No. 21-1141

IN THE
Supreme Court of the United States

CHARLES WADE,

Petitioner,

v.

GORDON LEWIS,

Respondent.

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

BRIEF OF RIGHTS BEHIND BARS AND THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Rights Behind Bars (RBB) legally advocates for people in prison to live in humane conditions and contributes to a legal ecosystem in which such advocacy is more effective. RBB seeks to create a world in which people in prison do not face large structural obstacles to effectively advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively and through such advocacy push towards a world in which people in prison are treated humanely.

The Roderick & Solange MacArthur Justice Center (MJC) is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for civil rights and a fair and humane criminal justice system. MJC has represented clients facing a myriad of civil rights injustices and frequently litigates on behalf of individuals subjected to unconstitutional conditions of confinement. MJC has an interest in ensuring accountability for civil rights violations by preventing the unwarranted expansion of qualified immunity.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit granted qualified immunity to a correctional officer who ignored the pleas for medical assistance from a prisoner who was "bleeding all over" and leaving behind a "path of blood." It did so by distinguishing the act of ignoring a "*path* of blood"

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

from a bleeding prisoner forced to walk from the act of ignoring a "*pool* of blood" from a bleeding prisoner forced to stay still.

The Eleventh Circuit erred. It required factually identical precedent when both the court's past precedent and the broader legal principles were adequate to put the defendant on notice. Though this Court has long held that in "obvious" cases, general principles of constitutional law provide government officials with all the notice necessary to override the defense of qualified immunity, *see, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002), lower courts have flouted that settled rule. Last October Term alone, this Court twice reversed or vacated lower courts for granting qualified immunity despite the presence of obvious constitutional violations. *See Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021).

Like handcuffing an incarcerated person to a hitching post in the blazing Alabama sun, *Hope*, 536 U.S. at 737-38, forcing a prisoner to lie naked atop human excrement for days on end, *Taylor*, 141 S. Ct. at 53-54, and attacking an incarcerated person with pepper spray "for no reason at all," *McCoy*, 141 S. Ct. 1364, taking a prisoner leaving a trail of blood behind him and throwing him into solitary confinement instead of bring him medical assistance is sufficiently unlawful that corrections officers need not have opened a casebook to understand that their conduct was prohibited under the Constitution. Relying on such minute distinctions in granting qualified immunity effectively bars recovery for plaintiffs injured by the unconstitutional acts of a government official. The court's error is no less egregious than those in *Taylor* and *McCoy*.

Also like in *Taylor* and *McCoy*, the court's mistake appears to be the result of granting both substantive and remedial deference to prison officials. The substantive law governing prison conditions is already uniquely deferential to government defendants. When courts erroneously stack a deferential qualified immunity analysis on top of the requisite substantive deference, the burden on plaintiffs is all but insurmountable, even when the conduct is indefensible and obviously unconstitutional. That is what occurred here. This Court should either grant plenary review and resolve the circuit split in favor of petitioner or summarily reverse.

I. GOVERNMENT OFFICIALS MAY VIOLATE "CLEARLY ESTABLISHED LAW" WITHOUT PRIOR FACTUALLY IDENTICAL DECISIONS.

Overcoming qualified immunity does not require plaintiffs to find a case with a virtually identical factual scenario. The Eleventh Circuit erred first by distinguishing this case from its own precedent by relying on trivial distinctions. It erred again in holding that an officer ignoring the pleas for help from a prisoner leaving a trail of blood before locking him in a solitary confinement cell did not qualify as obvious deliberate indifference to medical care, which would obviate the need for precisely analogous precedent.

The Eleventh Circuit's cramped view of the qualified immunity inquiry cannot be squared with this Court's rationalizations for the defense. This Court has repeatedly explained that the relevant question is whether analogous precedent provided

notice to defendants, not whether a court has held that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Therefore, a "general constitutional rule" identified in prior cases provides fair warning when it applies with "obvious clarity to the specific conduct in question." *Taylor*, 141 S. Ct. at 53-54 (citation omitted). Obviousness alone can provide fair warning to officials that their acts are unlawful. *See, e.g.*, *Taylor*, 141 S. Ct. at 53-54; *Hope*, 536 U.S. at 741-46.

Just last term, this Court twice considered it necessary to remind the lower courts of these principles. First, in *Taylor*, this Court summarily reversed the Fifth Circuit for its unduly narrow view of the clearly established inquiry in a prison conditions case. 141 S. Ct. at 53-54. Prison officials had confined the plaintiff in a cell covered with feces for four days, followed by two days without clothing in a frigid cell that had a clogged drain overflowing with human waste, forcing the plaintiff to sleep naked on the floor in raw sewage. *Taylor v. Stevens*, 946 F.3d 211, 218-19 (5th Cir. 2019). But, because the lower court had not previously held that prisoners could not be "housed in cells teeming with human waste" for "only six days," it concluded that the law was not clearly established. *Id.* at 222.

This Court, however, was untroubled by the absence of a prior case establishing that the specific duration of time a plaintiff was held in the conditions at issue in Taylor was unconstitutional. *Taylor*, 141 S. Ct. at 53-54. Instead, the "obviousness of [the plaintiff's] right" to be free from "such deplorably unsanitary conditions for such an extended period of time" was apparent from the "general constitutional rule" barring deliberate indifference under the Eighth

Amendment. *Id.* at 53-54 & n.2 (quoting *Hope*, 536 U.S. at 741).

Several months later, this Court granted, vacated, and remanded in another qualified immunity case, *McCoy v. Alamu*, 141 S. Ct. 1364 (2021). In *McCoy*, the Fifth Circuit had rejected the plaintiff's argument that being pepper sprayed by a prison guard "for no reason" was an "obvious" violation of the general rule that prison officials cannot act "maliciously and sadistically to cause harm." See *McCoy v. Alamu*, 950 F.3d 226, 229, 234 (5th Cir. 2020). Notwithstanding Fifth Circuit caselaw clearly establishing that punching a prisoner in the face for no reason, *Cowart v. Erwin*, 837 F.3d 444, 449, 454-55 (5th Cir. 2016), or tasing a prisoner without provocation, *Newman v. Guedry*, 703 F.3d 757, 763-64 (5th Cir. 2012), violates the Eighth Amendment, the majority granted the guard qualified immunity because it had never held that a guard could not pepper spray a prisoner for no reason. *McCoy*, 950 F.3d at 232-33. The dissent centered on obviousness, vigorously contending that the fact that the "weapon of choice was pepper spray" instead of a fist or a taser did not matter, and that the majority erred in not applying the "obviousness exception." *Id.* at 235, 236 (Costa, J., dissenting). This Court apparently agreed, and instructed the Fifth Circuit to reconsider in light of *Taylor*. 141 S. Ct. at 1364.

McCoy and *Taylor* emphasized to lower courts what this Court has repeatedly articulated—factually identical precedent is not necessary to defeat qualified immunity, especially when the illegality of the conduct is obvious. As Justice Gorsuch once astutely pointed out, "the most obviously unlawful things happen so rarely that a case on point is itself an

unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015). Without the obviousness doctrine, the more "flagrantly unlawful" the action, the more likely an official would be to escape liability. *See id.*; *see also Bellotte v. Edwards*, 629 F.3d 415, 424 (4th Cir. 2011) (Wilkinson, J.) ("The absence of 'a prior case directly on all fours' here speaks not to the unsettledness of the law, but to the brashness of the conduct.").

One city attorney whose job consists of *defending* officers against Section 1983 claims recently urged that "courts should more frequently withhold qualified immunity from officers who commit obvious constitutional violations" to "ensure that reckless and incompetent officers are held accountable, thereby increasing the public's trust in the justice system and ensuring that constitutional rights are meaningfully enforced." Alexander J. Lindvall, *Qualified Immunity and Obvious Constitutional Violations*, 28 GEO. MASON L. REV. 1047, 1049 (2021); *see also* Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 437 (2018) ("[T]he question of whether there is fair warning is often ignored in practice, but nonetheless appears to be the question lower courts ought to ask.").

Were this Court to fail to police the abdication of the obviousness principle by lower courts, conduct so cruel and shocking that it is unlikely to ever be repeated by more than one government official, let alone in any given circuit—like leading a prisoner leaving a trail of blood to a solitary confinement cell, telling him it is not his job to care—would enjoy immunity, while only common and mundane violations would be punished. *See Lindvall*, supra, at

1065-76 (collecting "jaw-dropping" cases); Joanna Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L. J. 305, 350-51 (2020) (observing that robust application of the obvious violation doctrine would "limit[] one of the most troublesome aspects of the Court's qualified immunity jurisprudence"). This result would be perverse.

II. THE ELEVENTH CIRCUIT ERRONEOUSLY STACKED REMEDIAL DEFERENCE ATOP SUBSTANTIVE DEFERENCE.

Erroneously stacking deference to government officials who raise the defense of qualified immunity on top of the uniquely deferential substantive law governing conditions of confinement leads to a standard that incarcerated plaintiffs can virtually never meet, regardless of circumstances. This unauthorized (and unsound) deference-stacking results in lower courts sanctioning abhorrent behavior by prison officials. It also amounts to a clean break from the purported justification for qualified immunity, which is notice.

This Court has repeatedly asserted that prison officials are due a unique level of deference. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 85 (1987); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973); *see also* Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1426 (2019) (explaining that the Court's deference doctrines result "in a prisoners' rights jurisprudence in which deference becomes its own transsubstantive rule—call it the penal power doctrine—under which prison administrators may infringe recognized constitutional rights in ways that other state actors cannot"); Sharon Dolovich, *Forms of*

Deference in Prison Law, 24 FED. SENT'G REP. 245 (2012) (writing that "judicial deference" "is arguably the primary driver of the Court's prisoners' rights jurisprudence"). This deference is not a mere defendant-friendly gloss on constitutional claims but instead drives the creation of demanding standards for all varieties of prison rights claims.[2]

In *Taylor*, the governing standard for the plaintiff's conditions of confinement claim was that the plaintiff could not be deprived of the "minimal civilized measure of life's necessities." *Palmer v. Johnson*, 193 F.3d 346, 352–53 (5th Cir. 1999). The Fifth Circuit held that six days in unimaginable conditions did indeed constitute a denial of life's necessities but that defendants were not sufficiently on notice that it was so, as while the court's precedent had established that many months in filthy conditions violated the constitution, it had never held as much when the stay lasted only days. *Taylor v. Stevens*, 946 F.3d 211, 217 (5th Cir. 2019). "That doom[ed] Taylor's claim." *Id.* The court relied on this Court's Fourth Amendment cases in explaining its reasoning. *See id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)).

In *McCoy*, the Eighth Amendment standard for excessive force was whether the officer had acted "maliciously and sadistically to cause harm." *Hudson*

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[2] Few of this Court's qualified immunity cases reversing on behalf of government defendants occurred in the prison context while all three cases over the same timespan articulating the importance of notice to reverse or vacate on behalf of plaintiffs involved prison conditions. *McCoy*, 141 S. Ct. at 1364; *Taylor*, 141 S. Ct. at 53-54; *Hope*, 536 U.S. at 741-46. This is likely not a coincidence but rather a result of lower court errors in deference-stacking. This petition is another example.

v. McMillian, 503 U.S. 1, 7 (1992).[3] The Fifth Circuit held that the plaintiff being pepper sprayed in the face for no reason met this standard, but not obviously so. After all, "[t]he Supreme Court has repeatedly admonished courts not to define the relevant law too capaciously," citing to this Court's Fourth Amendment qualified immunity jurisprudence. *McCoy*, 950 F.3d at 234. The injury to McCoy was not particularly severe and the officer promptly cleaned him up afterwards—this created enough ambiguity for the court to make the malice and sadism not "obvious." *Id.*

Those failures to designate egregious conduct obviously unlawful for purposes of qualified immunity amount to an unsound expansion of the deference already owed to prison officials by the substantive doctrines governing prisoner claims. Such deference stacking has repeatedly led to the sanctioning of flagrantly unconstitutional conduct that this Court was ultimately required to summarily reverse or vacate.

The present case is no different. The substantive standard in the present case is once again high—a prison official must demonstrate deliberate indifference to a serious medical need, constituting cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The court once again cited to

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[3] This language is noticeably different from the test for a Fourth Amendment excessive force claim that occurs outside of prison, which simply asks whether the use of force was objectively reasonable. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Importantly, this reasonableness requirement is not only more lenient than the "malicious and sadistic" standard but also—in the absence of binding case law—provides far less notice to government officials of what conduct is constitutional.

Fourth Amendment case law to demonstrate the importance of specificity in defining clearly established rights, Pet. App. 15a, and, by doing so, impermissibly stacked remedial deference atop the substantive deference already owed. And the result was once again the sanctioning of conduct that no court should countenance. Despite this Court's clear instructions in *Hope* and *Taylor*, this result is common in the lower federal courts. This case presents an opportunity for the Court to enforce the guardrails that exist around deference and qualified immunity, without which meritorious claims involving shocking behavior in prisons will continue to perish prematurely—if not tripping on one hurdle, then surely falling on the next.

III. THIS CASE MERITS SUMMARY REVERSAL.

Although petitioner has identified a circuit split that this Court would be wise to resolve in petitioner's favor, even if the Court is disinclined to take up the case on the merits it should nonetheless grant the petition and summarily reverse. While fact-bound applications of existing law are typically inappropriate for certiorari, qualified immunity is different: "[M]ost of the Court's qualified immunity decisions are just fact-bound applications of the already-established principle that liability requires clearly established law." William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 85-86 (2018). "[O]nly a special dispensation from the normal principles of certiorari explains the Court's qualified immunity docket," and the Court has acknowledged the "privileged status" of the doctrine. *Id.*

This Court has repeatedly used the tool of summary reversals to police lower courts on qualified immunity.[4] For a number of years that trend ran in only one direction—in favor of the government official seeking immunity. Last term, however, as described above, the Court summarily reversed or vacated two lower court decisions, *Taylor* and *McCoy*, on behalf of plaintiffs when the defendants were granted qualified immunity. Then this term it summarily reversed two additional cases.[5]

The defense of qualified immunity "is important not only to the defendant officials, but to society as a whole." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). So too is the vindication of constitutional rights in cases when it does not apply. Just as this Court should not be in the business of denying relief because a prisoner spent six days in sewage instead of a year, or was maced in the face for no reason instead of punched for no reason, the enforcement of constitutional rights should not turn on a prisoner's blood leaving a trail instead of a puddle. Summary reversal is an appropriate mechanism to correct such reasoning.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should reverse the lower court, either through plenary review or summarily.

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[4] *See City of Escondido v. Emmons*, 139 S. Ct. 500 (2019); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullenix v. Luna*, 577 U.S. 7 (2015); *Taylor v. Barkes*, 575 U.S. 822 (2015); *Carroll v. Carman*, 574 U.S. 13 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013).

[5] *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021); *Tahlequah v. Bond*, 142 S. Ct. 9 (2021).

Respectfully submitted,

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