No. 21-1065

IN THE
Supreme Court of the United States

DENNIS WAYNE HOPE,

Petitioner,

v.

TODD HARRIS, ET. AL.

Respondents.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

Petitioner Dennis Wayne Hope has been in solitary confinement for 27 years. Pet.3. Such a duration of isolation is a historical anomaly, unheard of at the time of the Founding and vanishingly rare in the centuries since. Pet.19-21; Amicus Br. of Professor John F. Stinneford 6-12. And Mr. Hope has alleged that Respondents kept him in solitary confinement long after there was any basis to do so, rubber-stamping his ongoing isolation year after year. Pet.22-23, 31-32. In at least five circuits, those allegations would suffice to state an Eighth Amendment claim; in at least seven, they would state a Due Process Clause claim. Pet.10-13, 33-35.

Respondents don't contest any of that. Instead, they claim that they have managed to moot Mr. Hope's request for injunctive relief by placing him in

a "transition program." BIO.12-13. But Respondents mispresent the current state of affairs, and even on Respondents' telling, they placed Mr. Hope in the program after some 27 years in solitary confinement and nearly 17 years after he ceased to be considered an escape risk—and just one week after the petition for certiorari was filed in this case. Respondents supply no reason to believe the timing is a coincidence, and they certainly haven't carried the "heavy burden" of making "absolutely clear" that "the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017).

Respondents' remaining arguments are similarly inapposite. Respondents claim that because the Fifth Circuit allowed a *different* Eighth Amendment claim—for unsanitary conditions—to go forward, this Court should hold off on reviewing Mr. Hope's entirely separate claims regarding the deprivation of human contact for nearly three decades. BIO.14-16. But that's never been this Court's rule. *Infra*, n.4. And Respondents spend a quarter of their Brief in Opposition summarizing a dramatized TV version of Mr. Hope's crimes and quoting from an interview Mr. Hope gave in the mid-1990s. BIO.3-8. But they do not dispute that, in the quarter century since those crimes and that interview, at least eight individual correctional officials and a committee of security experts have concluded that Mr. Hope has changed such that solitary confinement was not necessary. Pet.App.75a¶36; Pet.App.78a¶42.

Respondents cannot contest that the questions presented are exceptionally important, for Mr. Hope, whose mind and body have deteriorated from so many

years of near-total isolation; for the more than 500 prisoners in Texas who have languished without human contact for more than a decade; and for thousands around the country (and the judges fielding their claims) who have spent even a fraction of the time Mr. Hope has spent in solitary confinement.

This Court should grant certiorari.

I. This Court Should Resolve Whether Decades Of Solitary Confinement Can, In At Least Some Circumstances, Violate The Eighth Amendment.

A. *Split.* Respondents don't deny there is a square split among the circuits. Five circuits hold that solitary confinement may sometimes violate the Eighth Amendment; three have held that isolation cannot violate the Eighth Amendment, no matter the term or the reason for its imposition; and the Court below sided with the latter circuits, finding that the deprivation of human contact cannot violate the Constitution without some other, accompanying deprivation. Pet.10-16; Pet.App.17a n.5.

Respondents implausibly suggest (BIO.17) that, actually, the Fifth Circuit adopted a rule that "solitary confinement can violate the Eighth Amendment, depending on its length, its impact on a prisoner's mental and physical health, and its necessity." Not so. The Fifth Circuit's opinion made no mention of Mr. Hope's "mental and physical health" or the "necessity" of solitary confinement, and its only mention of length came in the footnote dismissing the notion that solitary confinement could give rise to an Eighth Amendment claim. Pet.App.17a n.5.

Respondents argue otherwise (BIO.17) because the Fifth Circuit reversed the dismissal of a *different* Eighth Amendment claim, for "unsanitary conditions, including urine, feces, and mold" in cells. Pet.App.20a. But that claim is entirely separate from the Eighth Amendment claim at issue in this petition. Housing Mr. Hope in "unsanitary conditions" for weeks would violate the Eighth Amendment even if he weren't in isolation, *see Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020), and depriving Mr. Hope of human contact for decades for no good reason would violate the Eighth Amendment even if he were kept in spotless cells.[1]

And as to the claim at issue here, the Fifth Circuit said only that the "sheer length…of an isolation sentence" cannot give rise to an Eighth Amendment claim, a rule that aligns it with the short side of a longstanding circuit split. Pet.App.17a n.5; Pet.9-16.

B. *Merits.* Respondents do not dispute that a quarter century of solitary confinement is "cruel"—understood for centuries as a form of torture. Pet.16-19. They don't dispute that solitary confinement of such a duration is "unusual"—virtually unheard of in

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[1] Respondents' citation (BIO.17) to the Fifth Circuit's holding that "it is unclear from Hope's complaint" if several Respondents were "even aware of the conditions of which he complains" is similarly a sleight of hand. The Fifth Circuit held some Respondents were not aware of the unsanitary conditions of Mr. Hope's cells; it did not address whether Respondents knew about Mr. Hope's solitary confinement. Pet.App.20a. Indeed, the Fifth Circuit could not have found Respondents anything but "aware" of Mr. Hope's solitary confinement, given Mr. Hope's allegations that each Respondent signed off on his isolation every six months. Pet.App.59a-61a¶¶5-11; Pet.App.71a-72a¶¶29-30; Pet.App.72a-75a¶¶33-35; Pet.App.77a-78a¶¶39-42.

the history of the Republic and even now imposed on a small number of prisoners, mostly in Texas.[2] Pet.19-21. And they don't dispute that it is "punishment," of the sort that, at the time of the Founding, would have been meted out by courts rather than prison bureaucrats. Pet.21.

Respondents nonetheless claim that Mr. Hope's treatment does not violate the Eighth Amendment's prohibition on "cruel and unusual punishment" because "his conditions of confinement are not totally without penological justification." BIO.19. That argument flouts the standard of review: Respondents don't dispute that at least eight prison officials found no reason for Mr. Hope to remain in solitary confinement, stretching back 15 years, so it's a more-than-plausible inference that there has been no "penological justification" to keeping him in isolation for most of his time in solitary confinement.[3]

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[2] Email from Tammy Houser, Texas Department of Criminal Justice, to Counsel for Petitioner (Jan. 13, 2022) (on file with counsel) (529 prisoners in Texas have spent more than 10 years in solitary confinement); The Correctional Leaders Association & The Arthur Liman Center for Public Interest Law at Yale Law School, *Time-in-Cell 2019: A Snapshot of Restrictive Housing* 12-13 tbl.2 (Sept. 2020) (431 prisoners in all jurisdictions other than Texas have spent six or more years in solitary confinement).

[3] Respondents' argument that Mr. Hope remained a security threat rests on two sources, neither appropriately before this Court. The first is a TV show that is, by its own terms, a dramatization rather than a documentary (for instance, Mr. Hope never robbed "armored-vehicle guards at gunpoint"). BIO.3-7, 21; *I (Almost) Got Away With It*, Season 3, Episode 10 (first aired June 28, 2011), at 00:03-00:07, 6:38-8:31. The second is a prison grievance form, which was mentioned nowhere in Respondents' briefing below, and for good reason: Failure to

Pet.App.72a-73a¶33; PetApp.75a¶36; Pet.App.78a¶42.

More importantly, the Fifth Circuit didn't dismiss Mr. Hope's claim because it found a "legitimate penological interest." That phrase appears nowhere in the Fifth Circuit's opinion, and the Fifth Circuit's discussion of Mr. Hope's Eighth Amendment claim does not even mention his escape. Pet.App.17a-24a. Respondents are free to explain on remand why they think keeping Mr. Hope in solitary confinement for decades is justifiable. But Respondents have not attempted to defend the Fifth Circuit's actual answer to the question presented.

C. ***Vehicle.*** Respondents don't contest that, at every junction, Mr. Hope pressed his claim that being unnecessarily deprived of human contact for 27 years violates the Eighth Amendment. Pet.24. Instead, Respondents argue that Mr. Hope's request for injunctive relief is moot and that his request for damages is not ripe. BIO.12-16. Neither is correct

1. *Injunctive Relief.*

a. A defendant arguing mootness has the "heavy burden" of making "absolutely clear" that the "allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran*, 137 S. Ct. at

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exhaust is an affirmative defense that Respondents haven't raised, *see Jones v. Bock*, 549 U.S. 199, 211-17 (2007); Mr. Hope has alleged that the grievance process does not reflect the actual basis for his ongoing solitary confinement, BIO.19-20; Pet.App.78a¶42; Pet.App.79a¶44; and there's no requirement that Mr. Hope contest findings in the grievance process that he'd already contested in the placement review process, *see Sims v. Apfel*, 530 U.S. 103, 107 (2000).

2019 n.1. That burden is heightened where the defendant voluntarily ceases the challenged conduct because in such cases "there is reason to be skeptical that cessation of violation means cessation of live controversy." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 214 (2000) (Scalia, J., dissenting). And it's at its apex when the timing of the voluntary cessation appears "designed to insulate a decision from review by this Court." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012).

Here, on Respondents' own telling, Mr. Hope's claim for injunctive relief was supposedly mooted on February 7, 2022—27 years after he was placed in solitary confinement, 17 years after correctional officials removed the "escape risk" designator from his file, four years after the start of this litigation, but only one week after the filing of the petition for certiorari. BIO.App.1a-2a¶2; Pet.App.61a-62a¶12; Pet.App.78a¶42; Pet.App.59a. Because Respondents supply no reason to believe that timing is simply a coincidence, their suggestion of mootness must be "viewed with a critical eye." *Knox*, 567 U.S. at 307; BIO.12-13.

In any event, Respondents nowhere make it "absolutely clear" that Mr. Hope won't be subjected to unnecessary solitary confinement again; they don't suggest that their policies or practices have changed, and in fact, their brief explicitly contemplates that Mr. Hope might return to isolation. *See Trinity Lutheran*, 137 S. Ct. at 2019 n.1; BIO.13. Indeed, Respondents "vigorously defend[] the constitutionality" of Mr. Hope's 27 years in solitary confinement, a consideration this Court has held

dispositive in rejecting a suggestion of mootness. *See Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); BIO.19-20.

b. Respondents' suggestion of mootness should be viewed with a "critical eye" for another reason. They misrepresent the current state of affairs. Respondents submit a declaration claiming that, as of May 4, 2022, Mr. Hope had a cellmate and was being served communal meals. BIO.12; BIO.App.2a. Both were false: Mr. Hope did not have a cellmate, and Mr. Hope had not eaten a meal with another human being in decades (though, after filing the Brief in Opposition claiming to have already done so, Respondents gave Mr. Hope his first communal meal on May 9).

Those misrepresentations, combined with the allegations in Mr. Hope's complaint, give cause to question Respondents' assertion that Mr. Hope "is not going to be subject to the challenged review procedure again." BIO.12. Respondents offer that they would not return Mr. Hope to solitary confinement absent a "disciplinary violation" that would "warrant" it. BIO.13. But according to the complaint, Respondents kept Mr. Hope in solitary confinement for more than 17 years after security experts concluded there was no "warrant" for his isolation, and Respondents don't suggest any reason something similar could not recur. Pet.App.78a¶42.

c. In any event, a suggestion that Mr. Hope's request for injunctive relief is moot poses no obstacle to this Court's review. As Respondents concede, this Court's Article III jurisdiction is secure because Mr. Hope's damages claim is not moot. BIO.14. This Court's usual course, should it hear the case, would be to resolve the question presented, then remand for a

district court to consider whether Respondents have met their burden of showing that an injunctive-relief request is moot. *Laidlaw*, 528 U.S. at 210-12. Respondents offer no reason this Court would depart from that usual course here.

2. *Damages.*

a. Respondents argue (BIO.14-16) that review should be denied on Mr. Hope's solitary confinement claim because the Fifth Circuit allowed two of Mr. Hope's *other* claims—for unsanitary cell conditions and retaliation—to go forward. That's never been this Court's rule.[4] And such a rule would make little sense here, where the solitary-confinement claim that the Fifth Circuit rejected was the core of Mr. Hope's case: The first sentence of his complaint, the last sentence of his complaint, almost all of his district-court briefing, and two-thirds of his Fifth Circuit brief focus on the deprivation of human contact. Pet.App.59a-80a.

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[4] *Compare, e.g.*, *Taylor v. Stevens*, 946 F.3d 211, 222-25 (5th Cir. 2019) (allowing some claims to proceed); *Sossamon v. Texas*, 560 F.3d 316, 335 (5th Cir. 2009) (same); *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 650-51 (5th Cir. 2004) (same) *with Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (granting certiorari as to claim that was not allowed to proceed); *Sossamon v. Texas*, 563 U.S. 277, 280 (2011) (same); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 (2005) (same). Respondents' citations to the contrary are largely where defendants petition for certiorari after a claim is allowed to *proceed*, in which case this Court may prefer to wait to see how the claim develops. BIO.14-16; *see Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari). Where, as here, a claim has been *dismissed*, there will of course be no further development.

b. Respondents also suggest (BIO.14) that "thorny questions about qualified immunity would complicate this Court's review of" the damages claims. But Respondents have not actually raised the defense of qualified immunity. That fact actually makes Mr. Hope's case a uniquely suitable vehicle for this Court to address the question presented: In *other* solitary confinement cases, defendants will raise qualified immunity, such that "thorny questions" may stymie review.

c. Finally, Respondents claim that Mr. Hope's request for damages is "not yet ripe." BIO.14. That's misleading at best. True, the Fifth Circuit remanded for the district court to decide which defendants Mr. Hope could proceed against for damages. Pet.App.11a-12a. But the remand to identify particular defendants obviously does not apply to the Eighth Amendment solitary confinement claim because the court of appeals rejected that claim *in toto*. Pet.App.17a n.5. For purposes of that Eighth Amendment claim, it's irrelevant which defendants might be amenable to suit for the other, surviving claims.

D. *Importance.* Finally, Respondents don't contest that the question presented is important. Mr. Hope's vocal cords have atrophied from lack of use, his muscles from having only a three-foot-square space for movement, and his eyesight from staring only at the inside of a cage. Pet.App.61a-62a¶12; Pet.App.70a-71a¶27. He has been plagued by hallucinations and thoughts of suicide. Pet.App.71a¶28. And Respondents provide no reason to believe he won't suffer the same fate again. *Supra*, 6-8.

That Texas has attempted to moot this case and that the Fifth Circuit has refused to address the question presented in more than a cursory fashion should not stop this Court from resolving an important circuit split, particularly since the prisoners most affected by the question presented—those who have been in solitary confinement for a decade or longer—are concentrated in Texas. *Supra*, n.2.

This Court is not likely to see a vehicle like this one again—a claim pressed at every stage, no qualified immunity overlay, from a prisoner who is not laboring under a capital sentence and whose conditions mirror those abandoned as too cruel at various points in our Nation's history. Pet.13 n.4, 24-26. And it certainly will not see one from a prisoner who has spent nearly three decades in solitary confinement, because as unusual as it is to spend so many years in isolation, it is rarer still that someone deprived of meaningful human contact for decades on end will retain enough of their faculties to draft a complaint.

II. This Court Should Make Clear That Hearings With A Pre-Ordained Outcome Do Not Satisfy The Due Process Clause's Requirement Of Periodic Reviews.

Respondents don't contest that decades of isolation deprived Mr. Hope of a liberty interest within the meaning of the Fourteenth Amendment. They don't contest that, as Judge Haynes put the point in dissent, "if Hope is correct that the forty-eight SCC hearings were a 'sham,' then it would be as if he had never attended any hearings at all." Pet.33-36; Pet.App.29a.

Respondents (BIO.20) instead claim that Mr. Hope's "allegations are, at most, merely consistent with wrongdoing." But Respondents entirely ignore Mr. Hope's key allegations: first, that Respondents don't actually review Mr. Hope's case, but instead make small talk about anything else; second, that Respondents falsely disclaimed any ability to remove him from solitary confinement (even though Texas regulations give them that power); and third, that Respondents do not assess whether Mr. Hope is an ongoing security risk. Pet.App.71a-72a¶30; Pet.App.72a-75a¶¶33-35; Pet.App.76a-77a¶¶38-40.

Respondents completely ignore the first two allegations. As for the third, Respondents don't dispute that that allegation standing alone would be sufficient to state a claim in seven circuits. Pet.33-36. Respondents nonetheless claim that this Court's decision in *Hewitt v. Helms*, 459 U.S. 460 (1983), sanctions hearings with a pre-ordained outcome. BIO.21. Not so. *Hewitt* did not require formal submission of new evidence, but it made clear that the Due Process Clause requires prison officials to "engage in some sort of periodic review" to ascertain "whether a prisoner *remains* a security risk." 459 U.S. at 477 n.9 (emphasis added).

Mr. Hope has suffered a quarter century without meaningful human contact, and that deprivation of liberty was imposed entirely at the say-so of unaccountable correctional administrators, a historical anomaly. Pet.37. At the very least, Mr. Hope was entitled to have those administrators meaningfully consider whether he could be safely housed outside of solitary confinement.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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