No. 19-1291

IN THE
Supreme Court of the United States

CHARLES HAMNER,

Petitioner,

v.

DANNY BURLS, et al.

Respondent.

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

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

Had Petitioner Charles Hamner filed his challenge to solitary confinement in all but three circuits, he would have been assured appellate review of the merits. But because he filed in the Eighth Circuit, the court below ignored the merits and raised *sua sponte* an affirmative defense that Respondents had waived or forfeited.

To obscure this clear split, Respondents make three unavailing arguments. First, that three sections of the Prison Litigation Reform Act ("PLRA") compelled the court's maneuver. But those provisions do not apply to Petitioner's appeal. Second, that the split is not a split, or at least not as deep as Petitioner describes. Not so. The split is precisely as Petitioner described: nine circuit courts never raise qualified immunity *sua sponte*, even in PLRA cases, and three sometimes do. The PLRA neither changes the score nor impacts Petitioner's summary reversal request. Finally, Respondents' argue that Petitioner lacks standing to seek review of *Pearson v. Callahan*, 555 U.S. 223 (2009). But Petitioner advanced the necessary arguments below, and they are "fairly included" within the questions presented.

I. The PLRA Did Not Authorize The Eighth Circuit To Raise Qualified Immunity *Sua Sponte*.

Respondents contend that three PLRA provisions—28 U.S.C. § 1915, 28 U.S.C. § 1915A, and 42 U.S.C. § 1997e—obliged the Eighth Circuit to raise qualified immunity *sua sponte*. BIO 11-17. That would come as a surprise to the court, which did not cite the

PLRA.[1] In any case, those provisions are inapplicable here.

Section 1915 only apples to *in forma pauperis* ("IFP") suits. 28 U.S.C. § 1915(a)(1). Although Petitioner proceeded IFP and pro se before the district court, he paid his full filing fee at the outset of appeal when counsel appeared. *See* Receipt for Appellate Docketing Fee, *Hamner v. Burls*, 937 F.3d 1171 (8th Cir. 2019) (No. 18-2181).[2] Section 1915A permits courts to screen out "nonmeritorious claims" and dismiss them *sua sponte* prior to service. *Jones v. Bock*, 549 U.S. 199, 213-14 (2007). While Petitioner's Fourteenth Amendment claim was originally dismissed at screening, he subsequently expanded upon it and then added two Eighth Amendment claims, all three of which were ultimately decided on Respondents' 12(b)(6) motion.[3] The Eighth Circuit was not reviewing a 1915A dismissal. Section 1997e is limited to "actions," not "action[s] or appeal[s]." "Had Congress intended to" authorize *sua sponte* appellate dismissals under Section 1997e, "it presumably would have done so expressly as it did in" Section 1915.

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[1] Indeed, Respondents cite only one decision—a pre-service screening case—where a circuit court reasoned that the PLRA authorized it to raise qualified immunity *sua sponte*. *Story v. Foote*, 782 F.3d 968, 969-70 (8th Cir. 2015).

[2] The Seventh Circuit apparently stands alone in concluding that Section 1915 applies to paid litigants. *See Bradley v. Sabree*, 842 F.3d 1291, 1292 n.1 (7th Cir. 2016) (per curiam) (identifying circuit split).

[3] Respondents appear to argue that Section 1915A authorizes district courts to screen prisoner complaints subsequent to service. BIO 11-12. To support this extra-textual interpretation, they cite to a single case, *Echols v. Craig*, that does not analyze successive screening. 855 F.3d 807, 810 (7th Cir. 2017).

Sandoz, Inc. v. Amgen, Inc., 137 S. Ct. 1664, 1668 (2017) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Regardless, Respondents have not identified any case where a circuit court relied on Section 1997e to *sua sponte* raise qualified immunity.

And there is another problem: Congress authorized courts to *sua sponte* screen and dismiss claims that are self-evidently meritless. *Jones*, 549 U.S. at 203-04. Unless a claim is truly novel—and Petitioner's is not, *see, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005)—it is not susceptible to *sua sponte* dismissal on the basis of qualified immunity. *See Porter v. Nussle*, 534 U.S. 516, 528 (2002) (noting the PLRA's purpose to "filter out groundless claims"). This makes sense—qualified immunity "depends on facts peculiarly within the knowledge and control of the defendant." *Gomez v. Toledo*, 446 U.S. 635, 641 (1980). Here, for example, were Petitioner to learn through discovery that Respondents knowingly violated the law, they would not be entitled to immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

II. The Circuits Are Divided.

Respondents characterize the circuits as exercising case-by-case discretion in a "fairly homogeneous manner." BIO 19. Far from it. Nine circuit courts never raise qualified immunity *sua sponte*, even in PLRA cases, and three sometimes do.

A. Nine Courts Of Appeals Never Raise Qualified Immunity *Sua Sponte*.

Respondents cite no case where the **First Circuit** raised qualified immunity *sua sponte*, but argue that the court would have done so here. BIO 20–21. To the contrary, if defendants do not press qualified immunity below—*even in a PLRA case*—the "claim is

reviewable, *if at all*, only for plain error" and "only" under circumstances where excusing forfeiture is necessary "to prevent a clear and gross injustice." *Surprenant v. Rivas*, 424 F.3d 5, 13-14 (1st Cir. 2005) (emphasis added). A failure to timely raise qualified immunity, does not satisfy the "clear and gross injustice" standard. *Id*.

Respondents imply that the **Third Circuit** would raise qualified immunity *sua sponte* in this case. BIO 21-22. But they cite neither a case where the court has done so nor one that suggests it would. *T.D. Bank N.A. v. Hill* is a contract case. 928 F.3d 259, 276 n.9 (3d Cir. 2019). The district court raised qualified immunity in *Torrey v. N.J. Dep't of Law & Pub. Safety*, 717 F. App'x 169, 171 (3d Cir. 2017). Defendants did in *Doe v. Delie*, 257 F.3d 309 (3d Cir. 2001). And in *Rauso v. Giambrone*, 782 F. App'x 99, 100 (3d Cir. 2019), the district court raised absolute immunity. The court is unequivocal: the defense of qualified immunity, when raised for the first time on appeal, "come[s] too late." *Halsey v. Pfeiffer*, 750 F.3d 273, 288 (3d Cir. 2014).

Respondents cite no case where the **Fourth Circuit** raised qualified immunity *sua sponte*, but imply that the court would have done so in this case. BIO 22-23. Not so. The cases they cite concern plaintiffs who raised immunity before the district court which, in each instance, decided the claim. *Id*. (citing *Noel v. Artson*, 297 F. App'x 216, 218 (4th Cir. 2008); *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 303 (4th Cir. 2006); *Smith v. Gilchrist*, 749 F.3d 302, 306 (4th Cir. 2014)). All are consistent with the court's approach: qualified immunity must be addressed in the district court to be considered on appeal. *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997). The court's method in PLRA cases

is identical. *See DePaola v. Clarke*, 884 F.3d 481, 488 n.4 (4th Cir. 2018) ("Defendants . . . did not raise . . . qualified immunity in their motions to dismiss . . . and, therefore, have waived that argument on appeal.")[4]

Respondents claim the **Fifth Circuit** has discretion to address unpreserved immunity defenses. BIO 23 (citing *Kelly v. Foti*, 77 F.3d 819 (5th Cir. 1996)). In *Kelly*, however, the Fifth Circuit explained that it could only consider a poorly preserved defense if not doing so would result in "grave injustice." 77 F.3d at 822–823. Respondents point to "protracted [] litigation" as evidence of grave injustice in this case. BIO 23. But the *Kelly* court expressly rejected that justification. 77 F.3d at 822. Absent grave injustice, the court consistently holds that qualified immunity must be first addressed in the district court. *See, e.g.*, *Peña v. City of Rio Grande City*, 879 F.3d 613, 621 (5th Cir. 2018); *Randle v. Lockwood*, 666 F. App'x. 333, 334, 336-37 (5th Cir. 2016); *Zapata v. Melson*, 750 F.3d 481, 486 n.3 (5th Cir. 2014). Although Respondents point to *Clay v. Allen*, 242 F.3d 679 (5th Cir. 2001), to argue the rules are different in PLRA cases, BIO 13, the court there declined to review qualified immunity in the first instance. 242 F.3d at 682. Of course, none of these cases even suggest that the Fifth Circuit would itself raise an unpreserved affirmative defense.

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[4] *Martin v. Duffy*, 858 F.3d 239 (4th Cir. 2017), a PLRA case, cited by Respondents for the proposition that the Fourth Circuit "may raise qualified immunity sua sponte," BIO 13, does not even remotely support that interpretation. The Fourth Circuit did not raise qualified immunity in *Martin—defendants* did. *Id.* at 250-51 & n.3.

Respondents do not identify a single instance in which the **Sixth Circuit** ruled on qualified immunity in the first instance, much less raised qualified immunity *sua sponte*. Instead, Respondents point to cases where defendants asserted the defense before the district court, the district court ruled on qualified immunity, or the Sixth Circuit refused to entertain immunity arguments introduced on appeal. *See* BIO 24 (citing *Berkshire v. Beauvais*, 928 F.3d 520, 530-31 (6th Cir. 2019) (qualified immunity raised and denied in the district court); *McNeal v. Kott*, 590 F. App'x 566, 569 (6th Cir. 2014) (similar);[5] *Jacobs v. Alam*, 915 F.3d 1028, 1035 (6th Cir. 2019) (district court denied qualified immunity); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 477 (6th Cir. 1990) (declining to address qualified immunity when not raised or decided below)). The court's approach in PLRA cases is identical. In *Small v. Brock*, 963 F.3d 539 (6th Cir. 2020), *see* BIO 13, the court declined to affirm a Section 1915 dismissal on the alternative ground of qualified immunity because "[i]t is [] for the district court to determine in the first instance." *Id.* at 543.

Respondents claim the **Seventh Circuit** has "emphatically endorsed th[e] view"—" in dicta"—that "district courts can raise qualified immunity *sua sponte* to dismiss PLRA suits," BIO 13-14, and "affirmed district courts' *sua sponte* grants of immunity in non-PLRA cases." BIO 25. But that does not mean the *circuit* court raises qualified immunity

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[5] Respondents assert that *McNeal* stands for the proposition that defendants need only challenge the merits to preserve immunity. BIO 24. Respondents badly mischaracterize *McNeal*, which merely considers whether failing to brief the clearly established prong on one occasion forfeits immunity when it is subsequently pressed on *three* separate occasions. 590 F. App'x at 568-69.

sua sponte where, as here, it was not addressed below. The Seventh Circuit's on-point rule *in PLRA cases* is this: defendants "waive"—not merely "forfeit"—qualified immunity by failing to raise it in dispositive briefing in the district court *even* when they raise it in an answer and press it on appeal. *Henry v. Hulett*, 969 F.3d 769, 785-87 (7th Cir. 2020) (en banc). Construed as mere forfeiture, defendants' predicament would "not present an exceptional circumstance that would warrant its consideration in the first instance on appeal." *Id.* at 786-87.

Respondents concede that the **Tenth Circuit** recently rejected the practice of *sua sponte* raising qualified immunity in PLRA cases. BIO 25 (citing *Greer v. Dowling*, 947 F.3d 1297 (10th Cir. 2020)). They speculate, however, that the court "is unlikely to follow *Greer*" going forward. *Id.* Respondents justify this view on four grounds, none persuasive. First, that *Greer* conflicts with the general rule that an appellate court may affirm on any basis supported by the record. *Id.* at 25-26. But the Tenth Circuit does not raise qualified immunity *sua sponte*—even if supported by the record. *Montoya v. Vigil*, 898 F.3d 1056, 1063 (10th Cir. 2018). Second, that *Greer* conflicts with "holdings that district courts may raise qualified immunity *sua sponte*." BIO 26. But that does not mean the Tenth Circuit does, and moreover ignores the court's admonition that *sua sponte* dismissal in the district court is "reserved" for "extraordinary instances." *Banks v. Geary Cty. Dist. Ct.*, 645 F. App'x 713, 717 (10th Cir. 2016). Third, that *Greer* conflicts with cases reviewing "forfeited" qualified immunity arguments. BIO 26. But in the cases Respondents cite, defendants raised qualified immunity. *Cox v. Glanz*, 800 F.3d 1231, 1245-46 & n.7 (10th Cir. 2015); *Sayed v. Virginia*, 744 F. App'x 542, 544 (10th Cir. 2018).

Finally, Respondents explain that *Greer* conflicts with their theory of the PLRA. BIO 25. But that theory falls flat.

Respondents also imply that the **Eleventh Circuit** would raise qualified immunity *sua sponte* in this case. BIO 13, 26-27. But none of the cases they cite support this claim. In *Lillo ex rel. Estate of Lillo v. Bruhn*, 413 F. App'x 161 (11th Cir. 2011), defendants raised qualified immunity in the district court. *See* Answer at 6, *Lillo v. Bruhn*, 2009 WL 3177584 (N.D. Fla. Sept. 28, 2009) (No. 3:06cv247), ECF No. 5. In *Shepard v. Davis*, 300 F. App'x 832, 836 n.7 (11th Cir. 2008), the district court raised qualified immunity and the defense was fully briefed in the district court. And in *Manzini v. The Fla. Bar*, 511 F. App'x 978, 980 (11th Cir. 2013), defendants raised absolute and qualified immunity in the district court. Rather, where defendants do not properly raise qualified immunity in the district court, the defense is "waived"—even in PLRA cases. *Skrtich v. Thornton*, 280 F.3d 1295, 1306-7 (11th Cir. 2002).

Respondents concede that the **D.C. Circuit** has "refused to affirm on the alternative ground of qualified immunity where immunity was not raised below." BIO 27 (citing *Robinson v. Pezzat*, 818 F.3d 1, 11 (D.C. Cir. 2016)). Nonetheless, Respondents argue "it is hardly clear" the court "would decide *this case* any differently." *Id.* First, Respondents argue that the court has held that the PLRA authorized a district court to raise qualified immunity *sua sponte* pre-service. *Id.* (citing *Redmond v. Fulwood* 859 F.3d 11, 13 (D.C. Cir. 2017)). But in that case, defendants raised absolute immunity in the district court and qualified immunity in the court of appeals, and the circuit court merely concluded that qualified

immunity was a better fit. *Redmond*, 859 F.3d at 14. Second, Respondents argue that the court "may well adopt a more lenient view on forfeitures of qualified immunity in time." BIO 27. What a court might do in the future is beside the point.

B. Three Courts Of Appeals Sometimes Raise Qualified Immunity *Sua Sponte*.

Relying on Second, Eighth, and Ninth Circuit precedent, the court below reasoned that it was likewise entitled to raise qualified immunity *sua sponte*. Pet. App. 7a. Although Respondents effectively concede that these courts sometimes raise qualified immunity *sua sponte*, BIO 28-30, they contend that this does not create a split for two reasons. First, Respondents state that the Eighth Circuit only raises qualified immunity *sua sponte* in PLRA cases. BIO 28-29. Second, Respondents argue that the Second and Ninth Circuits only raise qualified immunity *sua sponte* under "exceptional circumstance[s]." BIO 29-30. Even if accurate, neither rationale is persuasive. That three circuits are inconsistent does not mean that the courts are unified.

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Had this case been raised in nine other courts of appeals, Petitioner would have been entitled to appellate review on the merits. In the court below and in two others, he might earn *sua sponte* dismissal from a circuit court determined to put its thumb on the scale for defendants. The split is deep, and it should be resolved.

III. This Court Should Resolve The Second Question.

A. Petitioner Has Standing.

Respondents' standing argument falls short. Petitioner argued below that Respondents violated his clearly established Eighth and Fourteenth Amendment rights. Pet. App. 4a-5a. Before this Court Petitioner seeks reversal on the basis that the Eighth Circuit erred in not reaching the merits of those claims. Petitioner's earlier contention that clearly established law forbids the challenged conduct is "fairly included" within the questions presented. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Accordingly, Petitioner has standing to ask this Court to revisit *Pearson v. Callahan*, 555 U.S. 223 (2009).

B. The Question Is Important.

Respondents correctly note that the circuit courts exercise *Pearson* discretion to avoid constitutional questions in 19 to 27 percent of cases, but they incorrectly deduce from that statistic that there has been no constitutional stagnation. BIO 35-37. In fact, post-*Pearson*, appellate courts find new constitutional violations at roughly half the rate they did under *Saucier v. Katz*, 533 U.S. 194 (2001). Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37–38 (2015). This Court has long called for constitutional scrutiny of solitary confinement. *See, e.g.*, *Davis v. Ayala*, 576 U.S. 257, 288-89 (2015) (Kennedy, J., concurring). With *Pearson* standing in the way, the practice will continue to "fall through the cracks." Nielson & Walker at 38.

IV. In The Alternative, This Court Should Summarily Reverse.

The Eighth Circuit did not—nor could it—raise qualified immunity *sua sponte* pursuant to the PLRA. It was therefore incumbent upon Respondents to assert the defense.[6] They did not. Accordingly, the decision below is irreconcilable with *Gomez v. Toledo*, 446 U.S. 635 (1980), and this Court should summarily reverse on that basis.

Further, because the PLRA did not authorize the panel's approach, its decision to revive a waived or inexcusably forfeited affirmative defense is incompatible with this Court's waiver and forfeiture cases. Those cases deny "authority" to excuse waiver and only grant permission to excuse forfeiture in "exceptional cases" implicating "concerns broader than those of the parties." *Wood v. Milyard*, 566 U.S. 463, 472-73 (2012). Beyond the manner in which the appellate court resolved this case, it is unexceptional.

CONCLUSION

The Court should grant the petition and resolve the questions presented. Alternatively, it should summarily reverse.

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[6] Even when prompted by the Eighth Circuit, Respondents did not assert qualified immunity as to Petitioner's mental health care claim. *See* Appellees' Supplemental Br. 7, 11. Relatedly, Respondents argue that Petitioner failed to name the defendants responsible for interfering with his mental health care. BIO 4-5. Not so. He laid that blame at the feet of the same correctional officers who were responsible for his solitary confinement. Am. Compl. 5, 8.

Respectfully submitted,

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