22-0050

No. _____

ORIGINAL



**In The**
**Supreme Court of the United States**

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WASEEM DAKER,
*Petitioner,*
v.
TIMOTHY WARD, *et al.*,
*Respondents.*

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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# PETITION FOR WRIT OF CERTIORARI

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WASEEM DAKER
Petitioner, *pro se*

ID#901373
Smith S.P.
P.O. Box 726
Glennville, GA 30427

## QUESTIONS PRESENTED

Petitioner alleged that Georgia Department of Corrections (GDC) officers place him in imminent danger of contracting hepatitis or HIV by forcibly shaving him with a damaged, unsanitized razor on a semi-monthly basis in a prison system where both blood-borne diseases are endemic. The district court held that these allegations did not satisfy the "imminent danger of serious physical injury" exception to the Prison Litigation Reform Act "three-strikes" provision, 28 U.S.C. § 1915(g). The Eleventh Circuit affirmed, citing its prior precedent in *Daker v. Ward*, 999 F3d 1300 (11th.Cir. June 7, 2021), which held that those allegations were "too speculative" to satisfy the exception because petitioner "has not contracted an infectious disease" or alleged the same of another prisoner despite the "longstanding custom." No other circuit follows this rule. Judge Rosenbaum dissented in *Daker v. Ward*, explaining that the correct test is whether the allegations "allow a court to draw reasonable inferences" of future "danger." Five circuits follow this rule.

The question presented is as follows

I. Whether an incarcerated person must allege presently occurring or certain-to-occur serious physical injury in order to successfully invoke the "imminent danger of serious physical injury" exception to the Prison Litigation Reform Act "three-strikes" provision, 28 U.S.C. § 1915(g)?

## LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Adams, Brian, Respondent;

Allen, Marty, Respondent;

Ammons, Jennifer, Respondent;

Anderson, Carl Anthony, Respondent;

Ayeni, Jacquelyn, Respondent;

Bell, [First Name Unknown ("FNU")], Respondent;

Beverick, FNU, Respondent;

Black, Nathan, Respondent;

Bobbitt, Trevonza, Respondent;

Bradley, Raymond, Respondent;

Brooks, Timothy, Respondent;

Brown, Tenaka, Respondent;

Bryson, Homer, Respondent;

Burke, Mr. [FNU], Respondent;

Chatman, Bruce, Respondent;

Clemente, Jaime, Respondent;

Daker, Waseem, Petitioner;

Davis, Freddie, Respondent;

Doe, Dr. John, Respondent;

Doe, John, Respondent;

Dozier, Gregory, Respondent;

Eaddie, Peter, Respondent;

Epperson, Alicia, Respondent;

Everett, Dennis, Respondent;

Flowers, Harold, Respondent;

Fountain, Lisa, Respondent;

Geiger, Dr. [FNU], Respondent;

Georgia Department of Corrections ("GDC"), Respondent;

Hartmeyer, Ashley, Respondent;

Henry, Tiffany, Respondent;

Hester, Jason, Respondent;

Hutcheson, Joseph L., Respondent;

Jackson, Ms. FNU, Respondent;

James, Carrie, Respondent;

Jeffries, Curtis, Respondent;

Johnson, Javaka, Respondent;

Jones, Robert E., Respondent;

Kegler, Clarence, Respondent;

Kelley, Tina, Respondent;

Kendrick, FNU, Respondent;

Kilgore, Shirley, Respondent;

Kirkland, Randall, Respondent;

Koon, Jack, Respondent;

Koon, Jack, Respondent;

Lane, Ms. [FNU], Respondent;

Lewis, Dr. Sharon, Respondent;

Lyte, Valiant, Respondent;

McGlohone, Ms. [FNU], Respondent;

McLaughlin, Gregory, Respondent;

Mendez, Michael, Respondent;

Mikell, Marcus, Respondent;

Mobley, Lynette, Respondent;

Monk, Joanie, Respondent;

Murphy, Carlton A., Respondent;

Myrick, Ricky, Respondent;

Odom, Roy, Respondent;

Ogden, Sheldon, Respondent;

Parker, Kristy, Respondent;

Pineiro, Aaron, Respondent;

Powell, Michael, Respondent;

Rivers, FNU, Respondent;

Ryals, FNU, Respondent;

Scott, FNU, Respondent;

Shuemake, Ronnie, Respondent;

Sikes, Jeffrey, Respondent;

Singletary, Adam, Respondent;

Smith, Calvin Milton, Respondent;

Smith, Cindy L., Respondent;

Stanton, Otis, Respondent;

State of Georgia, Respondent;

Streeter, Lewana, Respondent;

Summersett, Mikasa, Respondent;

Taylor, Tracy, Respondent;

Thomas, Lt. [FNU], Respondent;

Thurman, Geoffrey, Respondent;

Todman, Taral, Respondent;

Toole, Robert, Respondent;

Turner, Dr. Steven A., Respondent;

Upton, Steve, Respondent;

Ward, Timothy, Respondent;

Warren, Benjamin, Respondent;

Watkins, Calo, Respondent;

White, Bryan, Respondent;

Williams, Clarence, Respondent;

Williams, Curmit, Respondent;

Wilson, Fred Leon, Respondent;

Wright, Arsenio, Respondent;

## LIST OF RELATED CASES

*Daker v. Dozier*, Nos. 6:18-CV-00032, 6:18-CV-00073, U. S. District Court for the Southern District of Georgia. Judgment entered March 29, 2019.

*Daker v. Commissioner, Georgia Department of Corrections*, Nos. 19-11723, 19-11849, U. S. Court of Appeals for the Eleventh Circuit Judgment entered August 16, 2021.

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**STATUTES:**

## PETITION FOR A WRIT OF CERTIORARI

Waseem Daker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Daker v. Commissioner, et al.*, Nos. 19-11723, 19-11849.

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## OPINIONS BELOW

The Opinion of the Court of Appeals is unpublished but reported at *Daker v. Commissioner*, 856 FedAppx 841 (11th.Cir. Aug. 16, 2021).

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## JURISDICTION

The Court of Appeals affirmed Petitioner's appeal from the dismissal of Petitioner's Complaint on August 16, 2021. (App. A.) The Court of Appeals denied a petition for rehearing on October 26, 2021. (App. D.) On January 21, 2022, Justice Thomas granted an application for extension of time to file Petition for Writ of Certiorari until February 23, 2022. Application No. 21A338. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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## STATUTORY PROVISIONS INVOLVED

This Court involves Title 28, United States Code ("U.S.C.) § 1915(g) of the Prison Litigation Reform Act ("PLRA"), commonly known as the "three-strikes provision, which provides in pertinent part:

> (g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

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## STATEMENT OF THE CASE

Petitioner is a devout Muslim who, like many people of faith, wears a religiously mandated beard. *See Holt v. Hobbs*, 574 U.S. 352, 362 (2015) ("Petitioner's belief is by no means idiosyncratic"). For nearly a decade, GDC personnel at various prisons have employed dangerous means to coerce Petitioner's compliance with rules that infringe on his religious practice. Their methods include the use of tasers and

chemical spray; prolonged solitary confinement in cells covered in human excrement and teeming with the vermin attracted to it; and potential exposure to hepatitis and HIV through nearly monthly forced shaving with unsanitized communal razors in a prison system rife with those communicable diseases. As a result, Petitioner has consistently suffered serious injury, from chemical burns on his genitals; to infection from exposure to human waste; to wounds from the razors themselves. And GDC personnel frequently threaten to unleash even worse, one going so far as to pledge to "bury [Petitioner] before [he] retire[s]."

This case is about the forced shavings and resulting injuries that occurred at Georgia State Prison (GSP) on December 4, 2017, and March 23, 2018. Weeks before that period, Petitioner reminded GSP officers that his beard was essential to his religious exercise. GSP personnel responded with a promise to "beat" Petitioner and then forcibly shave him. When Petitioner still refused to voluntarily remove his beard, GSP personnel did not hold back.

On December 4, 2017, GSP personnel threatened Plaintiff with use of force if he did not shave. Petitioner refused. GSP personnel then forcibly held Petitioner down and forcibly shaved Petitioner with unsanitized clippers. They also not only shaved Petitioner's beard down to half-inch; they shaved it completely off. They also shaved Plaintiff's head hair completely off even though Plaintiff's hair was not out of compliance with GDC Rules. As a result of this forcible shaving, Plaintiff suffered numerous injuries, including injury to his left shoulder, right shoulder blade, right hand, cuts to his neck, cuts on both wrists, bruises on his right wrist, scrapes to both ankles,

bruises to both ankles, skin peeled off of both his left and right pinky fingers. Petitioner filed a civil rights complaint regarding this incident. As relevant, petitioner raised individual-capacity as-applied claims under the Eighth Amendment, RLUIPA, and the Free Exercise clause, against the GSP personnel who extracted and then forcibly shaved him on December 4, 2017, as well as facial challenges under RLUIPA and the Free Exercise clause to the GDC policies restricting his religious liberty. An indigent three-striker, he sought to invoke the imminent danger exception, including on the bases that (1) forcible shaving exposed him to an intolerable risk because it was a vector for deadly blood-borne pathogens like hepatitis and HIV, and (2) GSP personnel's custom of using unnecessary and excessive uses of force to forcibly shave him placed him in imminent danger.

On March 23, 2018, GSP personnel forcibly shaved Petitioner, using unnecessary force. They punched him in the face, slammed him on the ground, broke his glasses, handcuffed him too tight, placed leg-irons on him too tight, twisted the handcuffs, cutting his wrists, smashed his glasses, and forcibly shaved him with the unsanitized clippers. After shaving him, they then noticed that they shaved Petitioner incompletely, and they asked Petitioner if he wanted them to fix it or if he "wants to look crazy." Petitioner said he would rather "look crazy" than be shaved again. They then refused to leave him alone, and they forcibly shaved him a second time that day, shaving him with unsanitized clippers. Petitioner suffered numerous injuries, including a busted lip, bruises on his face, cuts on his head, left shoulder, both wrists, and both ankles, nerve damage in his hands and feet, bruising to his wrists, shoulder, and head, and injuries to his

back and both shoulders. On March 27, 2018, during inspection, Respondent Warden Marty Allen threatened Plaintiff that the same thing would happen again in a couple of weeks. On April 3, 2018, Respondent Allen threatened Petitioner that he (Allen) retires this year and that he (Allen) is "going to bury you (Petitioner) before I retire." Petitioner filed a civil rights complaint regarding this incident. As relevant, petitioner raised individual-capacity as-applied claims under the Eighth Amendment, RLUIPA, and the Free Exercise clause, against the GSP personnel who extracted and then forcibly shaved him on March 23, 2018, as well as facial challenges under RLUIPA and the Free Exercise clause to the GDC policies restricting his religious liberty. An indigent three-striker, he sought to invoke the imminent danger exception, including on the bases that (1) forcible shaving exposed him to an intolerable risk because it was a vector for deadly blood-borne pathogens like hepatitis and HIV, and (2) GSP personnel's custom of using unnecessary and excessive uses of force to forcibly shave him placed him in imminent danger.

Prior to service, the district courts *sua sponte* dismissed petitioner's complaints holding that petitioner was not in imminent danger of serious physical injury and therefore could not pay the filing fees in installments. App. ___.

The Eleventh Circuit affirmed, citing its intervening precedent in *Daker v. Ward*, 999 F3d 1300 (11th.Cir. June 7, 2021), wherein a majority of the Eleventh Circuit panel held that the risk of "expos[ure] . . . to an infectious disease like HIV or hepatitis" from "being forcibly shaved with damaged and unsanitary clippers" is "too speculative to establish"

that petitioner was "under imminent danger." 999 F3d at 1311-1312. In light of "GDC's longstanding custom to use damaged and unsanitary clippers," the majority reasoned that petitioner "arguably would have contracted an infectious disease" if the practice "truly posed an imminent danger" and he did not allege that anyone else had. *Id.* at 1312

In *Daker v. Ward*, 999 F3d 1300 (11th.Cir. June 7, 2021), Judge Rosenbaum dissented, holding that authoritative and comprehensive research from the Centers for Disease Control and Prevention (CDC), the American Barber Institute (ABI), and other sources confirmed what petitioner alleged—hepatitis and other blood-borne viruses are spread through communal razors and clippers, which pose a significant risk of infection. 999 F3d at 1314. "And that's when the clippers were actually cleaned"—at GSP, though, the communal clippers "are not disinfected in any way, they are damaged, and they are used on a population statistically known to include those with bloodborne disease at significantly greater rates than in the general population." *Id.* at 1314-15. Enhancing this risk, GDC does not track hepatitis infections, and thus "prison barbers may not know when they have used clippers on an infected person"; the frequency of forced shavings "necessarily augments the chances" of petitioner becoming infected; and the GDC itself "must recognize this real risk because its standard operating procedures require . . . clean[ing] and sanitize[ing] clippers after each use." *Id.* at 1315.

Beyond faulting the majority for "second-guess[ing] the CDC" and disregarding the serious risk to petitioner, Judge Rosenbaum dissented on the basis

that the majority erected an erroneous legal standard—"an impossible hurdle to clear"—by requiring petitioner to show either that he or another prisoner "actually contract[ed] HIV or hepatitis" from GDC's "use of unsanitized, damaged clippers." *Id.* at 1316. To start, petitioner could not divine the source of an HIV or hepatitis infection. *Id.* The correct test, in any event, is whether "as a matter of scientific knowledge, the allegations allow a court to draw reasonable inferences that there is a *danger* that a prisoner repeatedly shaved with unsanitized, damaged clippers used previously on other prisoners . . . will contract hepatitis." *Id.* (emphasis added). Employing that rule, adopted by other circuits, petitioner adequately alleged imminent danger of serious physical injury. *Id.* At 1316-17.

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## REASONS FOR GRANTING THE PETITION

### I. There is a Circuit conflict on the question presented.

Every other circuit to have reached the issue sides with Judge Rosenbaum— the test is whether the "allegations allow a court to draw reasonable inferences that there is a danger" of suffering serious physical injury. App. ___. Alleging presently occurring or certain-to-occur serious physical injury is not required. *Gibbs v. Cross*, 160 F.3d 962, 965 (3d Cir. 1998) (three-strikers can proceed IFP "without waiting for something to happen to them"); *Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 587 (6th Cir. 2013) ("We reject the notion that the inclusion of the word 'imminent' in § 1915(g) allows us to grant IFP status only after a plaintiff's condition has deteriorated."); *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir.

2002) ("[O]nce the beating starts, it is too late to avoid the physical injury."); *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003) (exception in § 1915(g) may be premised upon "a pattern of misconduct evidencing the likelihood of imminent serious physical injury"); *Andrews v. Cervantes* 493 F.3d 1047, 1056 (9th Cir. 2007) (credible risk of future harm satisfies § 1915(g); requiring more would "create an untenable Catch-22, in which filings would always be either too early or too late to invoke the provision").

The Third Circuit's rationale is illustrative. In *Gibbs*, the plaintiff alleged that "dust, lint and shower odor" emanated from his cell vent "for some time" and caused him to suffer "severe headaches, change in voice, mucus that is full of dust and lint, and watery eyes." 160 F.3d at 964. Hoping to invoke the imminent danger exception, plaintiff alleged that "depending on the nature of the particles he is breathing, there is a significant possibility that he is under imminent danger of serious physical injury." *Id.* at 965. The Third Circuit was "unimpressed" with the prison officials' argument that the allegation was too speculative, holding that incarcerated people "ought to be able to complain about 'unsafe, life-threatening condition[s] in their prison' without waiting for something to happen to them." *Id.* In so holding, the Third Circuit relied upon "common knowledge that improper ventilation and the inhalation of dust and lint particles can cause disease." *Id.* at 966.

The Tenth Circuit also follows Judge Rosenbaum's formulation in an unpublished opinion, *see, e.g., Fuller v. Wilcox*, 288 F. Apex 509, 511 (10th Cir. 2008) (unpublished), but has not issued a published opinion.

Furthermore, unlike in *Daker v. Ward, supra*, in this case, there was no alternative holding for affirmative, making this case a cleaner vehicle to resolve the circuit conflict.

## II. The issue presented is of exceptional public importance.

The panel majority demands that someone "actually contract[] HIV or hepatitis" before a federal court entertain petitioner's challenge to a policy of shaving him semi-monthly under circumstances that the scientific establishment has consistently described as potentially deadly. Op. 25. By that time, of course, "it is too late to avoid the physical injury" he fears. *Lewis*, 279 F.3d at 531. The panel majority has turned the imminent danger safety valve into a "chimerical, [] cruel joke on prisoners." *Id.*

The public has a great interest in preventing the spread of infectious diseases such HIV and hepatitis in prison. And, because most prisoners will eventually be released back into society, the issue is of great importance to the public health as well.

Lastly, unlike in *Daker v. Ward, supra*, in this case, there was no alternative holding for affirmative, making this case a cleaner vehicle to answer the questions presented.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully Submitted,

WASEEM DAKER,
Petitioner, *pro se*

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