics to show that migration patterns in the Central Valley revealed that the population was increasing. App.25a-26a. This evidence was assembled to argue that society contemplating to move there accepts a risk of valley fever, in sort of the same way the magistrate reached the same conclusion by looking at the size of the existing Central Valley population. App.25a-26a, 101a-102a.

Nonetheless, these contentions did not change Plaintiffs' proof that, no matter how many people lived in, or moved to, the Central Valley, the incidence rate of valley fever in the prisons was dramatically–epidemically–higher. App.220a-221a, 226a-235a.

The Ninth Circuit also assumed (without discussion) that the applicable *Saucier* level of generality was to the specific disease, valley fever. App.193a. This is logically untenable for the reasons stated above: it creates a 'catalog' exception that swallows the protective rule announced by this Court in *Helling*. *See also Farmer v. Brennan*, 511 U.S. 825,

828 (1994); *Baze v. Rees*, 553 U.S. 35, 49-50 (2008); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Hope v. Pelzer*, 536 U.S. 730, 742 (2002).

No one would seriously contend that officials should be immunized from liability if notified as a traffic matter to avoid oncoming cars, on the flimsy response they were not specifically warned to avoid oncoming Toyotas.

No one could rationally maintain that case law directing officials to protect inmates from nuclear radiation results in immunity unless a case unique to Uranium 235 was previously litigated.

The entire idea of protecting inmates from environmental dangers, like diseases (which is what *Helling* instructs) until each uniquely-named disease (here, valley fever) is recognized by a published case is logically indefensible. It negates *Helling*. It converts what is already an increasingly controversial, and some now say unwarranted, doctrine of partial government immunity into total immunity. *See, e.g., Ziglar v. Abbasi*, 137 S.Ct. 1843, 1872 (2017) (Thomas, J., concurring); Baude, W., *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018).

The application here effectively rewrites the Founding Fathers' carefully-crafted Bill of Rights to say that officials only violate the Constitution's Eighth Amendment cruel-and-unusual punishment clause when they have first been told by the federal courts that they violated it and then violate it a second time. Constitutional originalists might note that there is no mulligan clause within the text of the Eighth Amendment. *See Crawford-El v. Britton*, 523

U.S. 574, 611 (1998) (Scalia, J., Diss.); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., Conc.)

Separate and apart from these problems is yet another problem: *Edison*. In 2016, while the *Smith* mass action, *Jackson* class action, and one individual action were pending on appeal (later published under the umbrella name of *Hines v. Youssef*, 914 F.3d 1218 (9th Cir. 2019)), the Ninth Circuit decided *Edison v. Geo*, 822 F.3d 510 (9th Cir. 2016), a valley fever case against Taft federal prison.

There, the panel was unambiguous. Ruling on another trial-level dismissal, the Ninth Circuit reversed by finding wrongful contraction of coccidioidomycosis to be worthy of compensation.

"In most individuals, cocci manifests primarily as a minor fever. In an unlucky few, however, the disease takes a different, more devastating course—it causes a number of painful conditions, and can be fatal . . . As prisoners, Plaintiffs were particularly vulnerable to infection: Even if Plaintiffs had been warned of the disease, they were unable to move to a different location, remodel their living quarters, or erect protective structures, such as covered walkways. Thus, by placing prisoners at Taft, the BOP directly increased Plaintiffs' risk of harm. Under California law, the United States had a duty to protect Plaintiffs from the risk of contracting cocci." *Edison v. Geo*, 822 F.3d 510, 513, 522 (9th Cir. 2016).

Due to the slightly different procedural context, the defense of qualified immunity was not raised or litigated. However, the tenor, tone and outcome of the two opinions is stark. For the same legal problem involving the same elevated danger (285x CA rate at

Taft versus 363x combined CA rate at PVSP/ASP), *Edison* held that VF is a problem the United States and private-provider Geo must answer for in damages, in validating all plaintiff arguments and claims.

In contrast, in the umbrella litigation of *Hines*, the Ninth Circuit brushed off plaintiffs' protestations of epidemic danger, immunized all prison officials, dismissed all plaintiff arguments and claims, and left the victims without a remedy.

Finally, on a related issue, the qualified immunity doctrine seems pointedly contorted in the context of a dynamic where as long as the judiciary never "tells" the executive to take precautions, as occurred here for 12 long years, government officials can act as if the Eighth Amendment does not apply to them. This is how the defendant officials behaved. Since they had no formal obligation during the 2004-2014 window of the epidemic, and despite lawsuits, warnings, expert reports, activist alerts, pointed recommendations, media attention and a general prison population clamoring to avoid the "death dust," they did almost nothing. *See* App.35a-60a.

Yet, this Court's decisions, as reflected most prominently by a straightforward opinion like *Helling*, apply to all government officials without the insertion of convoluted exceptions.

II. ANY RESPONSIBILITY THE RECEIVER MIGHT SHARE WITH DEFENDANTS DID NOT CREATE A DEFENSE FOR DEFENDANTS.

The panel opinion also discusses the federal Receiver's role in the epidemic and relies on his "orders" to prison officials. App.23a-24a. The Court

cites little authority in making sweeping conclusions that prison officials respected or relied on these as orders during the window in question. App.23a-24a. The district court's ruling did not address or depend on the Receiver's position. App.71a. A total of two pages were addressed to the matter in the underlying briefs.

The Receiver never appeared, detailed or defended his decisions or defenses in a properly-worked up record, particularly as to whether that office had authority to issue the kind of safety precautions and inmate transportation directives the panel ascribes to it. Just as importantly, there is a question whether the Receiver had sufficient time to study the problem given the many other priorities his office faced in being charged with reforming the entire California prison medical system.

In particular, in the order of appointment, the Receiver "shall provide leadership and executive management of the California prison medical health care delivery system with the goals of restructuring day-to-day operations and developing, implementing, and validating a new, sustainable system that provides constitutionally adequate medical care to all class members as soon as practicable. To this end, the Receiver shall have the duty to control, oversee, supervise, and direct all administrative, personnel, financial, accounting, contractual, legal, and other operational functions of the medical delivery component of the CDCR." *Plata v. Brown*, Case No. 3:01-cv-01351, Dkt. 473 (N.D.Cal.2001) (underscore added).

In other words, the Receiver was tasked with creating a better system of medical treatment. It is a

different and debatable question whether those powers extended to proactive prevention during the plaintiffs' contraction window, such as ordering specific facilities to implement environmental suppression, commanding wardens to transfer certain inmates to safer prisons, or compelling a certain cleanliness standard within the prisons.

On June 24, 2013, the Northern District implicitly found that the Receiver could direct inmates to be excluded, but Petitioners recall the exercise preceding it as a point of contention up to Judge Henderson's decision. *See Plata v. Brown*, No. 3:01-cv-01351-TEH, Dkt. 2661 (N.D.Cal.2001). Either way, the record is devoid of the kind of serious work-up necessary for the Ninth Circuit to adjudicate that matter in this case, much less pin full responsibility for a mismanaged facilities safety epidemic on a person assigned to reform the way the prison system's medical care is delivered.

Messrs. Kelso (and Sillen) were not parties to the instant appeal. Rather, the Receiver's office was named in some of the underlying actions but was dismissed without prejudice pursuant to private tolling agreements entered in lieu of litigating against them on the same track as the prison defendants. *See, e.g., Smith v. Schwarzenegger*, Case No. 1:14-cv-00060-LJO-SAB, Dkt. 133.

Mr. Kelso was one of the actors on the solution side of the problem. Prison officials were on the defiance side of the equation, in both *Plata* and *Hines*. Even if Mr. Kelso was not as initially proactive as Petitioners might have preferred, foisting full responsibility on him given his other priorities is like

blaming the ER doctor for choosing which lives to save first, after a mass shooting. He may have possibly made some prioritization mistakes, but a modicum of perspective prohibits focus on him for the larger mess. It is unfair for the Ninth Circuit to have singled him out for criticism in a published opinion.

Given these limitations on proper record development of this complex issue, and given what was essentially a footnote issue in the underlying litigation here, awarding qualified immunity to defendants by suggesting that Receiver Kelso was both entirely empowered and entirely to blame for mismanaging the 10-year epidemic is legally and morally misplaced. App.23a-24a.

CONCLUSION

This case is defined by its absurdities.

During World War II, foreign prisoners of war succeeded in avoiding contraction of valley fever, by prevailing on American authorities to transfer them to safety. In contrast, the plaintiffs before the Court, being more vulnerable and with a greater amount of information transmitted to more scientifically-advanced decision makers 50 years later, are somehow without remedy despite being American citizens with a panoply of constitutional and legal rights.

One of the most significant mass torts in American penological history, involving hundreds of life-altering outcomes, has resulted in a lawsuit that cannot get past the pleading stage, in contrast to federal cases

that have previously recognized a single day's sun exposure (*Hope v. Pelzer*, 536 U.S. 730 (2002)) and deprivation of toothpaste (*Board v. Farnam*, 394 F.3d 469 (7th Cir. 2005)) as civil rights violations.

The opinion under review is founded on a dogged refusal to acknowledge the statistical disparity between the exponentially-higher danger in the state prisons as compared to the surrounding geographical area. Meanwhile, the same court validated comparable danger from the same agent located in the same hyper-endemic area in a federal prison. Diseases do not discriminate between defendants convicted of state versus federal offenses. Nor should judicial logic.

The opinion being challenged applies a *Saucier* level of generality that is so hyper-specific as to render absurd the operation of the qualified immunity defense, and thus extinguishes this Court's holding in *Helling v. McKinney*, which otherwise has afforded prisoners a constitutionally-minimal level of protection for the last 25 years.

This hyper-specificity, requiring a published case unique to cocci before any responsibility by prison officials attaches, means that every germ, toxin, disease, chemical and other unique environmental danger must be individually, and thus impossibly, litigated to an appellate outcome, before officials bear any responsibility for prisoner safety.

The notion that prison officials can ignore numerous alarms, expert warnings and formal alerts, and take no action in the face of nearly 40 lawsuits because of a governmental appellate publication technicality, and for the courts to then validate such

profound inaction on the same metric, undermines professional responsibility norms and standards.

Mitigation measures that worked well to minimize the spread of the disease in the 1940's were ignored at a current annual cost of less than $1M per prison. App.58a, 159a. Over the course of 10 years, the impact of the epidemic could have been avoided or greatly reduced for 1/5 of what was actually spent–estimated at over $100M in subsequent medical care expenses. App.41a-60a, 58a. If such wasteful exercises are not corrected, they will be repeated at additional taxpayer expense.

Most importantly, the Ninth Circuit did not apply the law as established by this Court in *Helling*. This Court should grant certiorari to correct the Ninth Circuit's rejection of its precedent.

Respectfully submitted,

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