No. _____

In the Supreme Court of the United States

TROY CHRISMAN; MATTHEW HUNTLEY; CHADWICK MOBLEY; STEVE JOHNSON; BONITA J. HOFFNER; STEVE RIVARD; HEIDI E. WASHINGTON; RUSSELL RURKA, PETITIONERS

v.

ESTATE OF SETH MICHAEL ZAKORA; BRANDY ZAKORA, IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SETH MICHAEL ZAKORA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a prisoner's criminal act of voluntarily ingesting an illegal drug banned within the prison can give rise to that prisoner's federal constitutional claim that under the Eighth Amendment state corrections officials failed to protect him by not preventing the influx of illegal drugs into the prison or failed to supervise other employees to protect him.

PARTIES TO THE PROCEEDING

Petitioners are Michigan Department of Corrections defendants Troy Chrisman, Matthew Huntley, Bonita J. Hoffner, Steve Rivard, and Russell Rurka. Respondents are the Estate of Seth Michael Zakora and Brandy Zakora, in her capacity as the personal representative of the Estate of Seth Michael Zakora.

RELATED CASES

Estate of Seth Michael Zakora, *et al*. v. *Troy Chrisman*, *et al*.; United States Court of Appeals for the Sixth Circuit (21-1620), Opinion issued August 10, 2022, for which the Sixth Circuit entered an order denying petition for en banc issued October 3, 2022.

Estate of Seth Michael Zakora, *et al*. v. *Troy Chrisman*, *et al*.; United States District Court Western District of Michigan (No. 1:19-cv-01016), Opinion and order issued September 10, 2021, approving and adopting report and recommendation of July 23, 2021.

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The Sixth Circuit's denial of the Michigan Department of Corrections defendants' en banc petition, App. 108a–109a, is not reported but is available at 2022 WL 10219849. The Sixth Circuit's opinion, App. 1a–51a, is reported at 44 F.4th 452 (6th Cir. 2022). The district court's opinion adopting the magistrate judge's report and recommendation in full and granting the Michigan Department of Corrections defendants' motion for summary judgment, App. 69a–76a, is not reported but is available at 2021 WL 4129209. The district court magistrate judge's report and recommendation, App. 77a–107a, is not reported but is available at 2021 WL 5019034.

JURISDICTION

The court of appeals issued its denial of the en banc petition on October 3, 2022, and its opinion on August 10, 2022. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) by filing the petition within 90 days of the denial of en banc review.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

INTRODUCTION

Zakora's death from a drug overdose in a state prison facility was caused by his own voluntary criminal behavior. That should have been the end of the qualified immunity inquiry. This kind of criminal act by a prisoner cannot give rise to a constitutional claim under the Eighth Amendment for injury caused by the prisoner's free decision to use illegal drugs. It would be a novel right for a prisoner or his estate to benefit from the prisoner's own criminal conduct—and one contrary to every understanding of what the Eighth Amendment protects against. As the dissent below noted, "By its terms, the voluntary and illegal nature of Zakora's activity pushes the claim outside the Eighth Amendment's ambit." App. 59a. Indeed, despite Zakora's regrettable death from overdose, corrections officials could not have "*inflict*[*ed*] this harm on Zakora" "when prison rules, state law, and federal law prohibit it—and Zakora violated those rules and laws[.]" App. 59a (emphasis in original). The Eighth Amendment does not cover such a claim.

Yet none of this deterred the majority below from concluding that the Estate of the prisoner plausibly alleged constitutional violations for failure to protect and failure to supervise when he voluntarily ingested illegal drugs banned by the Michigan prison system and died as a result. App. 22a–42a.

The majority's decision places a tremendous strain on prison administrators to adopt protocols that immediately respond to every instance of suspected drug possession and abuse, and on prison employees to look into their crystal ball and determine when

inmates might come to harm from their own voluntary, illegal conduct.

Consider the litany of examples provided by the dissent in the prison context. Would we hold prison officials liable for cruel and unusual punishment if a prisoner is harmed while

- voluntarily smoking in violation of prison rules,
- insisting he be housed with a known violent cellmate,
- insisting on using hazardous facilities,
- voluntarily turning down the temperature in his cell for himself in violation of prison rules,
- attempting to escape, or
- injecting himself with an unsanitary needle?

App. 61a. "Asking is answering. The Eighth Amendment does not cover this claim." App. 61a.

STATEMENT OF THE CASE

A. Relevant facts

In January 2017, three prisoners in Housing Unit C at Lakeland Correctional Facility suffered drug overdoses during one weekend. One prisoner suffered a "possible overdose" Friday evening, January 20, 2022, and was taken to a hospital. Another prisoner suffered a suspected overdose on Saturday, January 21, 2022, was revived with Narcan and remained in

the prison. Inmate Seth Zakora overdosed on Saturday night and died from fentanyl toxicity on Sunday morning. All three inmates overdosed in separate rooms of the facility's Unit C.

According to the amended complaint, the three inmates obtained access to the fentanyl when drug distributors tossed fentanyl-filled basketballs over the prison fence and yet-to-be-identified individuals recovered the drugs and distributed them to inmates.

B. District court proceedings

Seth Zakora's mother, Brandy Zakora, on behalf of the Estate, filed a four-count complaint against eight Michigan Department of Corrections (MDOC) employees (two prison guards and six administrators), four employees of the Michigan State Police, and an unnamed corrections official. App. 144a–162a.

Count I alleged that MDOC defendants Chrisman, Huntley, Hoffner, Rivard, Washington, and Rurka failed to protect Zakora from illegal drugs that entered Lakeland, in violation of Zakora's Eighth Amendment rights. Count II alleged that these same defendants violated Zakora's Fourteenth Amendment rights under the state-created-danger doctrine by failing to investigate allegations of drug smuggling. Count III alleged that MDOC defendants Washington, Rivard, and Hoffner failed to train and supervise their subordinates with regard to preventing the smuggling of drugs into the prison, in violation of Zakora's Fourteenth Amendment rights. Count IV alleged an Eighth Amendment deliberate-indifference claim against MDOC defendants Johnson and Mobley for failing to promptly check on Zakora after a

prisoner allegedly told them that something was wrong with Zakora.

Ms. Zakora alleged that high-ranking MDOC officials had longstanding knowledge that illegal drugs were being smuggled into Michigan's prisons, including Michigan's Lakeland facility, the site of her son's fatal overdose, yet they took no action to investigate or stop the illegal drugs from entering the prison. App. 152a–154a. She also alleged that the facility's warden and other facility prison officials had specific knowledge of the drug-smuggling operation yet failed to investigate or stop drugs from coming into the prison. App. 151a–154a. She further alleged that some corrections officials were themselves involved in the drug smuggling. App. 152a. Ms. Zakora did not allege that her son's overdose was anything other than self-induced and accidental. App. 144a–162a.

Ms. Zakora did not oppose the dismissal of Count II. App. 82a–83a. The magistrate judge recommended dismissal of all the claims (Counts, I, III, and IV) against the corrections defendants. App. 78a. Her analysis noted that the state defendants "raise[d] the issue of qualified immunity." App. 83a. The magistrate judge then observed that Ms. Zakora's case citations were "not directly applicable" before concluding that she failed to allege a constitutional violation. App. 94a.

The district court agreed with this recommendation, ruling that the officials won on prong one of the qualified immunity claim—that no constitutional violation occurred as a matter of law—and holding that Ms. Zakora's claims do not state any plausible constitutional violation. App. 71a–73a.

C. Sixth Circuit proceedings

Ms. Zakora appealed to the Court of Appeals for the Sixth Circuit. In a published opinion, the panel majority affirmed in part and reversed in part the district court's rulings. The court of appeals held that Ms. Zakora failed to establish a plausible constitutional violation with respect to the serious-medical-needs claim against the two corrections officers as well as the failure-to-protect claims against MDOC Director Washington. App. 40a–42a. But the Court permitted the failure-to-protect and failure-to-supervise claims against the prison administrators and supervisors to proceed as cognizable constitutional violations at prong one of the qualified immunity inquiry. App. 22a–40a. After analogizing Zakora's voluntary action to an act of suicide, the majority held that an action could lie despite Zakora's voluntary criminal act:

> [A]n inmate who suffers a drug overdose will not automatically lose a failure-to-protect claim simply because he voluntarily ingested the drugs. Such a claim is cognizable if the inmate alleges, and ultimately establishes, that he was at serious risk of injury from the presence of drugs before the injury occurred.

App. 26a.

As to prong two of the qualified immunity inquiry, the majority held that the state defendants had forfeited the issue by not raising the "clearly established" prong on appeal, and remanded the issue to the district court to decide it in the first instance after factual development. App. 51a.

Judge Sutton concurred in part and dissented in part. He concurred in the majority's ruling holding that Ms. Zakora failed to establish a plausible constitutional violation with respect to the serious-medical-needs claim, as well as the majority's affirmance of the dismissal of the failure-to-protect claims against the head of the corrections department. App. 53a. But he dissented both as to the majority's holding permitting the failure-to-protect claim against the prison guards and administrators and the failure-to-supervise claim against prison administrators to proceed as a cognizable constitutional violation at prong one of the qualified immunity inquiry, and as to its holding on prong two of the qualified immunity inquiry, "where the Court simultaneously says that the defendants forfeited the argument *and* remands the issue for the district court to decide it in the first instance." App. 54a (emphasis added).

As to prong one, Judge Sutton concluded that the prison officials did not violate the U.S. Constitution. App. 55a. "By its terms," he said, "the voluntary and illegal nature of Zakora's activity pushes the claim outside the Eighth Amendment's ambit." App. 59a. And he queried how corrections officials could *inflict* this harm on Zakora in violation of the Eighth Amendment, "when prison rules, state law, and federal law prohibit it—and Zakora violated those rules and laws[.]" App. 59a.

Judge Sutton explained that "[t]raditional conditions-of-confinement cases arise in a markedly different context" from this case, pointing out a feature of those cases that is "conspicuously absent in this case"—namely, the existence of the types of risks "an

inmate cannot reasonably be expected to avoid on his own," those in which the inmate "has no way out." App. 59a–60a. He noted that any risk Zakora incurred based on "the availability of drugs did not become serious until he chose to use them." App. 61a.

As to prong two, Judge Sutton opined that the MDOC defendants had not forfeited their argument and that the Estate had not even remotely shown that the law on the books at the time of this incident left the illegality of the officials' actions "beyond debate." App. 55a–59a, 61a–66a. "Zakora has not identified any court in the country, anytime anywhere, that has recognized such a claim. No hints, no dicta, no holdings." App. 54a.[1] Judge Sutton concluded that because there was no forfeiture, no constitutional violation and no clearly established violation, "the prison guards and administrators should not be subject to liability or, indeed, even the burdens of litigation." App. 66a (internal quotes and citation omitted).

[1] Although the MDOC Defendants agree with Judge Sutton on these points, they are not raising prong two of the qualified immunity analysis in this petition for certiorari because whether forfeiture occurred is fact-specific and therefore not cert-worthy.

REASONS FOR GRANTING THE PETITION

This case presents a question of exceptional importance—one that will recur. And the answer will significantly affect the administration of prisons.

This Court should grant the petition to consider whether a prisoner's criminal act of voluntarily ingesting an illegal drug banned within the prison can give rise to a federal constitutional claim that state corrections officials failed to protect or failed to supervise under the Eighth Amendment.

Resolution of this issue is vital for two reasons.

First, creating a novel right of a prisoner or his estate to benefit from his own voluntary criminal activity expands the Eighth Amendment—an expansion that is not only unwarranted but also wholly contrary to the principles that undergird the Punishment Clause. Indeed, in the prison context, the Eighth Amendment protects those who cannot protect themselves or obtain outside aid because of their confinement. *Farmer* v. *Brennan*, 511 U.S. 825, 833 (1994). It is not meant to protect prisoners from their own choice to engage in voluntary, criminal activity that the prison system bans.

Second, in combatting the persistent problem of illegal drugs in prisons, prison officials should not be subject to liability for failing to guess when an inmate will choose to engage in the crime of ingesting contraband and incur harm in the process. This creates an untenable burden for the prison system. It also strips officials of their reasoned assessment of the appropriate scope and timing of a facility's response to actual

and suspected drug use. Prison officials need latitude to respond to emergent situations with the judgment that comes with experience. Knee-jerk lockdowns may sound appealing as a solution to such prison issues, but those drastic actions can come at the cost of prisoner morale and safety, as well as the safety of prison officials themselves.

I. The court below grievously erred in concluding that the prisoner's criminal act of voluntarily ingesting illegal drugs could provide the basis for Eighth Amendment failure-to-protect and failure-to-supervise claims.

This is not first time a prisoner has died from an overdose or similar event from the voluntary use of illegal drugs in prison. Yet there does not appear to be a single case—from any court, from anywhere in the country—supporting the panel majority's conclusion that voluntary ingestion of illegal drugs can provide a basis for liability. That is because there is no constitutional violation under the Eighth Amendment for any injury that arises from a prisoner's voluntary, criminal act of using illegal drugs.

For that reason, the dearth of caselaw is hardly surprising. As Judge Sutton noted when discussing prong one of the corrections defendants' qualified immunity defense, "[t]raditional conditions-of-confinement cases arise in a markedly different context" from this case. App. 59a.

The types of risks that give rise to Eighth Amendment claims are those "an inmate cannot reasonably be expected to avoid on his own." App. 60a. As this

Court explained in *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189, 199–200 (1989), when the State restrains an individual's liberty such that he cannot care for himself, it must provide for his "basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety." *Id.* (internal citations omitted). Failure to do so "transgresses the substantive limits on state action set by the Eighth Amendment . . ." *Id.* It is well established, for example, that prison "officials are not free to let the state of nature take its course," *Farmer*, 511 U.S. at 833, and no one contends that officials can simply ignore an inmate's serious medical needs, *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976), or physical safety, *Helling* v. *McKinney*, 509 U.S. 25, 31–33 (1993).[2]

But in contrast here, Zakora's conduct of ingesting illegal contraband was *voluntary*. There are no allegations that a prison official forced him to take fentanyl; he chose to do so. The mere fact that he could have avoided the unfortunate result of his lethal overdose sets this case apart from the typical conditions-of-confinement case.

And rightly so. The hallmark of the Eighth Amendment is the prohibition on punishment being "inflicted." (U.S. Const. amend. VIII: "Excessive bail

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[2] The State acknowledges that an Eighth Amendment deliberate-indifference claim may arise in some circumstances in which state corrections officials fail to act *after* a prisoner has criminally ingested drugs by failing to provide necessary medical care. But the Sixth Circuit panel majority correctly found that the count related to this claim was properly dismissed. App. 42a ("[N]either [correctional official] were aware that Zakora was suffering from a serious medical condition before he died, and they acted appropriately once they were made so aware.").

shall not be required, nor excessive fines imposed, nor cruel and unusual punishments *inflicted*.") (emphasis added). Although there is "[n]o static 'test' . . . by which courts determine whether conditions of confinement are cruel and unusual," it is well accepted that the Eighth Amendment " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Rhodes* v. *Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). A prisoner's own choice to ingest contraband cannot offend evolving standards of decency with respect to that of prison officials. Too, a punishment that is inflicted is one that is "lay[ed] on" or "impose[d]." Chambers 20th Century Online Dictionary. It can hardly be said that a prisoner's voluntary choice to ingest contraband has been imposed on him by prison staff or administrators.

The *criminal* nature of Zakora's actions also sets this case apart from the typical conditions-of-confinement case. Drugs like fentanyl are contraband—items that prison rules prohibit prisoners from having while detained in prison. See *Florence* v. *Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 332 (2012) (citing Prisons: Today and Tomorrow 237 (J. Pollock ed. 1997) (defining contraband as any item that is possessed in violation of prison rules)). As this Court has explained, contraband in prison facilities undermines security, poses a significant danger, and can create additional problems as currency in a jail's culture and underground economy. *Id.* at 332–33. Fentanyl is also a schedule II narcotic under both state and federal law. Mich. Comp. Laws § 333.7214(b); 21 CFR 1308.12(c)(9).

The panel majority attempts to sidestep these important distinctions by explaining that "[t]he Estate would have no claim if this were simply a run-of-the-mill drug overdose case," but concluding that "the relevant defendants allegedly knew that Zakora was at risk and ignored that risk," which makes this case "directly comparable to the suicide 'deliberate-indifference' cases where this court has allowed the claim to proceed beyond the pleading stage." App. 31a–32a.

But the suicide cases are different in kind from injuries that arise from criminality. Suicide cases are a species of adequate medical care cases, where "the Eighth Amendment covers them because an inmate, isolated from society, 'must rely on prison authorities' for treatment." App. 63a–64a. That's not the case for the voluntary ingestion of drugs banned by the prison.

In *DeShaney*, this Court examined the categorical distinction between a person taken into state custody and one who lives in the community. 489 U.S. at 199–200. In restraining a person's liberty, the incarceration renders the prisoner "unable to care for himself," regarding "food, clothing, shelter, medical care, and reasonable safety." *Id.* at 201. But that is not true for illegal drugs and the dangers they present. Whereas Zakora was dependent on the prison for his clothing, shelter, medical care, and reasonable safety, his ability to protect himself from dangerous drugs remained within his control. Zakora's incarceration did not "restrain[ ] [his] freedom to act on his own behalf" to refrain from taking drugs. *Id*. at 200.

And that is the key. As noted by Judge Sutton in his dissent, Zakora freely elected to engage in the exact conduct that caused his death, the criminal

ingestion of illegal drugs, which violated the rules of the prison.[3] See App. 61a ("Zakora never argues that her son consumed fentanyl involuntarily. What was true outside prison was true inside prison. Any risk from the availability of drugs did not become serious until he chose to use them."). In this way, he was like any other ordinary resident in Michigan, who generally has no claim of relief against state officials for their failure to prevent the spread of drugs in the community. The decision to use drugs was Zakora's and his alone. That the corrections officials might have been able to act more quickly or effectively in preventing the spread of drugs in the facility does not give rise to a claim under the Eighth Amendment.[4]

The point at which Zakora required medical care after ingesting gave rise to the State's obligation to render care, but the Sixth Circuit correctly rejected the claim that corrections officials failed to act to help him.[5] Thus, Zakora's position in the prison is fundamentally different from a suicidal prisoner who must rely on state officials for protection and medical care.

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[3] There was no claim that corrections officials knew that Zakora was addicted to drugs to any degree, and no claim was made that he was unable to voluntarily refrain from consuming the drugs at issue here.

[4] Although the Estate alleges that in the months prior to Zakora's death, the MDOC "had notice that corrections officers were smuggling drugs into prisons," App. 152a, there are no allegations that *these* officials were engaged in drug smuggling. And even if there were some corrupt officials, it would not change the ability of the ordinary resident in the prison "community" to refrain from voluntary ingesting illegal drugs.

[5] See n 2 above.

Moreover, the Corrections officials did not have advanced knowledge in any event. Courts look to see, for example, whether there has been a history with suicide attempts, severe mental health issues, suicide threats, or the exhibiting of suicidal tendencies. E.g., *Moore* v. *Hunter*, 847 F. App'x 694, 697 (11th Cir. 2021) (" '[F]ailure to prevent suicide has never been held to constitute deliberate indifference' " where a prison official has no knowledge of an inmate's suicidal tendencies) (internal citation omitted). That is because "[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 106. Prison officials cannot be held liable for not guessing when a prisoner will overdose on contraband drugs.

Here, it is undisputed that there had not been overdoses in the prison or the unit prior to the weekend of Zakora's fatal overdose, App. 116a; there is nothing in the complaint to indicate that Zakora was on a drug watch, App. 144a–162a; and the close-in-time nature of the other two non-fatal weekend overdoes is also undisputed. In short, "the voluntary and illegal nature of Zakora's activity pushes the claim outside the Eighth Amendment's ambit." App. 59a.

The majority's decision below greatly and wrongly expands the reach of the Eighth Amendment. And it leaves prison administrators guessing and vulnerable when they inevitably cannot predict and prevent the risks flowing from drugs and all other voluntary and illegal contraband in the prison setting.

II. This case presents a recurring issue of exceptional importance to the administration of prisons.

Unquestionably, "[d]rug and alcohol abuse by prisoners is unlawful and a direct threat to legitimate objectives of the corrections system, including rehabilitation, the maintenance of basic order, and the prevention of violence in the prisons." *Overton* v. *Bazzetta*, 539 U.S. 126, 129 (2003). Unfortunately, within the "volatile 'community' " of a prison, *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984), there is a demand for illegal drugs, and the drugs find their way in, despite prison officials' efforts to curb their availability.

Misuse of contraband drugs in our country's prisons is not new. Regrettably, it is commonplace. This Court has long noted that "[d]rug smuggling and drug use in prison are intractable problems." *Overton*, 539 U.S. at 134; see also *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979) (noting that "[a] detention facility is a unique place fraught with serious security dangers," and that "[s]muggling of . . . drugs . . . is all too common an occurrence."); *Block* v. *Rutherford*, 468 U.S. 576, 588–89 (1984) ("We can take judicial notice that the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country."); *Hudson*, 468 U.S. at 527 (taking judicial notice that the introduction of drugs and other contraband into the prison premises "is one of the most perplexing problems of prisons today"). See also Christopher P. Keleher, *Judges As Jailers: The Dangerous Disconnect Between Courts and Corrections*, 45 Creighton L. Rev. 87, 119 (2011) (recounting that drug trade in prison "was – and still is – big business," that the "money and

power at stake is staggering," and that "gangs parlay intake search restrictions into fortunes").

This Court and lower courts across the nation have recognized the varied and often ingenious ways inmates smuggle in illegal drugs. Here it was purported to be by means of drug-filled basketballs hurled over the yard fence, a tactic that is not unique to Michigan facilities. See *United States* v. *Millan-Machuca*, 991 F.3d 7, 15 (1st Cir. 2021) (explaining that drugs are often smuggled in by visitors to prisons, generally concealed in body cavities, or by "pitch-ins"–packages that accomplices on the outside literally "pitched" over the prison walls, retrieved from prison yards, and sold to other inmates). Other facilities have encountered similarly creative methods. See, e.g., *Block*, 468 U.S. at 586–87 (noting that contact visits "open the institution to the introduction of drugs" and that "identification of those inmates who have propensities for. . . drug smuggling is a difficult if not impossible task."); *Prison Legal News* v. *Sec'y. Fla. Dep't of Corr.*, 890 F.3d 954, 958 (11th Cir. 2018) (discussing inmates who abuse correspondence privileges by using their stamps as a currency in the underground prison economy to buy drugs); *United States* v. *Mills*, 66 F. App'x 273, 275 (2d Cir. 2003) (discussing an inmate who used his children to his own criminal advantage by insisting that children accompany his drug-smuggling mother on visits in order to create a distraction); *Hill* v. *Koon*, 977 F.2d 589, *1 (Table) (9th Cir. 1992), as amended on denial of reh'g (Dec. 18, 1992) (noting that visitors often place drugs in sandwich baggies and tubes before inserting them into their body cavities, then remove the drugs in a prison restroom and pass them to the inmates during some sort of diversion,

whereby the inmates then insert the drugs into their anal cavities and transport them inside the prison.); *Blackburn* v. *Snow*, 771 F.2d 556, 574 (1st Cir. 1985) (noting that visitors can easily conceal drugs "in countless ways and pass them to an inmate unnoticed by even the most vigilant observers.")

In the midst of such challenges, the panel majority decision below has now created an impossible standard for prison officials, potentially holding them liable for not immediately initiating an investigation and eradicating all drugs in the prison or in a particular unit whenever there is a suspected drug overdose.

Here, for example, the majority below apparently expected prison officials to initiate a drug smuggling investigation, and possibly, a lockdown and disruptive cell search following two *suspected* drug overdoses—one occurring on Friday night, the second occurring on Saturday morning, when most prison administrators and officials qualified to conduct investigations of drug overdoses are not working and when the results of drug testing had not yet been received—and to eradicate all drugs in Zakora's unit (and perhaps, the entire prison), before Zakora's voluntary ingestion of illegal narcotics on the same Saturday night.

Until now, inmates have not asserted that their voluntary illegal ingestion of contraband was someone else's problem. Nor, until now, has any court held that the resultant harm of such voluntary behavior was a type of punishment inflicted on them by prison officials as a condition of their confinement.

Should the unwarranted specter of litigation like this linger in prison officials' minds, they will be

forced to adjust prison policies in an attempt to meet the impossible task of foretelling harm from the voluntary use of illegal drugs—for example, by completely locking down a unit or even a whole prison, or immediately initiating a disruptive and costly search of individual cells each of the inevitably frequent times an inmate may have ingested illegal drugs or overdosed. In a vacuum, immediate measures, even in response to illegal activity, might seem prudent. But in the difficult job of managing a prison, these actions, performed prematurely, have consequences that go well beyond cost—including disruption, security risks, and impact on morale of prisoners and staff.

It is for precisely reasons such as these that this Court has often emphasized that prison authorities' resolution of the problems of prison administration should be accorded deference by the courts. See, e.g., *Washington* v. *Harper*, 494 U.S. 210, 223–24 (1990); *Turner* v. *Safley*, 482 U.S. 78, 84–86 (1987); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987); *Bell*, 441 U.S. at 547; *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128 (1977); *Meachum* v. *Fano*, 427 U.S. 215, 228–29 (1976); *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972). Indeed, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84–85; *Bell*, 441 U.S. at 547–48 (1979) ("Such considerations are peculiarly within the province and professional expertise of corrections officials. . . .") (cleaned up).

In sum, the panel decision below improperly expands the scope of the Eighth Amendment and sets up prison officials for failure in the ongoing, nationwide battle against drugs in our prisons.

CONCLUSION

For these reasons, this Court should grant the petition.

Respectfully submitted,

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