No. 19-1261

# In the Supreme Court of the United States

TRENT MICHAEL TAYLOR, PETITIONER

*v.*

ROBERT RIOJAS, ET AL.

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

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

Petitioner Trent Taylor is a Texas prisoner. He sued various correctional officers, including Respondents, claiming the unsanitary conditions in two short-term housing assignments violated his Eighth Amendment right to be free from cruel and unusual punishment. The district court granted summary judgment to Respondents and the Fifth Circuit affirmed, relying on qualified-immunity principles that this Court has confirmed innumerable times over the last four decades.

Like this Court and every other circuit, the Fifth Circuit grants qualified immunity to state officials except the plainly incompetent or those who knowingly violate the law. This Court has held that a "filthy, overcrowded cell . . . might be tolerable for a few days and intolerably cruel for weeks or months." *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978). And the Fifth Circuit has previously held that a three-day confinement in a cell smattered with blood and excrement does not offend the Eighth Amendment. No authority holds that such confinement for *six* days, as opposed to three, crosses the Eighth Amendment line. The questions presented are:

1. Whether the Court should reinterpret section 1983 and overturn thousands of cases across many decades holding that state officials are immune from suit except when settled law clearly proscribed their conduct.

2. If so, whether Respondents acted "under color of" any Texas "statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983; *cf. Monroe v. Pape*, 365 U.S. 167, 187 (1961).

3. Whether the Fifth Circuit correctly considered binding authority when concluding that Respondents' conduct was not unlawful beyond debate.

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## BRIEF IN OPPOSITION

### INTRODUCTION

Petitioner asks the Court to engage in error correction or, in the alternative, "abolish" the longstanding doctrine of qualified immunity. The Court should deny both requests. As to the first, the Fifth Circuit correctly granted qualified immunity by applying the exact principles this Court and every other circuit endorse. Where, as here, binding on-point authority does not put reasonable officials on notice that their conduct was unlawful, they are immune to suit under section 1983. This Court's decision in *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978), and the Fifth Circuit's decision in *Davis v. Scott*, 157 F.3d 1003, 1006 (5th Cir. 1998), together indicate that it is not unconstitutional to house an offender in a "filthy," *Davis*, 157 F.3d at 1006 (quoting *Hutto*, 437 U.S. at 686), unsanitary cell for three days. It is neither obvious nor clearly established that such confinement allegedly

lasting *six* days crosses the Eighth Amendment's line. The Fifth Circuit applied the same test every other court applies and reached the correct result.

Because there is no error below, and because there is no meaningful disagreement among the circuits, Petitioner asks the Court to "abolish" the doctrine of qualified immunity. But there is no basis to do so. For many decades, this Court has consistently and correctly read section 1983 in light of the common-law background its text incorporates. An unbroken chain of decisions spanning nearly forty years confirms that liability does not attach unless settled law proscribes the state actor's conduct beyond debate. Petitioner ignores entirely the insurmountable *stare decisis* hurdle that stands in the way of overruling such deeply entrenched law. None of the *stare decisis* considerations permits this Court to undertake the overhaul (or abolition) Petitioner requests. And if the Court were inclined to set aside those considerations and rethink section 1983 *immunity*, it would also need to revisit *Monroe v. Pape* and reevaluate the scope of section 1983 *liability*.

The better course is to leave well enough alone. Over the past four decades, federal courts have confronted thousands, if not tens of thousands, of cases involving qualified immunity. The fact that such a massive sample size has produced only a few questionable outcomes is proof of doctrinal efficacy, not failure. And if Petitioner were correct that something needs fixing, Congress is already on the job, actively considering legislation to address the same policy concerns Petitioner raises.

A few days ago, the Court wisely denied several petitions alleging the same confusion and doctrinal unworkability Petitioner alleges here. *E.g.*, *Zadeh v. Robinson*, No. 19-676, 2020 WL 3146691, at *1 (U.S. June 15, 2020)

(declining to grant petition attacking Fifth Circuit's approach to qualified immunity), *denying cert. to* 928 F.3d 457 (5th Cir. 2019). This petition should be denied as well.

## STATEMENT

1. Petitioner Trent Taylor is a Texas prisoner serving an 11-year sentence for aggravated robbery.[1] Three years into his sentence, in 2013, he ingested a large number of narcotic painkillers, leading prison staff to grow concerned he was a suicide risk. ROA.49; *see also* ROA.1343, 1451, 2884.[2] To provide him with proper treatment, prison officials transferred Petitioner to the John T. Montford psychiatric unit in Lubbock. Pet. App. 32a; ROA.49, 142. Petitioner's verified complaint alleges that, upon arrival at Montford, he was stripped naked and placed in two cold, unsanitary cells for periods of time totaling about six days. Pet. App. 6a-7a, 7a n.6; *see also* Pet. App. 14a n.15 (noting Petitioner's verified pleadings are competent summary judgment evidence).

According to Petitioner, the first cell had "fecal matter on the floor, ceiling, window, walls, and packed inside the water faucet, preventing [him] from being able to drink water." ROA.50. This cell was equipped with a "steel bunk" and "a single suicide blanket." *Id.* Petitioner alleges that his requests for the cell to be cleaned went unheeded, Pet. App. 8a n.8; ROA.51-52, although the summary judgment record also shows that the officials did attempt to clean the cell, *see* Pet. App. 14a n.14. In efforts to avoid contamination, Petitioner alleges, he was "confined to [his] bunk" and "not able to eat." ROA.52.

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[1] Texas Department of Criminal Justice, *Offender Information Details*, https://bit.ly/2XUqWXd (last visited June 23, 2020).

[2] "ROA" refers to the record on appeal before the Fifth Circuit.

After Petitioner told a guard that he wanted to hurt himself, he was relocated to a seclusion cell. ROA.53, 3157. Petitioner alleges that the seclusion cell had no "toilet, water fountain, []or bunk," requiring him to sleep on the floor. ROA.53, 55. In this cell, Petitioner alleges he was ordered to relieve himself in a floor drain that smelled of ammonia and was "stopped up." ROA.53.

Petitioner alleges that he asked correctional staff to take him to the restroom instead. ROA.54. Petitioner alleges that his requests were denied or ignored, and for twenty-four hours he did not relieve himself. Pet. App. 19a. Ultimately, Petitioner alleges that he was no longer able to avoid relieving himself, and he could not use the drain, so he urinated on himself and "raw sewage" "r[a]n all over [his] feet." ROA.55. According to Petitioner, later that day, one Respondent ineffectively "spot dr[ied]" the cell with a towel. Pet. App. 14a n.14; ROA.56. That night, Petitioner alleges one Respondent told him to "[d]eal with it," in response to his complaints about the cold and the sewage on the floor and blanket. ROA.56. The next morning, Petitioner was removed from the cell and taken to the shower. ROA.57; 3161. He was subsequently assigned different housing.

Petitioner alleges that these circumstances caused him to suffer injuries including breathing difficulties and a distended bladder. Pet. App. 8a, 19a.

2. Petitioner brought 27 claims against 47 defendants, ROA.142, 177, based on the above and other allegations, under 42 U.S.C. § 1983. Among those defendants were the six Respondents here. Petitioner named Respondents in connection with his claim that his cell conditions violated the Eighth Amendment.[3]

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[3] The Fifth Circuit's rejection of his cell-conditions claim is not the end of the road for Petitioner. He continues to press his claim in

Respondents unsuccessfully moved to dismiss the cell-conditions claim. The matter proceeded to discovery, then summary judgment. The district court granted summary judgment to Respondents, concluding that Petitioner's claim failed as a matter of law. Pet. App. 49a-51a, 64a-65a.

3. On appeal, the Fifth Circuit disagreed, concluding that Petitioner had a viable Eighth Amendment claim. The court determined that Petitioner had raised genuine factual disputes supporting Eighth Amendment violations with his allegations regarding the cell conditions. Pet. App. 16a.

Nevertheless, the Fifth Circuit affirmed the district court's judgment based on qualified immunity. The court analyzed in detail previous cases addressing similar cell conditions, including this Court's decision in *Hutto* and its own binding decision in *Davis*. Those and other authorities, the Fifth Circuit concluded, failed to clearly proscribe Respondents' conduct. Pet. App. 16a-17a.

In particular, the Fifth Circuit noted this Court's pronouncement that confinement in "[a] filthy, overcrowded

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district court that the alleged denial of restroom access establishes deliberate indifference in violation of the Eighth Amendment. Pet. 9 n.3. In addition, Petitioner has already presented another related claim to a jury and prevailed—a judgment the Fifth Circuit upheld in related appeal No. 17-10342. *See* ROA.29-30, 815; *Taylor v. Olmstead,* 729 F. App'x 334 (5th Cir. 2018) (per curiam) (affirming judgment against Defendant Olmstead, but awarding no damages, on excessive-force claims). And the Fifth Circuit vacated and remanded a summary judgment in favor of eight other defendants on other claims in related appeal No. 16-10498. *See Taylor v. Williams,* 715 F. App'x 332 (5th Cir. 2018) (per curiam) (forced psychiatric treatment claims). The Fifth Circuit is currently reviewing the later summary-judgment disposition of those claims in related appeal No. 18-11572. *See Taylor v. Stevens,* No. 18-11572 (5th Cir. filed Dec. 10, 2018).

cell . . . might be tolerable for a few days and intolerably cruel for weeks or months." Pet. App. 17a (quoting *Hutto*, 437 U.S. at 686-87). Consistent with *Hutto*, the Fifth Circuit had held previously that confinement in an excrement-covered cell "for only three days" did not violate the Eighth Amendment. Pet. App. 17a (citing *Davis*, 157 F.3d at 1005-06). And *Hutto* specifically admonished that "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." 437 U.S. at 686. Taken together, these authorities left "ambiguity in the caselaw" that failed to provide Respondents "fair warning" that six days of the confinement conditions alleged here violated the Eighth Amendment, while three days did not. *See* Pet. App. 17a. Thus, the Fifth Circuit held that Respondents were entitled to qualified immunity. Pet. App. 17a.

This petition followed.

## REASONS FOR DENYING THE PETITION

### I. The Lower Courts Uniformly Apply This Court's Qualified-Immunity Precedents.

Section 1983 imposes liability on state officials for the "deprivation of any rights" made "under color of any statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. The Court has long interpreted that statute to allow liability only when a state official's conduct was clearly proscribed by settled law or, in extraordinary cases, when the conduct was obviously unconstitutional.

Cherry-picking language from isolated cases, Petitioner claims the circuits have different views on how to determine whether a legal principle is clearly established. He further claims the circuits disagree about how to apply *Hope v. Pelzer*, that is, how to tell when a constitutional violation is so plainly obvious that no on-point

authority is necessary to deem the conduct unlawful. Pet. 13-15, 17 (citing 536 U.S. 730, 734 (2002)).

Petitioner is wrong on both counts. Consistent with this Court's directives, all circuits require a case or body of law arising from similar circumstances before declaring a state actor's conduct unlawful beyond debate. And all circuits acknowledge and apply *Hope* and its progeny consistently. As its recent decisions confirm, the Fifth Circuit neither "disregard[s]" obvious constitutional violations nor requires an "identical" case for clearly established law. Pet. 17-18. There is no confusion necessitating this Court's involvement.

### A. This Court's precedents hold that a principle is clearly established for purposes of qualified immunity when it is obvious or has been previously applied in similar circumstances.

The Court has applied the same qualified-immunity framework for nearly forty years, since *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court held in *Harlow* that qualified immunity turns on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Id.*; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). The Court recently reiterated, in *District of Columbia v. Wesby*, that officials are entitled to qualified immunity unless "every reasonable official would interpret [precedent] to establish the particular rule the plaintiff seeks to apply," placing "the constitutionality of the officer's conduct 'beyond debate.'" 138 S. Ct. 577, 589-90 (2018) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011)).

It is well settled that identifying "clearly established" law generally requires "identify[ing] a case where an offic[ial] acting under similar circumstances . . . was held to have violated the [Constitution]." *White v. Pauly*, 137

S. Ct. 548, 552 (2017) (per curiam). That does not require "a case directly on point," but it does require a case—"'a body of relevant case law' is usually necessary"—placing the unlawfulness of the particular conduct "beyond debate." *Wesby*, 138 S. Ct. at 589-90. That is, for a principle to be so "clearly established" that it proscribes conduct "beyond debate," it must arise in materially similar circumstances. *Cf. Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (distinguishing the obvious violations addressed in *Hope*, for which "there need not be a *materially similar* case," from conduct governed by the usual rule (emphasis added)). In addition, "there can be the rare 'obvious case,' where the unlawfulness of the offic[ial]'s conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590 (quoting *Brosseau*, 543 U.S. at 199).

The Court has repeatedly reinforced these standards. *See City of Escondido v. Emmons*, 139 S. Ct. 500, 503-04 (2019) (per curiam) ("The Court of Appeals made no effort to explain how . . . case law prohibited [the defendant's] actions in this case. That is a problem under our precedents."); *White*, 137 S. Ct. at 551 ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases.").

### B. Every circuit correctly and consistently applies those principles.

The above principles have been applied correctly in thousands of qualified-immunity cases in every circuit over several decades. Nevertheless, Petitioner asserts that the Fifth and Eighth Circuits employ a "remarkably myopic," "narrow approach" to clearly established law, requiring authority with "a granular level of factual similarity that is nearly impossible to satisfy." Pet. 17-18, 20.

In contrast, Petitioner claims, the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits do not require "a case involving precisely the same facts" for clearly established law. Pet. 21.

This attempt to divide the circuits, however, cherry-picks language to create the illusion of disagreement, where no meaningful disagreement actually exists. Indeed, what Petitioner describes as conflicting approaches are really just reflections of this Court's own pronouncements in *Wesby*. The directive to plaintiffs—as *Wesby* put it, to produce a "body of relevant case law" placing the conduct beyond debate unless the violation is obvious—is the law in all circuits. Despite the petition's allusions to the contrary, the Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all apply this framework. *See King v. Pridmore*, No. 18-14245, 2020 WL 3026399, at *7 (11th Cir. June 5, 2020); *James v. N.J. State Police*, 957 F.3d 165, 169 (3d Cir. 2020); *Cole v. Carson*, 935 F.3d 444, 451, 453 (5th Cir. 2019) (en banc), *cert. denied sub nom. Hunter v. Cole*, No. 19-753, 2020 WL 3146695 (U.S. June 15, 2020); *Kelsay v. Ernst*, 933 F.3d 975, 981-82 (8th Cir. 2019) (en banc), *cert. denied*, No. 19-682, 2020 WL 2515455 (U.S. May 18, 2020); *Torry v. City of Chicago*, 932 F.3d 579, 587 (7th Cir. 2019); *Colbruno v. Kessler*, 928 F.3d 1155, 1165 (10th Cir. 2019); *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017); *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017). For good measure, the First, Second, Sixth, and District of Columbia Circuits do, too. *See Gray v. Cummings*, 917 F.3d 1, 10 & n.4 (1st Cir. 2019); *Hedgpeth v. Rahim*, 893 F.3d 802, 809 (D.C. Cir. 2018); *Simon v. City of New York*, 893 F.3d 83, 92 (2d Cir. 2018); *Baynes v. Cleland*, 799 F.3d 600, 610-13 (6th Cir. 2015). No one says otherwise.

Petitioner claims that the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits do not require "a case involving precisely the same facts" "for law to be clearly established"; he believes the Fifth and Eighth Circuits are more demanding. Pet. 21, 22-23. Petitioner fails to acknowledge, however, that the language he draws from those circuits mimics this Court's own pronouncements. For example, Petitioner cites the Fourth Circuit's statement that law can be "clearly established based on general constitutional principles" as evidence of the supposedly reduced precision required in that circuit. Pet. 21, 22 (citing *Thompson*, 878 F.3d at 98). But that language is just a restatement of *Wesby*'s rule that qualified immunity does not attach to obvious constitutional violations. And *Thompson* makes clear that the Fourth Circuit acknowledges both the usual rule—the "[o]rdinar[y]" need to identify similar precedent—and the exception when a "general constitutional rule" applies "with obvious clarity." 878 F.3d at 98 (quoting *Hope*, 536 U.S. at 741). So too in the Tenth Circuit, as *Davis v. Clifford* itself confirms that clearly established law "[g]enerally" requires "a Supreme Court or Tenth Circuit decision on point." 825 F.3d 1131, 1136 (10th Cir. 2016).

The same goes for the other circuits Petitioner lists, even those with cases focusing primarily on the obvious-violation exception. Those cases are still consistent with the usual rule, as they prioritize discussion of analogous precedent rather than relying on broad propositions at high levels of generality. *See Ioane v. Hodges*, 939 F.3d 945, 956-57 (9th Cir. 2018); *Kane v. Barger*, 902 F.3d 185, 194-95 & n.44 (3d Cir. 2018); *Brooks v. Warden*, 800 F.3d 1295, 1306-07 (11th Cir. 2015); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012).

And other cases from those same circuits reveal that the usual rule does, in fact, apply. For example, the Third Circuit recently articulated that "[i]n rare cases, a plaintiff may show that a right is clearly established if the 'violation is "obvious,"'" "[b]ut in most cases," clearly established law is shown by "identifying a case where an officer acting under similar circumstances . . . was held to have violated the constitutional provision at issue." *James*, 957 F.3d at 169-70 (alterations omitted) (first quoting *Brosseau*, 543 U.S. at 199, then quoting *White*, 137 S. Ct. at 552). Replace "Third" with any other circuit, and the rule is exactly the same. Likewise, the Seventh Circuit explains that "[i]t is usually necessary to identify an instance in which 'an officer acting under similar circumstances . . . was held to have violated'" the Constitution. *Torry*, 932 F.3d at 587 (quoting *Wesby*, 138 S. Ct. at 590); *accord King*, 2020 WL 3026399, at *7 (recognizing that, outside "the rare and narrow exception," clearly established law "requir[es] a plaintiff to identify a materially similar case on point"); *Shafer*, 868 F.3d at 1117 (stating "we generally must 'identify a case where an officer acting under similar circumstances . . . was held to have violated'" that constitutional provision (quoting *White*, 137 S. Ct. at 552)).

These cases show that there is no meaningful disagreement, which is why the doctrine of qualified immunity is applied consistently and correctly across thousands of cases without controversy. Petitioner cannot concoct "confusion," Pet. 23, by quoting half of the legal standard as the law of some circuits, and the other half as the law of other circuits.

### C. The Fifth Circuit's approach to qualified immunity is the same as every other circuit's.

What the Fifth Circuit "regularly demands," Pet. 19, is what every other circuit regularly demands. Although Petitioner claims the Fifth Circuit is an outlier, his own cases confirm that the Fifth Circuit's approach is no different from any other circuit's.

#### 1. The Fifth Circuit correctly requires similar, not identical, circumstances to find a principle clearly established.

Petitioner asserts that the Fifth Circuit requires "identical circumstances" for clearly established law, and that such a "granular level of factual similarity" "is nearly impossible to satisfy." Pet. 18, 20. But the cases he cites do not support that claim, and recent Fifth Circuit case law denying qualified immunity confirms otherwise.

As his first example, Petitioner cites *Morrow v. Meachum*. Pet. 19 (quoting 917 F.3d 870, 874-75 (5th Cir. 2019)). Petitioner takes issue with *Morrow*'s statement that an assessment of clearly established law "must frame the constitutional question with specificity and granularity." 917 F.3d at 874-75; *see* Pet. 19. But *Morrow* goes on to explain, using the exact language of this Court, how this phrase summarizes decades of this Court's instructions: to avoid a "high level of generality," and to define clearly established law "in light of the specific context of the case" and "the *particular* conduct" in question. 917 F.3d at 875 (first quoting *al–Kidd*, 563 U.S. at 742, then quoting *Brosseau*, 543 U.S. at 198, and then quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)). The synonyms for specificity were particularly appropriate because, as this Court has explained, *Morrow* was an excessive-force case—"an area of the law 'in

which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Id.* at 876 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam)).[4] *Morrow* followed this Court's instructions. Petitioner's recurring incantation of "granularity," Pet. 19, 20, 35, is a red herring.

Petitioner next faults *McCoy v. Alamu* for improperly finding that a single unprovoked application of pepper spray was not clearly unconstitutional. Pet. 19-20 (citing 950 F.3d 226, 231-32 (5th Cir. 2020)). Petitioner objects to the conclusion, however, without rebutting the premise.

First, the *McCoy* court considered the body of relevant case law, *see Wesby*, 138 S. Ct. at 590, which included a previous Fifth Circuit holding that a single spray of a chemical agent (there, a fire extinguisher) "was a de minimis use of physical force" not rising to the level of an Eighth Amendment violation, 950 F.3d at 233-34 (quoting *Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993) (per curiam)). The court acknowledged that subsequent Supreme Court law qualified *Jackson*'s conclusion. *Id.* at 233 n.9. But that did not excise *Jackson*, in its entirety, from the body of relevant case law for purposes of clearly established law. Second, the court explained that the constitutional question, a "[f]act-intensive balancing test[]" assessing excessive force, did not lend itself to the requisite particularity, especially where multiple factors favored the officer. *Id.* at 234 (citing *Ziglar*, 137 S. Ct. at 1866).

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[4] Petitioner also selected an excessive-force case to illustrate the Eighth Circuit's "similarly narrow" approach. Pet. 20 (discussing *Kelsay*, 933 F.3d at 978-80).

In short, Petitioner's examples do not tell the story he wishes they did. And recent Fifth Circuit authority confirms that Petitioner's claims about its application of qualified-immunity doctrine are off base. For example, the Fifth Circuit denied qualified immunity *in this very case* as to Petitioner's restroom-access claim. The court explained that its precedents had clearly established that "fail[ing] to provide inmates a minimally sanitary way to relieve themselves for a period of seventeen hours, leaving them no choice but to sleep in their own waste overnight," was deliberately indifferent to an inmate's health and safety in violation of the Eighth Amendment. Pet. App. 22a (footnote omitted).

In two other cases, decided less than six months later, the Fifth Circuit denied qualified immunity for Eighth Amendment deliberate-indifference claims because the law was clearly established. *Converse v. City of Kemah*, No. 17-41234, 2020 WL 3118234, at *5 (5th Cir. June 12, 2020); *Dyer v. Houston*, 955 F.3d 501, 509 (5th Cir. 2020) (finding the law clearly established, albeit "not a paradigm of consistency"); *accord Johnson v. Epps*, 479 F. App'x 583, 592 (5th Cir. 2012); *Cantu v. Jones*, 293 F.3d 839, 845 (5th Cir. 2002). So too has it denied qualified immunity in conditions-of-confinement cases. *E.g.*, *Hinojosa v. Livingston*, 807 F.3d 657, 669-70 (5th Cir. 2015) (finding clearly established a prisoner's right to amelioration of "extremely dangerous temperatures" despite the absence of a case "giv[ing] an exhaustive list of acceptable remedial measures"); *Webb v. Livingston*, 618 F. App'x 201, 209 (5th Cir. 2015) (per curiam) (same).

That pattern holds in the context of law-enforcement conduct more broadly, as well. Indeed, since the petition in this case was filed, there have been at least four Fifth Circuit decisions denying qualified immunity. *See Pena*

*v. City of Rio Grande City*, No. 19-40217, 2020 WL 3053964, at *8 (5th Cir. June 8, 2020) (per curiam) (excessive force violating clearly established Fourth Amendment law); *Amador v. Vasquez*, No. 17-51001, 2020 WL 2900759, at *6-7 (5th Cir. June 3, 2020) (same); *Goode v. Baggett*, No. 19-60350, 2020 WL 1983196, at *1 (5th Cir. Apr. 24, 2020) (same); *Scott v. White*, No. 19-50028, 2020 WL 1983194, at *4 (5th Cir. Apr. 24, 2020) (per curiam) (same).

These cases belie Petitioner's assertion that it is all but impossible to defeat qualified immunity in the Fifth Circuit.

**2. The Fifth Circuit does not refuse to find obvious constitutional violations.**

Even if the decision below contained isolated language that could be read as inconsistent with the approaches of other circuits, that would provide no basis to conclude that the Fifth Circuit requires "case law directly on point" for obvious constitutional violations, thereby "br[ea]k[ing] with its sister circuits." Pet. 13, 17. Indeed, Petitioner does not address the en banc Fifth Circuit's recent clarification that governing Fifth Circuit law does not require similar cases for obvious constitutional violations. *See Cole*, 935 F.3d at 453.

In *Cole*, the en banc court made clear that qualified immunity does not require the identification of an identical case. *Cole* did not "depend[] on the fact patterns of other cases." *Id.* It instead relied on the exception for "obvious" cases to find that the officers violated clearly established law prohibiting deadly force against a suspect who "poses no immediate threat to the officer and no threat to others," requiring advance warning of deadly force "where feasible." *Id.* & n.48 (citing, *inter alia*, *Hope*, 536 U.S. at 741).

And there was no reason to doubt that the Fifth Circuit recognized obviously unconstitutional conduct before *Cole*. *E.g.*, *Morrow*, 917 F.3d at 875 n.5 (noting that "the very action in question" need not have "previously been held unlawful" (quoting *Hope*, 536, U.S. at 739)). For instance, in *Alexander v. City of Round Rock*, the court acknowledged that "officers in this circuit" had not "faced this precise factual situation before." 854 F.3d 298, 305 (5th Cir. 2017). "But," the court continued, "that is not a condition precedent to denying qualified immunity—'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'" *Id.* (quoting *Hope*, 536 U.S. at 741). That principle applied in the Eighth Amendment context. *E.g.*, *Rodrigue v. Grayson*, 557 F. App'x 341, 347 (5th Cir. 2014) (per curiam) ("Officials can be on notice that their conduct violates a constitutional right even in 'novel factual circumstances.'" (quoting *Hope*, 536 U.S. at 741)).

Nevertheless, *Cole* eliminated any lingering doubt.[5] *Cole* confirms that the Fifth Circuit stands in line with other courts.

## II. There Is No Basis to "Abolish" or Overhaul This Court's Longstanding Qualified-Immunity Jurisprudence.

The doctrine of qualified immunity is consistent with the text, context, and history of section 1983. And even if the doctrine has strayed from the statute, Petitioner offers no basis for this Court to set aside decades of

[5] It makes no difference that *Cole* predates the decision below by several months. The same active Fifth Circuit judges who voted against rehearing here, Pet. App. 71a-72a, were also members of the en banc court in *Cole*. If this decision were inconsistent with *Cole*, a member of the en banc court in *Cole* surely would have said so.

precedent. Last week, this Court denied multiple petitions making the same arguments Petitioner presents here. *E.g.*, Petition for Writ of Certiorari at i, *Zadeh*, 2020 WL 3146691 (No. 19-676) (asking, in connection with a case arising from the Fifth Circuit, "[w]hether the Court should recalibrate or reverse the doctrine of qualified immunity"). There is nothing special about this petition that sets it apart from those denied days ago.

### A. Qualified immunity correctly interprets section 1983.

This Court has correctly interpreted section 1983 in light of the common-law and federalism principles that inform the statute's text, context, and history.

1. The Court's qualified-immunity jurisprudence remains faithful to the common-law background of section 1983, which protected societal values by limiting official liability for good-faith, reasonable conduct. And it is proper to consider the statute's common-law background. *See* Bryan A. Garner & Antonin Scalia, *Reading Law* 318-19 (2012); *accord Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020) ("[W]e generally presume that Congress legislates against the backdrop of the common law.").

The common-law origins of the qualified-immunity defense have played the same critical role in the doctrine for over fifty years. *E.g.*, *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) ("At common law, government actors were afforded certain protections from liability . . . ."); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (finding federal statutory immunity proper as "the officers had such a limited privilege under the common law"). This role is to protect values that are "important to 'society as a whole.'" *White*, 137 S. Ct. at 551 (first citing *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 & n.3 (2015) (collecting

cases), then quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Specifically, the Court has explained that qualified immunity allows public officials to carry out their duties without being overly cautious for "fear of personal monetary liability and harassing litigation." *Ziglar*, 137 S. Ct. at 1866 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). Qualified immunity gives officials "breathing room" to do their jobs well, allowing for "reasonable but mistaken judgments about open legal questions." *Id.* (quoting *al–Kidd*, 563 U.S. at 743).

Accounting for qualified immunity's common-law principles is especially important given the common-law basis of the scope of section 1983 liability. The Court explained this symmetry best in *Pierson*. That decision recognized the defense as a common-law counterpart to the Court's previous interpretation of "under color of [state] law," within the meaning of section 1983, to include conduct that violates state law. 386 U.S. at 554-57; *accord Monroe v. Pape*, 365 U.S. 167, 187 (1961) (reading the statute "against the background of tort liability that makes a man responsible for the natural consequences of his actions"), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). As set out in Part III, *infra*, if Petitioner wants to revisit section 1983 *immunity*, he must also accede to a reevaluation of *Monroe* and section 1983 *liability*.

Petitioner takes issue with the absence of explicit statutory text stating the current doctrine of qualified immunity. Pet. 25. But this Court has never required that explicit text in light of section 1983's drafting history and common-law background. *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism* 9-10, 108 Georgetown L.J. (forthcoming 2020),

https://bit.ly/2YlYegX. "[F]or good or ill, the 1800s Congresses did not always expressly enact defenses even when [they] wanted them." *Id.* at 10. The 1800s Court read defenses in, with the understanding that the 1800s Congresses expected that. Whether the Court would recognize a common-law defense in a statute passed today sheds no light on how the 1871 Congress that passed section 1983 expected the Court to interpret the statute. *Cf. Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (declining to discount previous decisions just because "we would decide a case differently now than we did then").

Petitioner also claims that qualified immunity is inconsistent with the common-law background of section 1983. Pet. 25-28. But the common-law background includes ways that American law has limited liability for government officials' reasonable mistakes "from the earliest days of the republic." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1864 (2018). Although "not every officer received immunity in every case," courts commonly applied good-faith principles to limit liability for official actions. *Id.* at 1865-66; *see, e.g.*, *Filarsky*, 566 U.S. at 388 (collecting nineteenth-century cases noting the "well settled" good-faith defense for individuals enforcing the law). As one treatise explained, courts applied a "legal presumption in favor of the validity of [the officer's] official acts," giving an officer "the most lenient consideration consistent with the law, when it is manifest that he has acted throughout with perfect good faith, and striven honestly to do his whole duty." William L. Murfee, *A Treatise on the Law of Sheriffs and Other Ministerial Officers* 495 (1884); *accord Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 89 (1849) ("[T]he acts of a

public officer . . . are to be presumed legal till shown by others to be unjustifiable. It is not enough to show . . . an error in judgment . . . .").

The common-law defense contemplated, at least sometimes, the reasonableness of the conduct: "If an officer uses a reasonable and due discretion he cannot be made liable as for wrongful conversion . . . ." Murfee, *supra*, at 496; *see also* Nielson & Walker, *Qualified Defense*, *supra*, at 1867-68 & n.90 (identifying reliance on "something at least akin to an objective standard" (citing *Spalding v. Vilas*, 161 U.S. 483, 498 (1896))).

And, as good faith has "*both* an objective and a subjective aspect," the objectivity of modern qualified immunity traces directly back to its common-law origins. *Harlow*, 457 U.S. at 815 (emphasis added, quotation marks omitted).

2. The Court's current doctrine correctly reflects section 1983's federalism-promoting underpinnings. "Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 572 U.S. 844, 857-58 (2014); *accord Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). The Court "construes statutes narrowly when a broader construction would infringe on federalism interests." Nielson & Walker, *Federalism*, *supra*, at 30.

Had *Pierson* not recognized a common-law defense counterpart to *Monroe*'s common-law scope of liability, section 1983 liability would undoubtedly be broader. This liability implicates the functions and interests of States in their sovereign capacities. *See Wyatt v. Cole*, 504 U.S. 158, 167 (1992) ("Qualified immunity strikes a balance between compensating those who have been injured by

official conduct and protecting government's ability to perform its traditional functions."). The functions include "States' ability to enforce their laws without undue federal interference"; the interests include "hiring competent officers" and "preventing those officers from shirking their dut[ies] for fear of federal liability"—all of which the Court consistently considers in applying qualified immunity. Nielson & Walker, *Federalism*, *supra*, at 5; *see, e.g.*, *Filarsky*, 566 U.S. at 389-90.

### B. Statutory *stare decisis* considerations do not justify intervention by this Court.

Even if current doctrine were unsound, Petitioner's request to abolish or substantially curtail qualified immunity conflicts with settled principles of *stare decisis*. Petitioner faces a particularly heavy burden in this policy-based challenge to a doctrine that is grounded in a statute, not the Constitution. And the relief Petitioner seeks would offend federalism principles and upset the strong reliance interests of States. Against that backdrop, Petitioner's broadside attack on deeply entrenched precedent requires extraordinary justification, far beyond anything Petitioner offers.

#### 1. Petitioner's charges of interpretive inaccuracies and policy problems belong before Congress, not the Court.

Because qualified-immunity doctrine arises in the course of interpreting statutory text, *stare decisis* "carries enhanced force." *Kimble*, 135 S. Ct. at 2409; *see also* Nielson & Walker, *Qualified Defense*, *supra*, at 1855 (observing that qualified immunity "is largely statutory in character").

There is good reason to give this Court's statutory decisions enhanced *stare decisis* protection. After all,

"unlike in a constitutional case, critics of [the] ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble*, 135 S. Ct. at 2409. That is no mere hypothetical. Members of Congress have recently introduced two bills that would amend section 1983 to eliminate immunities and defenses based on good faith and clearly established law. Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2020), https://bit.ly/3dPvYd2; Ending Qualified Immunity Act, H.R. 7085, 116th Cong. § 4 (2020), https://bit.ly/2MURNvO.

In other words, currently before Congress are two bills that would amend section 1983 in the same ways, for the same reasons, that Petitioner asks this Court to reimagine section 1983. Even a leading academic critic of qualified immunity admitted, "I do worry about a world where Congress thinks, 'We don't need to do anything because the [C]ourt could always step in and fix it.'" RJ Vogt, *As Justices Mull Qualified Immunity, Could Congress End It?*, Law360 (June 7, 2020 8:02 PM EDT), https://bit.ly/3dWKIqo. This concern explains why the Court has consistently left policy-oriented "[c]laims that a statutory precedent has 'serious and harmful consequences'" to congressional policymakers. *Kimble*, 135 S. Ct. at 2414 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014)). Petitioner makes just such claims. Pet. 30-34.

Dodging these red flags, Petitioner hopes to persuade the Court using a growing roster of qualified-immunity critics. Pet. 29 & n.9; *see also Cole*, 935 F.3d at 477 (Ho & Oldham, JJ., dissenting) (observing that "[t]he originalist debate over qualified immunity may seem fashionable"). But the disfavor of jurists and academics is not a self-evident basis for upending longstanding doctrine. Indeed, *stare decisis* has protected doctrines that

the Court itself characterizes as "unrealistic, inconsistent, or illogical," when those doctrines have been applied consistently in many cases over many years. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (noting that the exemption of professional baseball from antitrust laws "is an aberration that has been with us now for half a century"); *see also Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995, 2000 & n.† (2015) (applying bankruptcy statutory precedent that "has been the target of criticism" "[f]rom its inception" 23 years before). The Court does not—and should not—change the law because critics have criticized it.

**2. Federalism principles counsel against upsetting the States' strong reliance interests.**

*Stare decisis* weighs particularly heavily in "cases involving property and contract rights" because "parties are especially likely to rely on such precedents when ordering their affairs." *Kimble*, 135 S. Ct. at 2410. These concerns are heightened for qualified immunity because the stakeholders are States: "[S]tate and local governments have structured their laws and contractual arrangements to indemnify their officers when sued in their individual capacities for official actions." Nielson & Walker, *Federalism*, *supra*, at 34. These arrangements reflect reliance interests of States and their employees in "avoid[ing] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky*, 566 U.S. at 389-90 (quoting *Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997)).

### 3. Qualified immunity is stable and workable, and there is no opportunity to address stagnation here.

This Court has indicated that "growth [in] judicial doctrine," *Kimble*, 135 S. Ct. at 2410, can support overhauling precedents. But that is not the case here. Even critics of qualified immunity acknowledge the doctrine's "unflinching" consistency. *Cole*, 935 F.3d at 471-73 (Willett, J., dissenting); *see* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 82-83 (2018) (noting 30 applications of the same doctrine over the last 35 years). *Compare Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring) (calling for the Court to "reconsider [its] qualified immunity jurisprudence"), *with Wesby*, 138 S. Ct. at 582 (Thomas, J.) (applying qualified immunity). Qualified-immunity law has been applied without incident thousands of times while producing only a small handful of errors, many of which are "manifestly incorrect." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

And Petitioner fails to demonstrate that qualified immunity "has proved unworkable." *Kimble*, 135 S. Ct. at 2411. There is no conflict in authority. *See* Parts I.B-C, *supra*. To the extent Petitioner offers an alternative reason to overrule qualified immunity based on purportedly inaccurate underlying empirical assumptions, *see* Pet. 31-32, that is "just a different version of the argument that [qualified immunity] is wrong," *Kimble*, 135 S. Ct. at 2414.

Further, this case presents no opportunity to address Petitioner's complaint that qualified immunity impedes development of constitutional law. Pet. 33-34. Even if the complaint has merit, Petitioner complains of stagnation in a case where no stagnation occurred. The Fifth Circuit

*decided* that Petitioner's version of the facts, if true, would amount to an Eighth Amendment violation. Pet. App. 12a-16a. And reaching the constitutional merits is by no means unusual for the Fifth Circuit, even examining the cases Petitioner mentions. *See McCoy*, 950 F.3d at 232 (finding an Eighth Amendment violation but no clearly established law); *Zadeh*, 928 F.3d at 468-70 (finding a Fourth Amendment violation but no clearly established law). Moreover, if stagnation were a problem, the solution is to revisit *Pearson*, not overhaul qualified immunity.

*Pearson* permits courts to use "their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. at 236. But Petitioner fails to demonstrate that lower courts abuse this discretion. Petitioner cannot cure that failure with abstract assertions that courts "frequently" or "regularly" dodge the constitutional question. Pet. 33. As in *Camreta v. Green*, "the Court of Appeals followed exactly this two-step process, for exactly the reasons [the Court] ha[s] said may in select circumstances make it 'advantageous'"—specifically, to "settle a question of constitutional law and thereby guide the conduct of officials." 563 U.S. 692, 707-08 (2011) (quoting *Pearson*, 555 U.S. at 242).

In sum, none of Petitioner's reasons overcomes the heavy burden of statutory *stare decisis* necessary for this Court to revisit the doctrine of qualified immunity.

## III. If the Court Intends to Revisit Section 1983 Immunity, It Should Also Revisit *Monroe* and Section 1983 Liability.

If the Court is inclined to accept Petitioner's invitation to revisit the settled immunity doctrine applied in

thousands of cases over many decades, it should also reevaluate the scope of section 1983 liability. As Justice Thomas recently noted, "[q]ualified immunity is not the only doctrine that affects the scope of relief under § 1983." *Baxter v. Bracey*, No. 18-1287, 2020 WL 3146701, at *3 n.2 (U.S. June 15, 2020) (dissenting from denial of certiorari).

Qualified immunity is inseparable from the existing scope of section 1983 liability because qualified immunity is the common-law counterpart of section 1983's common-law scope of liability. *See* pp. 18-21, *supra*. That provides strong reason not to revisit a doctrine like qualified immunity, with such a "close relation to a whole web of precedents," because "reversing it could threaten others," magnifying the already-significant risks of "unsettl[ing] stable law." *Kimble*, 135 S. Ct. at 2411.

But in any event, the Court should not deny Respondents immunity from section 1983 without first assessing whether liability attaches at all—that is, whether they acted "under color of" any Texas "statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983; *cf. Monroe*, 365 U.S. at 187.

Since 1961, courts have reflexively assumed that any state employee who, in the course of his job duties, violates a federal civil right necessarily acts "under color of" state law. The origin of that assumption is *Monroe*, which reasoned that state officials act "under color of" state law when their actions are not authorized by state law. 365 U.S. at 187. *But see id.* at 220-21 (Frankfurter, J., dissenting). That questionable holding has spawned significant "debate[]." *Baxter*, 2020 WL 3146701, at *3 n.2 (Thomas, J., dissenting) (collecting scholarship). And with good reason: no Texas "statute, ordinance, regulation, custom, or usage" directed Respondents' conduct

such that they acted under its "color." If the Court wishes to upend their settled expectations regarding their immunity, it should reconsider *Monroe* and ask whether Respondents acted "under color of" state law. *See Crawford-El v. Britton*, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting) ("We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented . . . ."); *see also Cole*, 935 F.3d at 477-78 (Ho & Oldham, JJ., dissenting) ("[I]t is better to leave things alone than to reconfigure established law in a one-sided manner.").

## IV. The Decision Below Is Correct.

Petitioner claims that the decision below incorrectly applied this Court's precedents. Even if this Court were to engage in error correction, there is no error to correct here. The Fifth Circuit faithfully relied on this Court's precedents to grant qualified immunity. Any other circuit, when faced with the same binding authorities that bound the court below, would have reached the same outcome.

### A. Binding authority provides that short-term housing assignments in unsanitary conditions do not violate the Eighth Amendment.

To assess the "clearly established" prong, every court evaluates the "body of relevant case law." *Wesby*, 138 S. Ct. at 590. Here, the body of case law regarding temporary housing assignments in unsanitary conditions did not put Respondents on fair notice that their conduct was unlawful beyond debate. To conclude otherwise, the Fifth Circuit would have been required to disregard this Court's pronouncement in *Hutto* and its own decision in *Davis*.

1. The decision below properly considered binding authority addressing unsanitary cell conditions. The body of relevant law included a case acknowledging a violation for unsanitary cell conditions lasting ten months and another case finding no violation based on such conditions lasting three days. *Compare McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991) (violation based on ten months of cell conditions with exposure to excrement), *with Davis*, 157 F.3d at 1006 (no violation based on three days of cell conditions with exposure to excrement). Neither case indicates when a temporary housing assignment gains sufficient duration that it crosses the line from permissible to unconstitutional. That tipping point is ambiguous. *See* Pet. App. 17a.

This Court's decision in *Hutto* only underscores that ambiguity. *Hutto* observed that "[a] filthy, overcrowded cell . . . might be tolerable for a few days and intolerably cruel for weeks or months." 437 U.S. at 684, 686-87 (finding isolation conditions unconstitutional where inmates "were sometimes left in isolation for months"). And it stressed that "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." *Id.* at 686.

A reasonably informed officer, then, would know that three days of temporary confinement in an excrement-covered cell does not offend the Eighth Amendment but that ten months of such confinement does. And he would know that this Court agrees that "filthy" cell conditions are constitutionally "tolerable for a few days." *Id.* at 686-87. Where the tipping point lies is eminently debatable and unanswered by any binding authority. Under these circumstances, Respondents are entitled to qualified immunity.

2. Petitioner ignores *Hutto* entirely and relegates *Davis* to a footnote. Pet. 13 n.4. But *Hutto* and *Davis* are central to the decision below and critical in assessing whether settled law made Respondents' conduct unlawful beyond debate. *See* Pet. App. 17a (*Davis* "dooms Taylor's claim"). To the extent Petitioner attempts to distinguish *Davis*, he "split[s] hairs," Pet. 21, over immaterial distinctions.

Petitioner first argues that the prisoner in *Davis* had cleaning supplies. Pet. 13 n.4. But the importance of cleaning supplies to the holding in *Davis* is unclear. *See Davis*, 157 F.3d at 1006 ("Furthermore, cleaning supplies were made available . . . ."). Petitioner then claims the circumstances of this case were unlike the crisis-management circumstances in *Davis* because Petitioner was "placed into squalid conditions simply because he was a psychiatric patient." Pet. 13 n.4. But Petitioner's own words reveal that the circumstances were not so "simpl[e]," *id.*; to the contrary, the circumstances involved at least some degree of crisis. He was transferred to Montford as a suicide risk, ROA.49, and while there, stated that he wanted to hurt himself, ROA.53.

But whether lawyers and judges can identify distinctions between this case and *Davis* does not answer the qualified-immunity question. Here, "[n]o matter how carefully a reasonable officer" read the relevant cases, "*no precedent clearly established*" that those distinctions are dispositive. *See Sheehan*, 135 S. Ct. at 1777 (concluding that the three circuit cases the lower court relied on did not clearly require the result it reached). The state of the law on this point was, at minimum, "undeveloped." *Wilson v. Layne*, 526 U.S. 603, 617 (1999). Because "the officers in this case cannot have been 'expected to predict the future course of constitutional law,'" it would be

"unfair to subject" them "to money damages for picking the losing side of the controversy." *Id.* at 617-18 (quoted in *Reichle v. Howards*, 566 U.S. 658, 670 (2012)); *accord Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) ("The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted.").

Unable to distinguish *Davis*, Petitioner suggests that the Fifth Circuit was wrong to consider *Davis* because it "cuts against the great weight of precedent" of other circuits. Pet. 13 n.4. But that ignores two of this Court's pronouncements regarding qualified immunity based on persuasive authority.

First, out-of-circuit precedent is relevant only "*absent* controlling authority." *al–Kidd*, 563 U.S. at 742 (emphasis added). *Davis* was controlling authority, despite predating *Hope*—even assuming *Hope* addressed "analogous but less egregious mistreatment," as Petitioner claims. Pet. 13 n.4. In the Fifth Circuit, "one panel of [the] court may not overturn another panel's decision, absent an intervening change in the law." *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (per curiam). This Court changes the law through decisions—and a *decision* is necessarily "unequivocal, not a mere hint of how the Court might rule in the future." *Id.* (quotation marks omitted). Nothing in *Hope* "unequivocal[ly]" declares *Davis* overruled.

Second, only a "a robust 'consensus of cases of persuasive authority'" will do. *al–Kidd*, 563 U.S. at 742. And no "robust consensus" from other circuits existed; for example, cases from at least two circuits involved temporal guidelines similar to those stated in *Davis*. *See Smith v. Copeland*, 87 F.3d 265 (8th Cir. 1996) (no violation for cell conditions with exposure to waste lasting four days);

*Johnson v. Pelker*, 891 F.2d 136 (7th Cir. 1989) (no violation for cell conditions with exposure to waste lasting three days); *cf. Saunders v. Sheriff of Brevard Cty.*, 735 F. App'x 559, 568 (11th Cir. 2018) (per curiam) (concluding that allegations of several days in a waste-covered cell "fall short of the egregious facts in *Brooks* [*v. Warden*]").

At best, the cases reflect inconsistency and show "that the courts are divided" on the merits question, which "demonstrates that the law on the point is not well established." *Ziglar*, 137 S. Ct. at 1868. That reinforces the Fifth Circuit's conclusion in this case.

### B. *Hope v. Pelzer* supports the judgment below.

Petitioner charges the Fifth Circuit with "disregard[ing] this Court's clear direction in *Hope*," by "requiring precedent," "despite the obvious unconstitutionality" of the cell conditions alleged in this case. Pet. 17. But the Fifth Circuit did not disregard *Hope*; it discussed *Hope* and found that it did not control because, in light of *Hutto* and *Davis*, Respondents' conduct was not obviously unlawful. *See* Pet. App. 16a-17a (citing *Hope*, 536 U.S. at 741). That was correct.

*Hope* held that it was obviously unconstitutional to punish an Alabama inmate for past subordinate conduct by handcuffing him to a hitching post, shirtless, for seven hours in the sun, with little water and no bathroom breaks. 536 U.S. at 734-35. The Court found the violation obvious for many reasons—it did *not* hold that any one reason was an "independent basis" for obviousness. *Contra* Pet. 14.

The Court invoked moral reasoning, to be sure, describing the violative conduct as "obvious[ly] cruel[]" and "antithetical to human dignity." *Hope*, 536 U.S. at 745. But the Court did not stop there. A battery of legal

resources supported the Court's conclusion, including: "[its] own Eighth Amendment cases," "binding . . . Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post." *Id.* at 741-42. The record reflected that, at that time, Alabama was "the only State that handcuffed prisoners to 'hitching posts.'" *Id.* at 733. And the record reflected that the prison had disobeyed its own policies regulating use of the hitching post. *Id.* at 735 & n.3. That constellation of factors allowed the Court to declare the respondents' conduct unlawful notwithstanding the case's "novel factual circumstances." *Id.* at 741. After all, multiple independent warning signs put those officials on fair notice that their conduct was unlawful. *Id.* at 745-46. *Hope* does not require lower courts to set aside binding case law, even in the face of difficult facts. And here, the binding case law discussed above (at pp. 27-30, *supra*) offered Respondents good reason to think their conduct was not unlawful.[6]

### C. Any other circuit would have reached the same conclusion.

As set forth above, all circuits apply the same test. *See* Part I.B, *supra*. The Fifth Circuit properly found ambiguity based on authority binding in the Fifth

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[6] Petitioner faults the decision below for recognizing that the risk of exposure to bodily waste was "especially obvious here" while denying qualified immunity on the ground that the conduct was not "obviously unconstitutional" under *Hope*. Pet. 9-10, 13. But Petitioner conflates two different inquiries. The fact that a *danger* is "obvious" for purposes of the Eighth Amendment merits inquiry under *Farmer v. Brennan*, 511 U.S. 825, 842 (1994), does not make prison officials' *behavior* "obviously unconstitutional" for purposes of the qualified-immunity inquiry under *Hope*.

Circuit. *See* Part IV.A, *supra*. Petitioner compares apples to oranges by relying on cases from circuits not addressing a similar body of law. *See* Pet. 16-17, 21-22 (citing *Berkshire v. Beauvais*, 928 F.3d 520 (6th Cir. 2019); *Weathers v. Loumakis*, 742 F. App'x 332 (9th Cir. 2018); *Brooks*, 800 F.3d at 1298; *DeSpain v. Uphoff*, 264 F.3d 965 (10th Cir. 2001)).

In *Hope*'s terms, the absence of warning signs, including the content of the authority binding the Fifth Circuit, precluded the possibility that the duration of the unsanitary conditions was obviously unconstitutional. That would have been true elsewhere. And the same is true in *Wesby*'s terms. The body of relevant law indicated a temporal range that did not place the constitutional violation here, beyond doubt, at either end of the range.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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