No. _____

IN THE
Supreme Court of the United States

CHRISTOPHER N. PAYNE,
Petitioner,

v.

JAHAL TASLIMI; MS. SMITH, LPN,
Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do inmates have a constitutional right to privacy in their HIV status, as the Second, Third, and Sixth Circuits have held (subject to legitimate penological interests), or is there no such right, as the Fourth Circuit ruled in this case?

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Payne v. Taslimi, et al., 1:18-cv-00587
(E.D. Va.) (June 15, 2018)

United States Court of Appeals (4th Cir.):

Christopher N. Payne v. Jahal Taslimi; Ms. Smith, LPN, 18-7030
998 F.3d 648 (4th Cir.) (May 27, 2021)

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Federal Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Payne respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is at 998 F.3d 648 (4th Cir. 2021). App. 1. The United States District Court for the Eastern District of Virginia issued two relevant orders, both of which are unpublished. App. 19, 22.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fourth Circuit entered judgment on May 27, 2021. App. 1. Under this Court's COVID-19 orders, Mr. Payne timely filed this petition within 150 days, on October 25, 2021.

CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution reads, as relevant:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual history.

This case is about a prison doctor's senseless disclosure of Payne's HIV status to other inmates and civilians. The morning of January 16, 2018, Payne was at his bed in an open dorm at Deep Meadow Correctional Facility. App. 2, 28. With other inmates and civilians less than five feet away, Dr. Jalal Taslimi approached Payne and told him that he had not taken his HIV medication that day. *Id.* Dr. Taslimi spoke loudly enough that others stopped their conversations and looked over. *Id.* Dr. Taslimi later apologized to Payne and admitted he should not have said what he said. App. 2.

II. Proceedings below.

After completing the prison grievance procedure, Payne filed a pro se action in the District Court for the Eastern District of Virginia under 42 U.S.C. § 1983. *See* App. 26–29. Among other claims, Payne alleged that Dr. Taslimi's disclosure violated the United States Constitution. *Id.*

The district court screened Payne's complaint under the Prison Litigation Reform Act, 28 U.S.C. § 1915A. The court construed Payne's constitutional claims "as claims for violation of his privacy" and concluded that "neither the United States Supreme Court nor the United States Court of Appeals for the Fourth Circuit has recognized a constitutional right to privacy with regards to medical records." App. 24. It thus concluded that Payne failed to state a cognizable § 1983 claim and dismissed Payne's complaint. *Id.*

Five days later, the district court received an amended complaint from Payne. App. 30–33. The amended complaint clarified that Payne alleged that the Fourteenth Amendment protects him from unauthorized disclosure of his HIV status. App. 32.

The district court construed Payne's amended complaint as a motion for reconsideration and denied the motion. App. 19–21. The court reiterated that Payne's "Fourteenth Amendment claim was dismissed because neither the United States Supreme Court nor the United States Court of Appeals for the Fourth Circuit has recognized a constitutional right to privacy with regards to medical records." App. 21. Payne timely appealed. App. 34–35.

The Fourth Circuit appointed counsel from McGuireWoods LLP to represent Payne on appeal.

After briefing and oral argument, the Fourth Circuit affirmed the dismissal of Payne's complaint. App. 18. In analyzing Payne's Fourteenth Amendment privacy claim, the court determined that circuit precedent required it to first ask whether Payne had any reasonable expectation of privacy in his medical records in general or HIV status in particular.

The Fourth Circuit concluded that "Payne lacked a reasonable expectation of privacy in his HIV status." App. 13. The court reasoned that no one questioned that the *prison staff* should be aware of his diagnosis and treatment. "Payne does not claim a reasonable expectation of privacy in the initial disclosure of his HIV diagnosis and medical records to prison officials. . . . Payne instead challenges the *secondary* disclosure from prison officials to prison

guards and inmates in the medical ward. App. 13–14. It then held that "where an inmate lacks a reasonable expectation of privacy, he lacks it for all purposes." App. 14. The court added that the "type of information" at issue—HIV status—"reduces any possible expectation of privacy that Payne might have had" because HIV is a "communicable disease" that could "spread rapidly" including even to "prison workers." App. 15. The court also cited the "location" of the disclosure, speculating that "it might be difficult to ensure others would not hear" conversations in a prison medical unit. *Id.*

Because the Fourth Circuit found categorically that inmates lack a constitutional privacy right in their HIV status, the court went no further. It never considered whether any penological interest could justify the doctor's disclosure of Payne's HIV status. App. 11–12.

REASONS FOR GRANTING THE PETITION

Inmates living with HIV face social isolation, stigma, intolerance, and violence. Their interest in maintaining the privacy of their medical records from senseless disclosure to fellow inmates is obvious.

For thirty years, the federal courts of appeals have grappled with whether inmates have a constitutional privacy right that would prevent prison officials from sharing their HIV-related medical information with other inmates or family members. Since 1999, several circuits have acknowledged a privacy right over HIV status. The Second, Third, and Sixth Circuits have recognized that prison officials may not disclose an inmate's seropositivity without a legitimate penological reason to do so.

The Fourth Circuit disagreed. Acknowledging the other circuits' different view, the court below found itself bound to view any privacy interest through a Fourth Amendment lens. The court then found no cognizable privacy right. The Fourth Circuit's reasoning combined an incorrect view of the root of this privacy interest with baseless speculation about prison operations and outdated theories about the risks HIV may pose to others. In sum, in the Fourth Circuit now, officials may share the HIV status of any inmate even if they have no legitimate penological interest in doing so.

The Fourth Circuit's decision to split from its sister circuits is wrong. In fact, the Fourth Circuit is wrong in a way that exacerbates the stigma of HIV. The court relied on speculation and unwarranted fear about transmission risk.

Lastly, the problem is important and recurring. Nearly every circuit has been presented with this exact problem—the medical privacy of an inmate's seropositivity. And the many thousands of inmates living with HIV in this country, and tens of thousands of new HIV diagnoses each year, suggest that the problem is not fading.

This Court has long "assume[d]" that "the Constitution protects a privacy right" over personal medical information. *NASA v. Nelson*, 562 U.S. 134, 138 (2011) (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977)). The circuit split here, over a narrow issue where privacy interests are at their zenith, presents the proper case to finally address the issue.

I. Circuits are split over whether inmates have a constitutional right to privacy in their HIV status.

A. Three circuits have recognized a constitutional privacy right.

The Second, Third, and Sixth Circuits have each recognized that inmates have a Fourteenth Amendment privacy right against the senseless disclosure of their HIV status.

The Second Circuit has long recognized the existence of this right. *See Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999). In *Powell*, the plaintiff alleged that a corrections officer told other inmates that the plaintiff was transgender and living with HIV. *Id.* at 109. As a result, the plaintiff claimed, "word about her sex-change operation and her HIV-positive status became known throughout the prison" and she "became the target of harassment." *Id.* The plaintiff's privacy claim went to trial. *Id.* The jury found in her favor against one of the defendants and awarded her compensatory and punitive damages. *Id.* at 110. The district court set aside the verdict. *Id.*

The Second Circuit held that the plaintiff had a constitutional right to privacy in her HIV status. *Id.* at 112. Circuit precedent had established that "[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition." *Id.* at 110 (quoting *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)). The court pointed out that "the privacy interest of persons who are HIV positive[] is particularly compelling." *Id.* at 111. As the court recognized, "HIV status . . . is the unusual condition that is likely to provoke both an

intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others." *Id.*

And, the court reasoned, "[p]rison inmates do not shed all fundamental protections of the Constitution at the prison gates." *Id.* at 112. "Rather, inmates retain those constitutional rights that are not inconsistent with their status as prisoners or with the legitimate penological objectives of the corrections system." *Id.* (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)) (cleaned up). Prison officials thus may only impinge on a prisoner's right to keep her HIV status confidential "to the extent that their actions are 'reasonably related to legitimate penological interests.'" *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

The court also held "that the gratuitous disclosure of an inmate's confidential medical information as humor or gossip . . . is *not* reasonably related to a legitimate penological interest, and it therefore violates the inmate's constitutional right to privacy." *Id.*

Two years later, the Third Circuit decided to "join the Second Circuit in recognizing that the constitutional right to privacy in one's medical information exists in prison." *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001).

In *Delie*, an inmate living with HIV alleged that the door to the clinic room was left open, allowing other inmates to see and hear the plaintiff during his doctor appointments, and that nurses announced his HIV medication loudly enough for other inmates to hear and thus infer his condition. *Id.* at 311–12. The

plaintiff sued, claiming that these practices violated his constitutional right to privacy. *Id.* at 311.

The Third Circuit recognized that "[i]t is beyond question that information about one's HIV-positive status is information of the most personal kind and that an individual has an interest in protecting against the dissemination of such information." *Id.* at 317. And "a prisoner's right to privacy in this medical information is not fundamentally inconsistent with incarceration." *Id.* at 317. Thus, "the constitutional right to privacy in one's medical information exists in prison." *Id.* at 317.

The court acknowledged that a prisoner's right to privacy in his HIV status "is subject to substantial restrictions and limitations in order for correctional officials to achieve legitimate correctional goals and maintain institutional security." *Id.* "Specifically, [the right] may be curtailed by a policy or regulation that is shown to be 'reasonably related to legitimate penological interests.'" *Id.* (quoting *Turner*, 482 U.S. at 89). But the burden is on the government to advance those interests. *Id.*[1]

Finally, the Sixth Circuit has expressly agreed with the Second and Third Circuits in an unpublished

[1] In both *Powell* and *Delie*, the court ultimately ruled against the prisoner on qualified immunity grounds. 175 F.3d at 113–14; 257 F.3d at 322. That is, the courts found that, as of 1991 and 1995, the privacy right they identified had not been "clearly established." Obviously, in both circuits the privacy right has been "clearly established" ever since—for more than two decades now.

opinion. *Moore v. Prevo*, 379 F. App'x 425, 427–28 (6th Cir. 2010).

In *Moore*, the plaintiff alleged that corrections officers and a nurse violated his constitutional right to privacy when they informed another inmate that the plaintiff was living with HIV. *Id.* at 425–26. The district court dismissed the complaint for failure to state a claim under § 1915, just like the district court's dismissal under § 1915A here. *Id.* at 426.

The Sixth Circuit held that "we join our sister circuits in finding that, as a matter of law, inmates have a Fourteenth Amendment privacy interest in guarding against disclosure of sensitive medical information from other inmates subject to legitimate penological interests." *Id.* at 428. Responding to a dissent, the panel majority observed that "[w]e are aware of no other circuit to have categorically barred a prisoner from bringing a claim against prison officials over the unnecessary dissemination of his sensitive medical information to other inmates." *Id.* at 427 n.4. The panel majority thus declined to extend older Sixth Circuit precedent "in a way that would create a circuit split." *Id.*

Thus, the *Moore* Court reversed the district court's dismissal and remanded for further proceedings on the inmate's privacy claim. *Id.* at 429.

The facts of *Powell*, *Delie*, and *Moore* are indistinguishable from those here. In all these cases, inmates with HIV alleged that prison staff revealed their diagnoses to other inmates out of meanness or recklessness. In each case, these courts recognized that HIV status warrants constitutional privacy

protection, subject only to legitimate penological interests.

B. The Fourth Circuit alone holds that an inmate never has a constitutional right to privacy in his HIV status.

In its opinion below, the Fourth Circuit held that an inmate never has a constitutional right to privacy in his HIV status. App. 12–16. The court acknowledged its disagreement with the Second and Third Circuits but found itself constrained to use a different test for constitutional privacy—a test that created a different outcome on near identical facts. *See id.*

Exactly like the plaintiffs in *Powell*, *Delie*, and *Moore*, Payne alleged a needless disclosure of his HIV status to other inmates (and civilians). App. 32, 34.

The Fourth Circuit found that circuit precedent required it to assess whether a constitutional privacy right existed by asking "(1) whether a reasonable expectation of privacy in the information exists as to entitle it to privacy protection and, if so, (2) whether a compelling governmental interest in disclosure outweighs the individual's privacy interest." App. 11 (quoting *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990)) (cleaned up). The Fourth Circuit never reached the second part of this test because it concluded that inmates like Payne "lack[] a reasonable expectation of privacy in [their] HIV medication and diagnosis." App. 11–12.

To get there, the court first cited *Hudson v. Palmer*, where this Court held that an inmate lacked a Fourth Amendment reasonable expectation of

privacy from searches of his prison cell. App. 12. (citing 468 U.S. 517, 525–26 (1984)). The Fourth Circuit thus immediately diverged from the other circuits, which had found that the "asserted right to privacy in [an inmate's] medical information is completely different than the right extinguished in *Hudson*." *Delie*, 257 F.3d at 316 (citing *Powell*, 175 F.3d at 112 n.3; *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995)). Indeed, other circuits have viewed *Hudson* as limited to the specific context of searching prison cells for contraband—not any other sorts of privacy issues. *Henry v. Hulett*, 969 F.3d 769, 777 (7th Cir. 2020) (en banc) ("the Supreme Court has never extended the scope of *Hudson* to exclude any aspect of a prisoner's life beyond her cell from the reaches of the Fourth Amendment"); *Elliott v. Lynn*, 38 F.3d 188, 191 n.3 (5th Cir. 1994) ("*Hudson* held only that prisoners have no justified expectation of privacy in their prison cells").

Going on, the Fourth Circuit reasoned that because Payne had no privacy right shielding his HIV status from prison officials, he also had no privacy right shielding that status from anyone else, either. "Where an inmate lacks a reasonable expectation of privacy," the court asserted, "he lacks it for all purposes." App. 14.

The Fourth Circuit then added that HIV is a "communicable disease," comparing it to COVID-19. App. 15. It concluded by speculating that it might be difficult to avoid others overhearing a doctor-patient conversation in a prison medical unit. *Id.*

The Fourth Circuit admitted that other circuits "have found a right to privacy in this context." App. 16 n.10. Conceding that it was creating a circuit split,

the Fourth Circuit stated that the other circuits had found this constitutional privacy right "to be 'completely different' than . . . *Hudson*'s reasonable-expectation-of-privacy test." *Id.* (quoting *Delie*, 257 F.3d at 316–17). The Fourth Circuit concluded: "Whatever the merits of that position, we are constrained to apply our [circuit precedent] to the contrary." *Id.*

C. Other circuits have taken various views, including evading the constitutional question on qualified immunity grounds.

Some courts, including the Eleventh and First Circuits, have acknowledged that a constitutional privacy right for inmates with HIV likely exists, but decided (on facts far different from those here) that legitimate penological interests justify certain disclosures of HIV status.

In *Harris v. Thigpen*, the Eleventh Circuit held that it was "clear that prison inmates, in spite of their incarceration, 'retain certain fundamental rights of privacy," although those rights are "rather ill-defined." 941 F.2d 1495, 1513 (11th Cir. 1991) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978)).

The *Thigpen* Court "believe[d] and assume[d] *arguendo* that seropositive prisoners enjoy some significant constitutionally-protected privacy interest in preventing the non-consensual disclosure of their HIV-positive diagnoses to other inmates, as well as to their families and other outside visitors to the facilities in question." *Id.* But the court ultimately upheld (in 1991) Alabama's use of segregation of

inmates living with HIV from others, in order to combat "the spread of a communicable, incurable, always fatal disease." 941 F.2d at 1521 (finding the segregation policy reasonably related to legitimate penological interests).

In 2014, the First Circuit considered an inmate challenge to a new Massachusetts prison policy of dispensing HIV medications only in single doses at dispensing windows. *Nunes v. Massachusetts Dept. of Correction*, 766 F.3d 136, 138 (2014). The inmates alleged that the policy change violated their right to privacy by exposing them to disclosures of their HIV status to other inmates. *Id.* at 143.

The First Circuit acknowledged that "three other circuits have found that prisoners have at least a limited constitutional right against gratuitous disclosures of medical information." *Id.* (citing *Powell*, 175 F.3d at 112; *Delie*, 257 F.3d at 317; and *Moore*, 379 F. App'x at 428). But it declined to decide whether a constitutional right to privacy exists, instead relying on the reasonableness of the DOC's policy. *Id.* at 144; 141–42 (citing extensive evidence that the single-dose dispensing at windows was cost-efficient and "contributed to a material improvement in the health of the HIV prisoners as a group").

Last, some circuits have rested their holdings entirely on qualified immunity. On one hand, the Seventh Circuit granted qualified immunity while expressing great skepticism of any underlying privacy right. On the other hand, the Tenth Circuit recognized a privacy right for probationers, but granted qualified immunity based on the clarity of the law in the early 1990s.

In *Anderson v. Romero*, a prison guard warned another inmate to stay away from the plaintiff because he had AIDS, and the same guard told an inmate barber not to cut the plaintiff's hair because he had AIDS. 72 F.3d at 520. The Seventh Circuit stated that the "only question" in the case was qualified immunity. *Id.* at 523. The court found qualified immunity because "[n]either in 1992 nor today [in 1995] was . . . the law clearly established that a prison cannot without violating the constitutional rights of its HIV-positive inmates reveal their condition to other inmates and to guards in order to enable those other inmates and those guards to protect themselves from infection." *Id.* at 524. The core of the court's reasoning was that, in 1995, HIV was "communicable," "invariably fatal[,] and ha[d] already reached epidemic proportions." *Id.*

Following a different path, the Tenth Circuit embraced a constitutional privacy right in HIV status for arrestees and probationers, but found the law unclear enough as of the early 1990s to grant qualified immunity. In *Herring v. Keenan*, the court noted that "[t]here is no dispute that confidential medical information is entitled to constitutional privacy protection." 218 F.3d 1171, 1175 (10th Cir. 2000). But the court granted a probation officer qualified immunity for informing a probationer's sister and employer that he had tested positive for HIV because that right was not clearly established in 1993. *See also A.L.A. v. West Valley City*, 26 F.3d 989 (10th Cir. 1994) (recognizing an arrestee's privacy right in his HIV status).

II. The Fourth Circuit erred.

A. The decision below conflicts with Supreme Court cases on privacy and wrongly views it as a Fourth Amendment matter.

Several times, this Court has referred to a constitutional privacy right in personal information. *NASA*, 562 U.S. at 138 (outlining the Court's history with this issue). Three times, the Court has found that right not infringed by a careful government program designed to gather necessary information and protect against its needless public disclosure. *Whalen*, 429 U.S. at 600–02 (upholding a government program to gather prescription medicine information against a privacy challenge because it provided meaningful safeguards against public disclosure of the private medical information); *Nixon,* 433 U.S. at 457–59 (upholding the government sorting of millions of pages of presidential documents against a privacy challenge in part because the government would protect against "undue dissemination of private materials"); *NASA*, 562 U.S. at 155–56 (upholding a questionnaire for NASA workers that was "subject to substantial protections against disclosure to the public").

The Fourth Circuit's decision here conflicts with these three cases. In particular, the Fourth Circuit reasoned that once an inmate's HIV status is known to prison officials and medical staff, there can be no right to keep it from anyone else. App. 14 (describing the challenge as one to a "secondary disclosure" to other inmates and holding that "[w]here an inmate lacks a reasonable expectation of privacy,

he lacks it for all purposes."). That ruling clashes with *Whalen*, *Nixon,* and *NASA*—all of which considered safeguards against public disclosure important to accepting the government intrusions on privacy in those cases. All of those three rulings from this Court rejected the Fourth Circuit's exact theory. Each upheld the required disclosures to the government *because* the information would still remain private from everyone else.

The Fourth Circuit's odd error in refusing to distinguish between disclosing information to the government and disclosing it to fellow inmates grew from its error of viewing the constitutional privacy right here as a Fourth Amendment creature. App. 6–12. Clearly, inmates have minimal, if any, "reasonable expectation of privacy" from searches of their person or cells. *Hudson*, 468 U.S. at 536. But open disclosure of private medical information is not a "search" or "seizure" under the Fourth Amendment. This Court has grounded the privacy interest mostly elsewhere. *E.g.*, *Whalen*, 429 U.S. at 606 (referring to "any right or liberty protected by the Fourteenth Amendment"). The Fourth Circuit seemed to understand that the privacy right here is different from Fourth Amendment interests—but after an extensive discussion of circuit precedent rules, held itself bound to the Fourth Amendment lens. App. 9 n.7.

Other circuits, not being so bound, have placed the privacy right properly in the Fourteenth Amendment. *Powell*, 175 F.3d at 112 n.3 ("The right to maintain the confidentiality of medical information is sufficiently distinct from the right to privacy protected by the Fourth Amendment such that the

Supreme Court's holding in *Hudson v. Palmer* has no bearing on this case."); *Delie*, 257 F.3d at 316 ("[The plaintiff's] asserted right to privacy in his medical information is completely different than the right extinguished in *Hudson* . . . [it] emanates from a different source and protects different interests than the right to be free from unreasonable searches and seizures."); *Anderson*, 72 F.3d at 522 (reasoning that *Hudson v. Palmer*'s holding "was with reference to the Fourth Amendment and it would be premature to assume that the [Supreme] Court meant to extinguish claims of privacy of an entirely different kind.").

B. The decision below ignores valid privacy rights in favor of prejudice and speculation.

After wrongly conceiving of this privacy interest as a Fourth Amendment matter, the decision below relied on categorical speculation and prejudice to reject any privacy right in an inmate's HIV status. In short, the court asserted that Payne was at his bed in a "prison medical unit" (the complaint called it an "open dorm"). App. 32. The court speculated that it might be difficult in some prison settings to avoid others overhearing a doctor-patient conversation. The court then speculated that if Payne failed to take his medicine, in theory his HIV could at some point become communicable, and thus dangerous. On these grounds—with no need to even consider any penological objective or qualified immunity—the court found no privacy right in Payne's HIV status.

But nothing in the record shows that either the tight-space or communicability concerns exist in this case.

First, incarceration does not nullify constitutional privacy rights. *Turner v. Safley* allows prison administration to weigh penological interests and prison practicalities against inmate rights. 482 U.S. at 90. But a theoretically overcrowded prison would not be reason to deny privacy rights in the first instance. Instead, crowding would be a reason the government could present to try to *overcome* privacy rights, by proving a legitimate penological interest in, say, numerous inmates standing within five feet of a doctor discussing medication with another inmate. *See* App. 32. But that would be a step in the analysis that the Fourth Circuit entirely foreclosed by finding no right to privacy in the first instance.

Regardless, the Government did not even argue that its doctor *had* to meet with Payne within earshot of other inmates. And the doctor's later apology to Payne suggests that no prison security or space required the doctor to say what he said in front of others. App. 2.

Second, nor did the Government ever assert that Payne was contagious. Nor does any evidence here suggest that Payne's supposed failure to take *one day's* HIV medicine by late morning would make him contagious. *Contra* App. 15 (theorizing that "a prisoner might forgo taking the medicine and thus become contagious again, just as Payne apparently did here" when Payne alleged one instance of being reminded to take his medicine one morning).

The bare facts here are that one morning, Dr. Taslimi said loudly to Payne: "You did not take your HIV meds today." App. 28. The only plausible assumption from this is that Payne was on a daily HIV

medicine regimen, and the doctor was reminding him to take his daily pill.

The Centers for Disease Control has recognized that treated HIV is not a danger to others. CENTERS FOR DISEASE CONTROL AND PREVENTION, EVIDENCE OF TREATMENT AND VIRAL SUPPRESSION IN PREVENTING THE SEXUAL TRANSMISSION OF HIV 1 (December 2020).[2] According to the CDC, "[p]eople with HIV who take HIV medicine as prescribed and get and keep an undetectable viral load (or stay virally suppressed) have effectively no risk of transmitting HIV to their HIV-negative sexual partners." *Id.* Modern medicine means that most Americans living with HIV pose no transmission risk. And the basic features of prison health care—a prison's duty to administer medicine and monitor patients over time—provides a setting conducive to proper treatment. The risk of transmission today for anyone on HIV medicine is lower than ever before, and nothing in the record of this case suggests Payne posed a meaningful danger to anyone.

The Fourth Circuit's ruling thus relies on the same prejudices that cause the stigma around HIV to persist. In the Fourth Circuit's world, HIV is like COVID-19: highly infectious and a danger to everyone nearby. The Fourth Circuit does not support its position with science or medicine, and it could not do so. Yet the Fourth Circuit's broad reasoning would apply to any prison setting and any inmate with HIV, no matter how thoroughly treated.

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[2] https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf

The Fourth Circuit's theories wrongly ignore that a person's HIV-positive status falls within the heartland of any imaginable privacy interest. On one hand, HIV carries a significant stigma from historically being a fatal illness perceived to be linked to certain modes of transmission. On the other hand, HIV is now more treatable than ever—to the point that many treated HIV patients live full lives and suppress the virus so that it cannot endanger others. But the stigma remains. *See* GLAAD, 2021 STATE OF HIV STIGMA 4 (2021) ("The findings paint a troubling picture of the general US population's overall awareness about HIV, including . . . persistent stigma toward people living with HIV.").[3]

This problem is even worse for inmates. "Inside of prisons, people living with HIV/AIDS are often the most vulnerable and stigmatized segment of the prison population. Fear of HIV/AIDS often places HIV-positive prisoners at increased risk of social isolation, violence, and human rights abuses from both prisoners and prison staff." UNITED NATIONS OFFICE ON DRUGS AND CRIME, HIV/AIDS PREVENTION, CARE, TREATMENT, AND SUPPORT IN PRISON SETTINGS 12 (October 2006).[4]

Recognizing this, courts have long appreciated the extreme sensitivity of an HIV diagnosis and who should be privy to that information. *See, e.g.*, *Doe v. City of New York*, 15 F.3d at 267 ("An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion

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[3] https://www.glaad.org/sites/default/files/HIV-StigmaStudy_2021_081621%20%281%29.pdf

[4] https://www.unodc.org/documents/hiv-aids/HIV-AIDS_prisons_Oct06.pdf

but to discrimination and intolerance."). Moreover, the need for privacy intensifies in prison, considering the potential for violence from other inmates. *See Anderson*, 72 F.3d at 523 (noting that inmates identified as HIV-positive are "a likely target of violence by other inmates"); *Powell*, 175 F.3d at 115 ("under certain circumstances the disclosure of an inmate's HIV-positive status . . . could place that inmate in harm's way"); *Thigpen*, 941 F.2d 1517 n.32 (noting that the prison policies there aimed to "minimize the possibility of altercation").

The Eleventh Circuit has also explained that "[i]gnorance and prejudice concerning the disease are widespread; the decision of whether, or how, or when to risk familial and communal opprobrium and even ostracism is one of fundamental importance." *Thigpen*, 941 F.2d at 1514. The *Thigpen* Court acknowledged that "there are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to exercise control, than the manner in which he reveals [an HIV] diagnosis to others." *Id.* at 1513–14. Informing others of an HIV diagnosis or treatment "is clearly an emotional and sensitive [decision] fraught with serious implications." *Id.* at 1514. "Certain family members may abandon the [seropositive] victim while others may be emotionally unprepared to handle such news. Within the confines of the prison the infected prisoner is likely to suffer from harassment and psychological pressures." *Id.* In sum, it "is beyond question that information about one's HIV-positive status is information of the most personal kind and that an individual has an interest in protecting against the dissemination of such information." *Delie*, 257 F.3d at 317.

In the modern era, the ability to treat and suppress or erase HIV viral loads has vastly reduced the risks of HIV as a "communicable disease." Harsh prison segregation policies, justified by an incurable and "always fatal" disease portending a "nightmarish death," have faded away. *Harris*, 941 F.2d at 1519, 1521; *see also Anderson*, 72 F.3d at 524, 525 (describing HIV in 1995 as "invariably fatal").

Even under the reasoning of these 1990s cases, HIV status should be more private today than ever. *Anderson*, 72 F.3d at 524 (noting that a "person with a noncommunicable disease is a danger only to himself, and the compelled disclosure of his condition to others is unlikely to further a legitimate interest of the state."). This statement is as true today as it was in 1995—except today, twenty-five years after antiretroviral treatments for HIV—it strongly *favors* a privacy right.

Thus, as time went on and medicine advanced, the trend in circuit rulings has increasingly favored acknowledging or assuming the constitutional privacy right in HIV status and then focusing on either the penological interests involved or qualified immunity. *E.g.*, *Powell*, 175 F.3d at 112 (1999) (acknowledging the privacy right); *Delie*, 257 F.3d at 317 (2001) (acknowledging the privacy right); *Moore*, 379 F. App'x at 428–29 (2010) (acknowledging the privacy right and narrowing older Sixth Circuit precedent which seemed to deny any such right); *Alfred v. Corr. Corp. of Am.*, 437 F. App'x 281, 285–86 (5th Cir. 2011) (finding that an HIV-positive inmate pleaded a non-frivolous constitutional claim based on a prison attorney disclosing his HIV status to another inmate); *Nunes*, 766 F.3d at 141–42 (2014) (extensively

considering the legitimate penological interest supporting a certain method of HIV medication dispensing before approving it).

The Fourth Circuit's decision below thus wrongly reverses the modern trend on privacy rights in inmates' HIV status.

III. This issue is important and recurring, and this case provides a good vehicle for narrow guidance on the right to privacy.

The circuit split here also warrants certiorari because the issue is important and recurring. The inherently narrow question presented here—limited to the privacy right around one specific, highly stigmatized illness in a single context (prison)—creates an ideal vehicle for this Court to weigh in.

First, federal appeals courts have wrestled with whether and when constitutional privacy rights protect inmates from disclosures of their HIV status for over thirty years. *E.g.*, *Harris v. Thigpen* (decided in 1991); *Moore v. Mabus*, 976 F.2d 268 (5th Cir. 1992); *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994); *Anderson v. Romero* (decided in 1995); *Tokar v. Armontrout*, 97 F.3d 1078 (8th Cir. 1996); *Powell v. Schriver* (decided in 1999); *Doe v. Delie* (decided in 2001); *Moore v. Prevo* (decided in 2010); *Alfred v. Corrections Corp. of America* (decided in 2011); *Nunes v. Massachusetts Department of Correction* (decided in 2014); *Payne v. Taslimi* (decided in 2021).

Second, HIV is not going away. More than a million Americans are HIV-positive, including many thousands of state and federal inmates. "HIV remains a persistent problem for the United States." CENTERS

FOR DISEASE CONTROL AND PREVENTION, HIV BASICS: BASIC STATISTICS.[5] In 2019, roughly 1,189,700 people in the United States were HIV-positive, with 36,801 people receiving a new HIV diagnosis that year. *Id.* In the prison context, about 17,150 inmates in state and federal custody were known to be living with HIV at the end of 2015. U.S. DEPARTMENT OF JUSTICE, HIV IN PRISONS, 2015 – STATISTICAL TABLES 1 (August 2017).[6] The simple fact that there has been a stream of cases, all specifically addressing *privacy* rights for *HIV-positive* inmates, reflects that this issue requires this Court's attention.

Third, HIV status should represent a zenith in constitutional privacy protections. While medical advances have greatly reduced the harms of the disease, it remains one of the most stigmatized illnesses in the world. Along with that stigma comes the risk of violence against inmates living with HIV. Even on the narrowest view of a constitutional privacy right—one limited expressly to deeply rooted fundamental rights and liberties—protecting from the release of private medical information that could cause bodily harm would be covered.

Now is thus a better time than ever before for this Court to acknowledge what some circuits have for decades—that a constitutional right to privacy protects inmates from open disclosures of their HIV status, subject to legitimate penological interests. *See NASA*, 562 U.S. at 756 n.10 (noting that long assuming the existence of privacy rights under far

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[5] https://www.cdc.gov/hiv/basics/statistics.html (last visited October 20, 2021).

[6] https://bjs.ojp.gov/content/pub/pdf/hivp15st.pdf (2020 statistics forthcoming).

more wide-ranging scenarios had never caused the sky to fall). Given the extreme nature of the privacy right in HIV status, and the narrow facts presented here, this case presents a far better vehicle for this Court to address the right in the first instance than any of this Court's earlier three cases. All of those involved various pieces of information of varying degrees of sensitivity, and thus would have required far more development of the doctrine in the first instance than this case would.

Last, the Fourth Circuit's categorical, no-privacy-right-exists holding opens the door to much more mean-spirited acts than what Payne alleged here. By refusing to recognize any privacy right in HIV status, the decision below preempted any consideration of legitimate penological interests. Under the Fourth Circuit's view, no protection exists for an inmate's HIV status, no matter why a prison guard or doctor may choose to disclose it, or to whom.

The point is, prison practices that reveal an inmate's HIV status should be subject to *some* judicial scrutiny short of the Eighth Amendment's cruel and unusual punishment clause. *See Anderson*, 72 F.3d at 523 (suggesting that an extreme case, such as the "branding or tattooing [of] HIV-positive inmates," may give rise to an Eighth Amendment claim for cruel and unusual punishment).

Several circuits are already providing such a review, either by acknowledging the privacy right or assuming it and then considering legitimate penological interests. *E.g.*, *Powell*, 175 F.3d at 112; *Nunes*, 766 F.3d at 144.

The Fourth Circuit's refusal to join them warrants this Court's review and reversal.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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