No. 19-1261

IN THE
Supreme Court of the United States

TRENT MICHAEL TAYLOR,
Petitioner,

v.

ROBERT RIOJAS, Sergeant of Corrections Officer, Individually and in Their Official Capacity; RICARDO CORTEZ, Sergeant of Corrections Officer, Individually and in Their Official Capacity; STEPHEN HUNTER, Correctional Officer, Individually and in Their Official Capacity; LARRY DAVIDSON, Correctional Officer, Individually and in Their Official Capacity; SHANE SWANEY, Sergeant of Corrections Officer, Individually and in Their Official Capacity; JOE MARTINEZ,
Respondents.

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

REPLY BRIEF FOR PETITIONER

Samuel Weiss
RIGHTS BEHIND BARS
416 Florida Avenue, NW
#26152
Washington, DC 20001

Kelsi Brown Corkran
Counsel of Record
Thomas M. Bondy
Tiffany R. Wright
Elizabeth R. Cruikshank
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
kcorkran@orrick.com

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

Respondents insist they needed the "breathing room" afforded by qualified immunity "to do their jobs well." Opp. 18. Respondents' definition of "doing their jobs well" apparently includes stripping a suicidal individual naked and confining him for nearly a week in two egregiously unsanitary cells, the first covered from floor to ceiling in feces and the second a freezing "cold room" where he was forced to sleep in a pool of human sewage. It includes depriving him of clean drinking water for days because his faucet was packed with feces. And it includes mocking him when he complained that these conditions left him struggling to breathe. According to Respondents, a reasonable official might not have realized this inhumane treatment was unconstitutional.

This argument defies belief. It also defies this Court's precedent and that of numerous circuits establishing that Respondents are not entitled to qualified immunity because the unconstitutionality of their conduct was both obvious and clearly established. At minimum, the contrary decision below warrants summary reversal to correct the Fifth Circuit's deviation from this case law.

But plenary review is also warranted: As illustrated by the two circuit splits implicated by the Fifth Circuit's decision, the courts of appeals desperately need clarification from this Court on how to determine whether a constitutional violation is obvious or clearly established. Respondents' attempt to reduce these conflicts to semantic differences fails—the circuits are indisputably reaching diametrically opposed

outcomes in materially indistinguishable cases. Respondents point to conflicting language in this Court's decisions to explain the disarray, but that only proves the necessity of clearer guidance from this Court.

Finally, as Respondents implicitly concede, this case presents an ideal vehicle for the Court to heed the demands of a growing number of voices—including members of this Court, numerous other federal judges, and legal scholars across the ideological spectrum—and reconsider qualified immunity.

I. The Decision Below Conflicts With This Court's Precedent And Decisions Of Other Circuits Establishing That Respondents' Conduct Was Obviously Unconstitutional.

Respondents barely attempt to distinguish *Hope v. Pelzer*, 536 U.S. 730 (2002), which is precisely on point. If anything, Respondents' treatment of Taylor was more severe than the misconduct Hope suffered: Taylor was degraded, humiliated, and put at risk of bodily harm for 20 times as long as Hope was; denied sanitary drinking water and food for days; and similarly subjected to extreme temperature conditions, nudity, and mockery. Taylor's experience reflects precisely the kind of cruel and degrading mistreatment *Hope* identified as obviously unconstitutional and therefore unprotected by qualified immunity.

Contrary to Respondents' assertion, *Hope* leaves no doubt that "[t]he obvious cruelty inherent in" the guards' conduct was dispositive. 536 U.S. at 745. Because "Hope was treated in a way antithetical to human dignity … under circumstances that were both

degrading and dangerous," this Court held that the guards had sufficient "notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Id.* These features of the misconduct alone defeated qualified immunity, though this Court noted additional reasons the conduct was obviously unconstitutional.

So too here. The Fifth Circuit correctly determined that Respondents exposed Taylor to an "especially obvious" risk of bodily harm by forcing him to sleep naked on a floor soaked by the waste of his cell's prior residents, Pet. App. 15a-16a, but it failed to follow that determination to its logical conclusion: Respondents' conduct was obviously unconstitutional. Respondents' attempt to explain this inconsistency, Opp. 32 n.6, is incoherent. The standard for a conditions-of-confinement claim is whether Respondents disregarded a substantial risk of serious harm; if the substantial risk of harm Respondents disregarded was "especially obvious," so was the constitutional violation. No reasonable official could believe that exposing Taylor to this "obvious" risk was lawful.

Respondents suggest that *Hutto v. Finney*, 437 U.S. 678 (1978), precludes this conclusion. Opp. 29-30. But the language Respondents quote was dicta that by no means approved of placing inmates in "filthy, overcrowded cell[s]"; this Court merely noted that the district court's analysis in *Hutto*—which did not consider the length of confinement in a vacuum—was appropriately context specific. *Id.* at 685-87.

Respondents make no attempt to distinguish cases from sister circuits denying qualified immunity

to prison officials who engaged in analogous, obviously unconstitutional misconduct. Instead, Respondents suggest that Taylor "compares apples to oranges by relying on cases from circuits not addressing a similar body of law." Opp. 32-33. But each decision found the misconduct so obviously unconstitutional as to defeat qualified immunity *regardless* of whether on-point circuit precedent existed. *See Brooks v. Warden*, 800 F.3d 1295, 1307 (11th Cir. 2015) (finding a "rare case of 'obvious clarity'" (brackets omitted)); *Berkshire v. Beauvais*, 928 F.3d 520, 537-38 (6th Cir. 2019) (concluding defendant was on "fair warning" in light of *Hope*'s admonition that certain conduct is "obvious[ly]" unconstitutional); *Weathers v. Loumakis*, 742 F. App'x 332, 333-34 (9th Cir. 2018) (finding the conduct clearly unconstitutional though the court had "never squarely confronted a case with facts precisely like these").

Finally, Respondents point to cases from other circuits they claim align with the Fifth Circuit's decision below. Opp. 30-31. That suggests only that the circuit conflict is deeper than the Petition claims, further warranting this Court's review.

II. The Circuits Are Divided On The Degree Of Factual Similarity To Precedent Required To Clearly Establish A Constitutional Right.

a. The Petition urges this Court to resolve a widely acknowledged conflict on the factual similarity to prior precedent necessary to find a constitutional right clearly established. Respondents attempt to reduce this conflict to a simple case of "cherry-pick[ed]

language" that "create[s] the illusion of disagreement." Opp. 9. But the conflict is neither illusory nor semantic. There is fundamental disagreement on the proper standard for—and application of—the "clearly established" requirement.

By highlighting this Court's varying articulations of that requirement, Opp. 9-11, Respondents demonstrate the necessity of this Court's intervention. On one hand, Respondents point to this Court's statement that courts must "identify a case where an officer acting under similar circumstances ... was held to have violated" the Constitution. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam). On the other, Respondents point out the requirement, in the same case, that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 551. These two statements are inconsistent: Precedent can be sufficiently similar to "put the officer on notice that his conduct would be clearly unlawful," *Saucier v. Katz*, 533 U.S. 194, 202 (2001), while not placing the constitutional question "beyond debate," *White*, 137 S. Ct. at 551.

This tension flows throughout this Court's qualified immunity cases. For example, in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017), this Court stated that the clearly established inquiry turns on whether "a reasonable officer might not have known for certain that the conduct was unlawful" *and* whether a reasonable officer "could ... have predicted" the unlawfulness. These two statements are as inconsistent as those in *White*: Precedent may allow an officer to "predict" unlawfulness while being insufficient for an officer to "know[it] for certain."

That lower courts rely on these varying statements to reach varying outcomes weighs in favor of review, not against it. And within the "widespread inter-circuit confusion on what constitutes 'clearly established law,'" *Cole v. Carson*, 935 F.3d 444, 472 (5th Cir. 2019) (en banc) (Willett, J., dissenting), the Fifth Circuit occupies an extreme position of demanding an exceedingly high level of factual similarity that is nearly impossible to satisfy.

b. Respondents claim that all circuits, including the Fifth Circuit, apply "the usual rule" that plaintiffs must identify "similar precedent" to meet the clearly established requirement. Opp. 10. This is demonstrably wrong. The Fifth Circuit expressly requires "specificity and granularity" to find a constitutional violation clearly established. *Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019). While Respondents argue that this statement in *Morrow* is unique to the excessive-force context, Opp. 12-13, the Fifth Circuit's analysis here demonstrates otherwise. It was not enough that circuit precedent established that confinement in a sewage-flooded cell violates the Eighth Amendment. *See McCord v. Maggio*, 927 F.2d 844, 847-48 (5th Cir. 1991). The Fifth Circuit found no violation of clearly established law because Respondents forced Taylor to live in human waste for "only six days," Pet. App. 17a, rather than seven, eight, or nine days. Nor was it enough in *McCoy v. Alamu*, 950 F.3d 226, 232-34 (5th Cir. 2020)—where a guard pepper sprayed a prisoner in the face without justification—that similar Fifth Circuit precedent made clear that the "[l]awfulness of force ... does not depend on the precise instrument used to apply it," *Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012),

and that the Eighth Amendment forbids punching a restrained prisoner in the face without provocation, *Cowart v. Erwin*, 837 F.3d 444, 454 (5th Cir. 2016). The Fifth Circuit found no violation of clearly established law in *McCoy* because the restrained prisoner there suffered "an isolated, single use of pepper spray" rather than a single punch. 950 F.3d at 233.

The Fifth Circuit thus does exactly what *Morrow* says, granularly slicing six versus seven days and splitting hairs between an unprovoked punch of a prisoner versus an unprovoked use of pepper spray. As the Petition explains, Pet. 21-23, this approach is at odds with that of the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See, e.g.*, *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) ("Every time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case … involving that particular weapon is decided.").

Respondents' citation to a handful of cases where the Fifth Circuit denied qualified immunity does not belie the improperly narrow nature of its analysis—or the conflict with other circuits. The circuit split is not premised on the notion that the Fifth Circuit *never* denies qualified immunity; rather, it rarely does so because of the difficulty of identifying "specificity and granularity" in prior precedent, *Morrow*, 917 F.3d at 874-75. Indeed, the cases Respondents cite illustrate this point. In *Converse v. City of Kemah*, 961 F.3d 771, 773-74 (5th Cir. 2020), police arrested a man after a suicide attempt, locked him in a cell, and left him alone with a blanket for 45 minutes, which

was forbidden by the jail's suicide-prevention procedures. After the man used the blanket to kill himself, the family sued, alleging deliberate indifference. *Id.* The Fifth Circuit found a violation of clearly established law based on a materially identical prior case wherein jail officers left a suicidal woman, who ultimately killed herself, alone in a cell with a blanket for 45 minutes. *Id*. at 778 (citing *Jacobs v. W. Feliciana Sheriff's Dep't*, 228 F.3d 388, 391 (5th Cir. 2000)). *Converse* thus involved the very granular specificity that is emblematic of the Fifth Circuit's approach to qualified immunity.

Respondents' other citations are similarly unhelpful to them. *E.g.*, *Cantu v. Jones*, 293 F.3d 839, 845 (5th Cir. 2002) (officers conceded that law was clearly established); *Hinojosa v. Livingston*, 807 F.3d 657, 675 (5th Cir. 2015) (dismissing appeal for lack of jurisdiction and "express[ing] no opinion on how the district court should rule on [the] qualified immunity defense"); *Webb v. Livingston*, 618 F. App'x 201, 211 (5th Cir. 2015) (dismissing appeal for lack of jurisdiction).

c. Finally, Respondents assert that "[a]ny other circuit would have reached the same conclusion" as the Fifth Circuit in this case. Opp. 32. But not only have other circuits already found clearly established constitutional violations on analogous facts, they have done so based on Fifth Circuit precedent. The Eleventh Circuit in *Brooks* denied qualified immunity in part based on *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971), which clearly established that confining an in-

mate near feces for two days was a constitutional violation. 800 F.3d at 1304.[1] And in *DeSpain v. Uphoff*, 264 F.3d 965, 974, 979 (10th Cir. 2001), the Tenth Circuit denied qualified immunity to prison officials who held an inmate in a cell flooded with sewage, relying on the "great weight of cases" on the subject, including the Fifth Circuit's decision in *McCord*. *See McCord*, 927 F.2d at 848 (holding it is "unquestionably a health hazard" to live in "filthy water contaminated with human waste").

III. This Court Should Abolish Or Reconsider Qualified Immunity.

a. Respondents' defense of qualified immunity doctrine ignores the common law history and scholarly research refuting the notion that qualified immunity has common law origins. Pet. 24-29. Instead, Respondents quote language from this Court suggesting that qualified immunity is consistent with the common law. Opp. 17-18. But because this Court's original determination that the common law provided a general defense to official liability was erroneous, Pet. 24-28, its statements referring back to that purported common law defense simply build on that initial error.

Respondents excuse the doctrine's lack of textual support by arguing that the 1800s-era Court "read defenses in, with the understanding that the 1800s Congresses expected that." Opp. 18-19. But this argument

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[1] *Novak* predates the split of the Fifth and Eleventh Circuits and therefore binds both equally. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

is predicated on the idea that there was any common law qualified immunity defense for the 1871 Congress to implicitly incorporate into § 1983. Respondents' ahistorical argument also ignores that the first time this Court had the opportunity to read an immunity defense into § 1983, it declined to do so. *See* Pet. 27 (discussing *Myers v. Anderson*, 238 U.S. 368, 378-79 (1915)).

Moreover, Respondents concede that even under their interpretation of the common law, "not every officer received immunity in every case" and that courts "applied good-faith principles to limit liability for official actions." Opp. 19-20. This undermines any blanket qualified immunity defense to every § 1983 action and instead supports a limited good-faith exception to certain claims, specifically those for which bad faith is an element. *See* Pet. 24, 28. Modern qualified immunity doctrine bears no resemblance to such a narrow defense.[2]

b. Respondents' recourse to federalism is similarly unavailing. Section 1983 was designed "to deter

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[2] Respondents suggest this Court cannot reconsider qualified immunity without revisiting *Monroe v. Pape*, 365 U.S. 167 (1961). But qualified immunity and the scope of § 1983 liability are distinct doctrines; there is no basis for Respondents' assertion that Taylor must "accede to a reevaluation of *Monroe*," Opp. 18, because he challenges qualified immunity. In any event, *Monroe*'s interpretation of the meaning of "under color of law" in § 1983 is consistent with the common law. *See, e.g.*, Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 Mich. L. Rev. 323, 341-361 (1992) (analyzing cases dating back to the 1500s to determine that the term historically encompassed both authorized conduct and false claims to authority).

state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Respondents cite no authority suggesting § 1983 was intended to be "federalism-*promoting*," Opp. 20 (emphasis added); the very premise of creating a cause of action to deter state actor misconduct reflects congressional intent to override background federalism principles.

In any event, the theory that states have ordered their affairs in anticipation that officer misconduct will be shielded by qualified immunity is not a compelling reason to maintain the defense. Even if some states offered indemnification because they did not expect officers to face repercussions for constitutional violations, this "does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Arizona v. Gant*, 556 U.S. 332, 349 (2009). Moreover, Respondents' claim that states relied on strong qualified immunity protections in enacting indemnification statutes is inaccurate: By the time this Court created the "clearly established" test, most states already had indemnification statutes, *see* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 Georgetown L.J. __ (forthcoming 2020), https://tinyurl.com/ycv8kj7v, and nothing in the legislative history of those statutes suggests the availability of qualified immunity factored into legislators' willingness to indemnify officers, *see* Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way*

Down, 109 Georgetown L.J. __ (forthcoming 2020), https://tinyurl.com/ycaq3f4q.

c. As amici explain in detail, *see* Br. of Cross-Ideological Groups As Amici Curiae 19-24, stare decisis factors do not counsel against revisiting qualified immunity. Qualified immunity has not provided the "stability, predictability, and respect for judicial authority" that underlie the stare decisis principle. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Instead, courts struggle to consistently apply qualified immunity, reaching opposing outcomes in analogous cases because the doctrine is unworkable. Though this Court purports to be interpreting a statute in its qualified immunity jurisprudence, the "special force" typically granted to stare decisis in statutory interpretation cases is unwarranted because qualified immunity does not even arguably derive from § 1983. And stare decisis here is at its nadir because qualified immunity deprives citizens of their constitutional rights. *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013).

Significantly, this Court has not adhered to stare decisis in its qualified immunity opinions but has readily changed course over time: It replaced its good-faith approach with the current "clearly established" test, *compare Pierson v. Ray*, 386 U.S. 547 (1967), *with Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and reversed its decision requiring courts to begin with an evaluation of the underlying constitutional claim, *compare Saucier*, 533 U.S. 194, *with Pearson v. Callahan*, 555 U.S. 223 (2009). And while the "clearly established" language dates back to 1982, it is the

Court's recent string of summary reversals of qualified immunity denials that is responsible for the doctrine creep that has left circuits uncertain how to apply the defense.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

Samuel Weiss
RIGHTS BEHIND BARS
416 Florida Avenue, NW
#26152
Washington, DC 20001

Kelsi Brown Corkran
Counsel of Record
Thomas M. Bondy
Tiffany R. Wright
Elizabeth R. Cruikshank
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
kcorkran@orrick.com

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